

THE ART LAW
REVIEW

THIRD EDITION

Editors

Lawrence M Kaye and Howard N Spiegel

THE LAWREVIEWS

THE ART LAW
REVIEW

THIRD EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in December 2022
For further information please contact Nick.Barette@thelawreviews.co.uk

Editors

Lawrence M Kaye and Howard N Spiegler

THE LAWREVIEWS

PUBLISHER

Clare Bolton

HEAD OF BUSINESS DEVELOPMENT

Nick Barette

TEAM LEADER

Katie Hodgetts

SENIOR BUSINESS DEVELOPMENT MANAGER

Rebecca Mogridge

BUSINESS DEVELOPMENT MANAGER

Joey Kwok

BUSINESS DEVELOPMENT ASSOCIATE

Archie McEwan

RESEARCH LEAD

Kieran Hansen

EDITORIAL COORDINATOR

Isabelle Gray

PRODUCTION AND OPERATIONS DIRECTOR

Adam Myers

PRODUCTION EDITOR

Katrina McKenzie

SUBEDITOR

Janina Godowska

CHIEF EXECUTIVE OFFICER

Nick Brailey

Published in the United Kingdom

by Law Business Research Ltd

Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK

© 2022 Law Business Research Ltd

www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at December 2022, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above.

Enquiries concerning editorial content should be directed

to the Publisher – clare.bolton@lbresearch.com

ISBN 978-1-80449-143-0

Printed in Great Britain by

Encompass Print Solutions, Derbyshire

Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

AARNA LAW

AMINEDDOLEH & ASSOCIATES LLC

ANGUS FORSYTH & CO

BERGH STOOP & SANDERS

BÜSING MÜFFELMANN & THEYE

CBM & PARTNERS – STUDIO LEGALE

CENTER FOR ART LAW

CONSTANTINE CANNON LLP

ETUDE RENOLD GABUS-THORENS & ASSOCIÉ(E)S

GIANNI & ORIGONI

GUSTAVO TANOUSS DE MIRANDA MOREIRA

HERRICK, FEINSTEIN LLP

HUNTERS LAW LLP

INSTITUTE OF ART AND LAW

KAYE SPIEGLER PLLC

LAMBRECHT LAW OFFICE

MARCÍLIO TOSCANO FRANCA FILHO

ÖKKE & HEKIM

PARASKEVAS LAW FIRM

POLAK & PARTNER ATTORNEYS-AT-LAW

PRYOR CASHMAN LLP

RAMÓN & CAJAL ABOGADOS

SAH & CO

SIMPSONS SOLICITORS

ŠIROKÝ ZRZAVECKÝ ATTORNEYS-AT-LAW

UGGC AVOCATS

WENGER PLATTNER

CONTENTS

PREFACE.....	vii
<i>Lawrence M Kaye and Howard N Spiegler</i>	

Part I General Papers

Chapter 1	RECENT DEVELOPMENTS IN THE ART MARKET	3
	<i>Pierre Valentin and Mona Yapova</i>	
Chapter 2	ASSIGNING BURDENS OF DILIGENCE IN AUTHENTICITY DISPUTES	14
	<i>William L Charron</i>	
Chapter 3	ART DISRUPTION: ART AND TECHNOLOGY IN THE TWENTY-FIRST CENTURY	24
	<i>Massimo Sterpi</i>	
Chapter 4	APPLICATION OF COPYRIGHT TO ART	37
	<i>Barry Werbin</i>	
Chapter 5	MORAL RIGHTS OF THE ARTIST (WHEN PRESENT): AN UPDATED US PERSPECTIVE.....	47
	<i>Irina Tarsis</i>	
Chapter 6	CULTURAL HERITAGE DISPUTES AND RESTITUTION	64
	<i>Leila A Amineddoleh</i>	

Part II Jurisdictions

Chapter 7	AUSTRALIA.....	81
	<i>Janine Lapworth</i>	
Chapter 8	AUSTRIA.....	94
	<i>Peter M Polak, Peter Pichlmayr and Thomas Mühlböck</i>	

Chapter 9	BELGIUM	104
	<i>Lucie Lambrecht and Lucy Ryan</i>	
Chapter 10	BRAZIL.....	119
	<i>Marcílio Toscano Franca Filho and Gustavo Tanouss de Miranda Moreira</i>	
Chapter 11	CANADA.....	131
	<i>Alexander Herman</i>	
Chapter 12	CZECH REPUBLIC	141
	<i>Daniela Kozáková</i>	
Chapter 13	FRANCE.....	154
	<i>Jean-François Canat, Philippe Hansen, Line-Alexa Glotin and Laure Assumpção</i>	
Chapter 14	GERMANY.....	168
	<i>Katharina Garbers-von Boehm</i>	
Chapter 15	GREECE.....	182
	<i>Dimitris E Paraskevas</i>	
Chapter 16	HONG KONG	188
	<i>Angus Forsyth</i>	
Chapter 17	INDIA	204
	<i>Kamala Naganand, Spandana Ashwath and Anusha Madhusudhan</i>	
Chapter 18	ITALY	216
	<i>Giuseppe Calabi</i>	
Chapter 19	JAPAN	228
	<i>Makoto Shimada and Taku Tomita</i>	
Chapter 20	NETHERLANDS	238
	<i>Gert Jan van den Bergh, Martha Visser and Auke van Hoek</i>	
Chapter 21	SPAIN.....	258
	<i>Rafael Mateu de Ros and Patricia Fernández Lorenzo</i>	
Chapter 22	SWITZERLAND	268
	<i>Marc-André Renold and Peter Mosimann</i>	

Contents

Chapter 23	TURKEY.....	280
	<i>Zeynep Hekim Bülbül and Zeynep Ökke</i>	
Chapter 24	UNITED KINGDOM.....	289
	<i>Mark Stiebel and Anastassia Dimmek</i>	
Chapter 25	UNITED STATES.....	307
	<i>Lawrence M Kaye, Howard N Spiegler, Yaél M Weitz and Gabrielle C Wilson</i>	
Appendix 1	ABOUT THE AUTHORS.....	329
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	345

PREFACE

We are delighted to present the third edition of *The Art Law Review*. Our prior two editions have elicited very positive responses from readers from around the world, for which we are very grateful. We once again present to you leading art law practitioners from many jurisdictions who share their knowledge about the latest developments in this area of the law. We trust that you will find this edition to be as interesting and important as our prior volumes.

We begin this volume, however, with some thoughts about the significance of art in these troubling times:

We are in a time once again where our need for the arts is growing more and more apparent. Controversy and anger and fear seem to swirl around us these days in large supply. This has happened plenty of times in our history. We have needed and sought the healing and teaching power of the arts for a long time, perhaps forever.¹

In addition to the tragedies wrought by natural disasters brought on by climate change and the civil strife affecting peoples in so many countries, as art lawyers we are particularly distressed by the threats to cultural identity caused by the destruction of cultural property in war. It is important to acknowledge that the onslaught in Ukraine is not only about the appalling carnage but also the systematic attack on its works of art and other cultural property. As the *New York Times* art critic Jason Farago recently asked, ‘Why should anyone care about a painting when cruise missiles are overhead?’ The answer he gave, quoting a Ukrainian art curator, is because ‘this is a war about cultural identity, as Russia actively tries to erase Ukraine’s national identity’.²

Even while oppression haunts targeted peoples, the creation and preservation of cultural heritage has remained an important mechanism of survival as it has in past struggles going back to the past century and before. For example, Picasso’s *Guernica* (1937), his poignant, universally known work that illustrates the horrific devastation of the Spanish Civil War, demonstrates vividly the struggle and chaos exemplified by one piece of art. It has transcended

1 Robert Lynch, president and CEO, Americans for the Arts, ‘The Arts Don’t Just Heal, They Also Unify and Inspire Action’, <https://blog.americansforthearts.org/2019/05/15/the-arts-don't-just-heal-they-also-unify-and-inspire-action>.

2 Jason Farago, ‘The Role of Art in a Time of War’, *New York Times* (28 July 2022), www.nytimes.com/2022/07/28/arts/design/ukraine-war-art-culture.html.

its depiction of one conflict to represent other periods of suffering caused by war throughout the world. During eras of conflict and disruption, art has provided tangible forms of solace and expression.

Let us keep this mind as we examine the many issues of art law examined in this volume, as follows:

- a* recent developments in the art market;
- b* art authentication;
- c* art and technology;
- d* moral rights; and
- e* cultural heritage disputes.

We then present chapters on recent art law developments in 19 key countries. Each country's chapter gives a review of hot topics, trends and noteworthy cases and transactions during the past year, then examines in greater depth specific developments in the following areas: art disputes, fakes, forgeries and authentication, art transactions, artists' rights, and trusts and foundations, and finally offers insights for the future.

We hope that you enjoy reading all of these excellent contributions.

Lawrence M Kaye and Howard N Spiegler

Kaye Spiegler PLLC

New York

December 2022

Part II

JURISDICTIONS

GERMANY

*Katharina Garbers-von Boehm*¹

I INTRODUCTION

Germany has many world-class public museums, a growing number of superb private museums and a thriving contemporary art scene. Nevertheless, from a global perspective and compared to markets such as China and the United States, the German art market is relatively small, with only slightly more than 2 per cent of worldwide turnover being generated in the country.² German collectors seem to be open to buying online, even in higher price segments. And among the one-third of all high net worth collectors who spent more than US\$1 million on art in 2021, German collectors accounted for 38 per cent.³ In 2021, sales in the Impressionist as well as the Post-War and Contemporary sectors increased in Germany.⁴

II THE YEAR IN REVIEW

The following art law topics are currently being discussed in Germany.

- a* Since 1 January 2020, new legislation⁵ deriving from recent European anti-money laundering legislation requires the trade to fulfil certain formalities for almost every transaction.⁶
- b* Constitutional complaints against the more bureaucratic provisions of the Cultural Protection Act introduced in 2018 have not been successful;⁷ therefore, the regime remains in place for the time being.⁸
- c* During the covid-19 pandemic, the VAT rate applicable to artwork was temporarily lowered. Lobbying for a permanently lowered VAT rate (similar to pre-2014) continues on a national level after the EU presented a new provision in favour of this.⁹

1 Katharina Garbers-von Boehm is a partner at Büsing Müffelmann & Theye.

2 Clare McAndrew, *The Art Market 2022* (Art Basel and UBS, 2022), p. 28.

3 *id.*, p. 189.

4 *id.*, pp. 163, 178.

5 Law on the Implementation of the Amending Directive of the Fourth EU Anti-Money Laundering Directive.

6 See Sections V.iv and V.v.

7 www.bverfg.de/e/rk20210628_1bvr172717.html.

8 See Section III.ii.

9 Directive (EU) 2022/542 of the Council of 5 April 2022 amending Directives 2006/112/EG and (EU) 2020/285 as regards rates of value added tax; see Section V.iii.

- d* Provenance has become even more important: with the restitution of *Füchse*, a painting by Franz Marc, a shift towards a more positive attitude on the restitution of ‘flight assets’¹⁰ has taken place.
- e* A new pastiche copyright limitation was recently introduced in the German Copyright Act; the first judgment applying this limitation was given in 2021.¹¹
- f* The steep rise in sales of non-fungible tokens (NFTs) has slowed but continues to create legal challenges.¹²

III ART DISPUTES

i Title in art

Passing of title

Generally, according to the German Civil Code, the purchase of any item has two requirements.

- a* First, the parties have to conclude a contract (oral or written) containing all essential components of the transaction, such as details of the object of purchase and the purchase price.
- b* Second, the transfer of property requires an agreement on the transfer of title and the handing over of the object to the buyer. If the object is already in the possession of the buyer, it is sufficient to agree on the transfer of title. Alternatively, a loan between the buyer and the seller or between the buyer and a third party suffices (indirect possession). Finally, if a third party (e.g., a museum), is in possession of the sold object, its physical transfer may be replaced by transferring to the buyer the claim against the third-party possessor.

Good-faith acquisition

In general, title can be acquired in a transaction even if the seller or provider is not the owner – unless the acquirer is not in good faith (i.e., if the acquirer either knows that the seller is not the owner of the object or the circumstances of ownership of the object are grossly negligently ignored).

There is no general civil law obligation to investigate the title of the seller, but due diligence becomes necessary under unusual circumstances (e.g., flea market deals, cash deals or other suspicious circumstances). In addition to the rather relaxed due-diligence obligations according to civil law, the Cultural Property Protection Act, which forbids the offer or sale of stolen items, provides for more detailed due-diligence obligations.¹³

There is no acquisition in good faith if the item was stolen, lost or otherwise left the owner’s possession against its will.¹⁴ An exception to this rule, allowing for good-faith acquisition even for stolen goods, is made for money (coins, notes, etc.) and for items that are sold at public auction¹⁵ – an extremely relevant (and often criticised) exception for the art market. Furthermore, German civil law recognises the legal principle of usucapion, according

10 Referred to as ‘*Fluchtgut*’, this describes art sold by Jews outside Nazi Germany in the context of their escape. See Section III.ii.

11 See Section VI.iv.

12 See Section V.v.

13 Section 40 et seq. of the German Cultural Property Protection Act (KGSG).

14 Section 935, Paragraph 1 of the German Civil Code (BGB).

15 id., Paragraph 2.

to which it is possible to become the owner of any item (even stolen) after directly possessing it for 10 years in good faith. This makes restitution claims difficult if stolen art has been in the hands of the current possessor for a long time.

Burden of proof

The burden of proof makes it difficult for a former owner who was dispossessed to reclaim an artwork from the current holder.

Generally, the burden of proof lies with the claimant. Consequently, a claimant claiming ownership has to prove that: (1) they once acquired ownership; (2) ownership was not lost; and (3) the current holder acquired the object in bad faith or was in good faith for less than 10 years.¹⁶

Moreover, German civil law provides for a presumption that the possessor of an object is the owner of the object. Also, due to this, the burden of proof lies with the previous owner, not with the current holder.¹⁷

Finally, regarding usucapion, it generally suffices if the current holder proves that they have had an item in their possession for at least 10 years. The previous owner must prove that the current holder acquired the object in bad faith or that bad faith occurred during the 10-year period.¹⁸ In a recent case, the Federal Court of Justice further specified that the current holder claiming usucapion must, at least, explain how the work was acquired. If this explanation proves to be wrong, they cannot claim that ownership was acquired through usucapion.¹⁹

ii Nazi-looted art and cultural property

Nazi-looted art

Cases regarding Nazi-looted art are rarely litigated in Germany because there has usually either been a subsequent good-faith acquisition or all limitation periods have expired. There is no specific exception to the maximum limitation period of 30 years in these cases.

Nevertheless, even today it is possible to successfully reclaim looted artwork, especially if the current holder is a public museum. This is because, after the Washington Conference in 1999, a 'common declaration of the federal government and the states to find and restitute Nazi-looted art'²⁰ was decided, according to which German museums must respect the Washington Principles²¹ by way of 'self-obligation'.²²

Many amicable restitutions from public museums happen on this basis every year.

16 Federal Court of Justice (BGH), the German supreme court in criminal and private law matters, NJW 82-38; BGH NJW 91,1415; *Grüneberg-Herrler*, Commentary on the BGB, 81, 2022 edition, Section 932, No. 15.

17 Section 1006, BGB.

18 *id.*, Section 937.

19 BGH, judgment dated 19 July 2019, Az. V ZR 255/17.

20 www.kulturgutverluste.de/Webs/DE/Stiftung/Grundlagen/Washingtoner-Prinzipien/Index.html.

21 *ibid.*

22 Declaration by the federal government, the federal states and the central municipal organisations on the tracing and restitution of cultural property confiscated as a result of Nazi persecution, in particular from Jewish ownership (joint declaration), available, in German, at www.kulturgutverluste.de/Content/08_Downloads/DE/Grundlagen/Gemeinsame-Erklaerung/Gemeinsame-Erklaerung.pdf?__blob=publicationFile&v=15.

If a matter regarding looted art cannot be settled between the parties (e.g., between a museum and claiming heirs), there is a specific mechanism of dispute resolution in place.

Following the Washington Principles and the common declaration of the German federal government and the federal states in 1999,²³ an Advisory Commission (the Commission) came into being in 2003. Cases involving artwork that was looted or otherwise taken from its owners between 30 January 1933 and 8 May 1945 (during the National Socialist regime) can be brought before the Commission, which consists of 10 very senior, experienced authorities with backgrounds in law, history and philosophy. Its recommendations are not legally binding but are usually followed by the parties involved.

Both sides (mostly heirs of victims of Nazi Germany on one side and public museums on the other side) have to agree to bring the case to the Commission and must express their commitment to accept the Commission's recommendation. After filing an application (which must fulfil formal requirements, such as sufficient documentation of the dispossession), the Commission asks for written statements from the parties and first tries to reach a settlement. If this fails, the Commission calls for a hearing allowing the parties to present their cases. The Commission then issues a recommendation on the basis of the Washington Principles. The recommendation can range from denying the application altogether to full restitution to the applicant, with various measures in between (payment of compensation, public display of the artwork's provenance, etc.).

In 2021, the Commission issued four recommendations, three recommending restitution and one declining it.

A recent example of a successful restitution claim recommended by the Commission is the case of the Grawi heirs, which was decided in February 2021. The case was widely discussed as it pushed the boundaries of the practice of the Commission into a more restitution-friendly direction. Kurt Grawi was a merchant and broker in Berlin until the coup d'état of the Nazi regime. He was also the owner of *Füchse*, a painting by the expressionist Franz Marc, which he acquired in 1928. After his release from the Sachsenhausen concentration camp, he emigrated to Chile in April 1939, at first without his family. To emigrate the whole family to Chile, Grawi found himself, according to his own statement, constrained to commission Ernst Simon to sell the painting. It was shipped to New York for this purpose, and Grawi retained ownership until at least February 1940. It is also certain that *Füchse* was sold no later than September 1940. Although the current holder of the painting, a public museum, countered that the sale of the painting was not confirmed as being essential for the emigration of the Grawis and that no evidence can be found for a low purchase price or for the fact that Kurt Grawi did not receive the money, the Commission recommended restitution, arguing that there was a close connection between the persecution and the sale of the work. At the same time, the Commission specified that whether the sale was within the territorial sphere of the Nazi regime's influence is not decisive. The fact that the sale took place in the United States did not exclude it from the pressure of persecution of the Nazi regime. Therefore, restitution was recommended.²⁴

Because there are no special laws regarding Nazi-looted art in relation to German limitation periods (a situation widely criticised), cases of Nazi-looted art are sometimes litigated abroad, even though they concern cultural goods located in Germany. For example,

23 ibid.

24 www.beratende-kommission.de/media/pages/empfehlungen/grawi-landeshauptstadt-duesseldorf/3ce1da9ab6-1652780945/21-03-18-empfehlung-grawi-duesseldorf.pdf

in the case of the Guelph Treasure, in which the Commission recommended that the Treasure should not be returned to the claimants, the claimants did not want to accept this and allegedly continue to litigate in the United States.²⁵

Cultural property protection law

The aim of the German Cultural Property Protection Act is twofold: the protection of important national cultural property against removal from Germany²⁶ and the return of illegally removed cultural property.²⁷

Export licensing

An export licence needs to be obtained for the export of works of art that exceed certain age and value thresholds, even within the European Union's internal market (depending on the type of cultural property, ranging from no age threshold to 50 or 100 years and from no value to €150,000 in value (e.g., for paintings), depending on whether the work is exported to another EU country or within the EU.

An export licence is mandatory if these thresholds are met.

A licence is granted if the item concerned is not included on the list of 'valuable national cultural property' or found to be of 'national importance'. The process of listing can be commenced regardless of the age or value of the cultural goods.²⁸

Listed items can no longer be permanently or temporarily exported, unless their export is permitted by the respective competent federal or central state authority.

Import restrictions

According to German cultural property protection law, an item can only be legally imported into Germany if it has been legally exported from its country of origin.²⁹ Therefore, all applicable legislation in the country of origin and all applicable international laws have to be respected. Sanctions in cases of non-compliance are severe (up to five years' imprisonment, fines and confiscation of the item).³⁰

Also, the law provides for public law repatriation claims in cases of unlawfully removed cultural property.³¹

25 In July 2020, the US Supreme Court agreed to hear an appeal by Germany and the Prussian Cultural Heritage Foundation. However, in February 2021, the Supreme Court decided that cases concerning Nazi-looted art do not fall within the field of application of the expropriation exception to the Foreign Sovereign Immunities Act, which, inter alia, states that foreign sovereign states (and its agencies or instrumentalities) shall not be immune from the jurisdiction of courts in the United States in any case in which property was taken away in violation of international law. The case returned to a Washington, DC, district court and was dismissed. It is unclear whether an appeal was filed.

26 See Section 1, Nos. 1–3, KGSG.

27 See id., Nos. 4–6.

28 The list and thresholds can be found at www.kulturgutschutz-deutschland.de/EN/Service/Publications/UbbersichtWertgrenzenEN.pdf?__blob=publicationFile&cv=2.

29 Section 28, KGSG.

30 id., Section 83 et seq.

31 id., Section 49 et seq.

In addition, there is European regulation in place,³² which, however, only applies to cultural objects that were created or discovered outside of the EU.³³ It is prohibited to import objects that were illegally taken from their countries of origin. An import licence is required for all types of archaeological objects created more than 250 years ago, irrespective of their value. For certain other objects, a registration of the object and a self-declaration as to its legal origin suffices.

Due diligence

Cultural protection law, rather than civil law, provides for certain due diligence obligations.³⁴

Whoever puts cultural goods on the market must make sure that the goods are not stolen, illegally excavated or illegally imported. As far as non-professionals are concerned, further inquiry is only necessary if there are any suspicious circumstances.

In addition, professionals are obliged to:

- a* establish the name and address of the seller, the consignor, the person acquiring the property or the client;
- b* prepare a description and an illustration suitable for the identification of the cultural property;
- c* check the provenance of the cultural property;
- d* examine documents proving lawful import and export;
- e* examine prohibitions and restrictions on import, export and trade;
- f* check whether the cultural property is registered in publicly accessible directories and databases; and
- g* obtain a declaration from the consignor or vendor that the latter is entitled to dispose of the goods.

According to the wording of the law, it is forbidden to place any items on the market that were stolen, illegally excavated or illegally imported. Sales of these items are null and void.³⁵ Thus, someone who places a work on the market must inquire into the work's provenance. Generally, this inquiry is limited to what is economically reasonable.³⁶ However, this limitation does not apply to objects suspected of having been looted during the Nazi era.³⁷ These items can only be sold if this suspicion is eliminated through provenance research or if an amicable solution has been reached.

iii Limitation periods

There is no specific limitation period for art claims in German law – they fall under the general limitation periods governing all civil law claims.

32 Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and the import of cultural goods.

33 *ibid.*

34 Section 40 et seq., KGSG.

35 *id.*, Section 40.

36 *id.*, Section 42.

37 For example, because they can be found in the database at www.lostart.de.

The following general limitation periods are important in the context of art cases.

- a Warranty claims regarding sales of goods are time-barred 30, five or two years following the transfer of the goods,³⁸ and almost all cases concerning the sale of art will fall under the two-year clause.
- b A declaration of will that was based on deceit can be contested for up to one year after the deceived person discovers the deception and up to, at the latest, 10 years after the declaration of will was given.³⁹
- c A claim of the owner of a work against the current holder of the work, who did not acquire any title (i.e., a claim against the possessor of a stolen item) is time-barred after 30 years after the loss of the item (i.e., the theft).⁴⁰ However, if the possessor of the stolen item both acquired it and retained it in good faith for a period of 10 years, usucapion takes place after that 10 years and the original owner can no longer reclaim the stolen item.

iv Alternative dispute resolution

Alternative dispute resolution (ADR) by the Commission in the field of restitution is established in Germany.

In recent years, ADR has also been put in place in other areas of art law; there are several arbitration bodies worldwide that can deal with art-related cases, including the World Intellectual Property Organization,⁴¹ the Court of Arbitration for Art⁴² and the Venice Chamber of Arbitration's⁴³ art sector. In addition, the German Arbitration Institute⁴⁴ has expressed an interest in art-related cases.⁴⁵

IV FAKES, FORGERIES AND AUTHENTICATION

Forgeries continue to raise complex criminal law and civil law questions.⁴⁶

According to the recently revised chapter on sales in the German Civil Code, goods are free from material defects if they meet the subjective and objective requirements.⁴⁷ Part of the subjective requirements are the agreed upon quality and the agreed upon suitability for use.⁴⁸ The quality of an object consists of any features that the parties have agreed upon.⁴⁹

38 Section 438, Paragraph 1, Nos. 1–3, BGB.

39 Section 123, Paragraph 1, BGB.

40 Section 197, Paragraph 1, Nos. 2, 200, BGB.

41 As far as intellectual property and copyright disputes are concerned.

42 www.cafa.world/cafa/about_us/.

43 The Venice Chamber of Arbitration recently published new arbitration rules developed by a committee of experts in the field.

44 www.disarb.org/.

45 In 2018, the Institute's international autumn conference dealt exclusively with alternative dispute resolution in art-related matters.

46 A good example of a recent case concerning this topic is one concerning a fake Alexander Rodchenko and Alexandra Exter work (BGH, 2 StR 398/19, May 2020). An important guiding principle for the court was that even an item for which it is not possible to determine whether it is a forgery has a certain value, even if the provenance was forged.

47 Section 434, Paragraph 1, S1, BGB.

48 *id.*, Section 434, Paragraph 2, Nos. 1, 2.

49 *id.*, Section 434, Paragraph 2 ATE.

Therefore, in the context of an authenticity dispute, it is key to establish what exactly the parties agreed upon. This agreement does not necessarily need to be explicit, it can also be implied (e.g., by referring to an expert opinion, a catalogue raisonné, an artist's signature or a certificate of authenticity during the sales negotiations or in an auction house's catalogue). Courts tend to focus on the details of the individual case and are sometimes hesitant to assume a binding agreement regarding the authenticity of an item. Therefore, from a buyer's perspective, it is advisable to include an explicit agreement.

If no quality (e.g., authenticity) has been agreed upon, the object (the artwork) meets the objective requirements if it is suitable for its customary use and if its quality is of the standard expected in goods of the same kind.⁵⁰ To determine the quality that the buyer can expect, public statements made by the seller – again, references to expert opinion, a catalogue raisonné, etc. – can play an important role.⁵¹ If the item is defective, the buyer has different rights, most importantly the right to revocation of the agreement⁵² or to demand damages or reimbursement of futile expenditure.⁵³

In addition to these specific remedies, the buyer can retroactively cancel the contract under certain circumstances (e.g., in the case of deception).⁵⁴ This cancellation right can be exercised for up to one year after becoming aware of the deception, or, at the latest, 10 years after conclusion of the contract. The consequence is the reversal of the transaction.⁵⁵

V ART TRANSACTIONS

i Private sales and auctions

There are no specific rules for private sales. Legally, a private sale can be structured in different ways, such as a simple sales contract or, if an intermediary is involved, such as an agency or a commission, following the rules laid down in the Commercial Code.

Auctions are specifically regulated; to conduct auctions, auctioneers need a permit.⁵⁶ Auctioneers' ways of doing business are further specified in public law regulations.⁵⁷

Legally, one of the differences between private sales and auctions is that an auctioneer can transfer title to a good-faith purchaser when an item is sold at a public auction, even if the item was stolen.⁵⁸ However, in a private sale, the buyer can negotiate contractual guarantees.

ii Art loans

For works on loan in German museums, there is the possibility to apply for immunity from seizure: to protect works of art that are temporarily exhibited in Germany from seizure, the owner can apply for a legally binding commitment to return the loan.⁵⁹ The application for

50 id., Section 434, Paragraph 3, Nos. 1, 2(a).

51 id., Section 434, Paragraph 3, No. 2(b).

52 id., Section 437, No. 2.

53 id., Section 437, No. 3.

54 id., Section 123.

55 id., Section 812 et seq.

56 Section 34b, Paragraph 1, General Administrative Business Regulation.

57 Auctioneer Regulation of 24 April 2003 (Federal Law Gazette (BGBl), p. 547), last amended by Article 101 of the Act of 29 March 2017 (BGBl, p. 626).

58 Section 935, Paragraph 2, BGB.

59 Section 73 et seq., KGSG.

this legally binding commitment needs to be submitted to the competent authority in ample time before the import; the duration of immunity from seizure shall not exceed two years but can exceptionally be extended to four years.

If immunity from seizure is granted, no conflicting third-party rights may be asserted against the lender's right to the return of the item. Legal action for recovery, arrest, attachment or seizure as well as official acts of enforcement or seizure are not permitted before the item is returned to the lender.

Moreover, immunity from seizure also prevents the item from being added to the list of cultural property of national significance.

No export licence is needed for the return of the property.

Once granted, immunity from seizure may not be cancelled, withdrawn or revoked.

Public museums in Germany often arrange for a public law guarantee of reimbursement by the state in the event of loss or damage instead of insuring the item, if this is acceptable to the borrower. In this case, it is important to specifically define liability.

iii Cross-border transactions

For further details regarding import and export restrictions, see Section III.ii.

From a tax point of view, the following generally applies to cross-border transactions.

If the seller is an entrepreneur whose turnover exceeds a certain threshold, any sale of goods that takes place in Germany is subject to German VAT. The sale of goods is regarded as taking place in Germany if the goods are located and sold in Germany.

The current German basic VAT rate applicable to sales of artwork is 19 per cent, unless an artwork is bought directly from the artist or the artist's heirs, in which case VAT amounts to 7 per cent.⁶⁰ With 19 per cent VAT currently, Germany is at the higher end of transaction costs. But after 10 years of trade associations' lobbying efforts, a new EU Directive⁶¹ might finally lead to a lower VAT rate for the art trade, once implemented into national law.⁶²

For non-EU buyers, a VAT exemption may apply if the goods are bought in Germany and delivered to the home country of the non-EU resident (to be assessed on a case-by-case basis).⁶³

Deliveries to entrepreneurs in other EU countries may qualify for an exemption, so that the sale is exempt from German VAT, with the VAT of the other EU state applying instead (also to be assessed on a case-by-case basis).⁶⁴

Import from a non-EU state might give rise to import VAT as well as customs duties.

There is the possibility of temporarily importing artwork for less than 24 months without any customs duties being charged, if the import is for public exhibition and sale.⁶⁵

Germany is a signatory to the 1970 United Nations Educational, Scientific and Cultural Organization Convention on the Means of Prohibiting and Preventing the Illicit

60 Section 12, Paragraph 2, No. 13, German VAT Tax Code (UStG).

61 No. 26, Annex III of EU Directive 2022/542 introduces works of art, collectors' items and antiques to the list of supplies of goods and services to which reduced VAT rates may be applied.

62 See the Federal Association of German Gallery Owners and Art Dealers annual meeting report, 2022, www.bvdg.de/aktuell_BVDG_Jahresversammlung2022.

63 Section 4, No. 1(a), UStG in connection with Section 6, UStG.

64 id., Section 4, No. 1(b), in connection with id., Section 6a.

65 With or without an ATA carnet (an international customs and temporary export–import document); in the latter case, generally, security has to be provided.

Import, Export and Transfer of Ownership of Cultural Property but has not signed the 1995 International Institute for the Unification of Private Law Convention on Stolen or Illegally Exported Cultural Objects.

iv Art finance

Certain banks in Germany offer loans with artwork as collateral. The legal structure used for the collateral is a pledge in most cases, which means that the artwork must be stored with the bank. As there is no register of security interests in Germany and because of the possibilities of good-faith acquisition, most banks refrain from using other legal structures allowing the artwork to remain with the beneficiary of the loan. Some banks make exceptions in specific circumstances, however.

Similarly, some companies and dealers offer loans to their clients. If this is done on a regular basis, a banking licence might be required.

The art trade as well as art warehouses are subject to the anti-money laundering regulations of the updated German Anti-money Laundering Code,⁶⁶ transposing the EU's Fifth Anti-Money Laundering Directive.⁶⁷ In practice, this means a requirement for know-your-customer obligations, such as scans of IDs and passports⁶⁸ for any transaction or series of connected transactions involving a value of €10,000 or more; the scan must be kept for five years⁶⁹ after the end of the contractual relationship. If the buyer is a corporation, it is necessary to inquire about the ultimate beneficiary, to document this inquiry and keep the documentation for five years. In cases of doubt or if the ultimate beneficiary is not indicated in the transparency register, an enquiry with the national financial intelligence unit is necessary.⁷⁰

v NFTs

The hype surrounding NFTs has considerably cooled down in 2022; however, many players in the art market are still active in the field.

There is not yet specific regulation in place for NFTs; however, regulation concerning cryptoassets has emerged. On a national level, the Regulation on Enhanced Due Diligence for the Transfer of Crypto Assets is relevant to NFT trades as they are predominantly traded with cryptocurrency. The purpose of this Regulation is to prevent money laundering.⁷¹ In addition, there is upcoming regulation on an EU level. However, the proposal for a regulation on markets in cryptoassets seems to exclude certain types of NFTs from the definition of cryptoassets, so the scope of application is still rather unclear.⁷²

66 Section 2, Paragraph 1, No. 13 of the German Anti-money Laundering Code (GWG).

67 Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU.

68 Section 12, GWG.

69 *id.*, Section 8.

70 *id.*, Section 27 *et seq.*

71 This can take place, for example, by 'wash trades', illegal trading using black money held as cryptocurrency, whereby traders or investors buy and sell the same non-fungible tokens multiple times over a short period, feeding misleading information to other market participants about an asset's price or liquidity; see 'Non-Fungible Token (NFT) und Geldwäsche – eine aktuelle Einordnung', Schemmel, *Compliance Berater*, 2022, 286.

72 *ibid.*

In terms of copyright, the creator and seller of NFTs must observe third-party rights, the same as with any other creation. Whether the buyer of an NFT acquires a licence depends on the token terms. For most NFTs this is not the case.

Resale royalties can be provided for in NFT smart contracts; therefore, the creator receives revenue from all onward sales.

VI ARTIST RIGHTS

i Moral rights

The moral rights of the author consist of the rights:

- a* to publish a work for the first time;⁷³
- b* to be named (or not) as the author (attribution right);⁷⁴ and
- c* to ensure that the work is not distorted.⁷⁵

Moral rights expire 70 years after the author's death.

In practice, claims against distortion may be particularly relevant in the context of architecture, if a building is later modified, as well as with public art that is subsequently moved or modified.

In 2019, the Federal Court of Justice specified the scope of the author's claim against distortion stating that destruction of an artwork by its owner may also constitute distortion.⁷⁶

ii Resale rights

In the EU in general and in German copyright law in particular, copyright owners receive resale royalties for 70 years following the artist's death, if an original artwork (including an original photograph) is resold and a dealer is involved as purchaser, vendor or intermediary.⁷⁷ If the vendor is acting as a private individual, the professional dealer involved as purchaser or intermediary shall be jointly and severally liable in addition to the vendor; however, in the relationship between the vendor and dealer, it is the vendor alone who shall be liable for payment. This rule does not apply for sales of less than €400 or to works of applied art or architecture.

Resale royalties amount to a certain percentage of the sales price.⁷⁸

To be able to assert a claim for resale rights, the law provides for a right to request the provision of information from an art dealer or auctioneer (e.g., the sales price) for past sales of the artist's work (going back three years); this includes the name and address of the vendor, if necessary for the assertion of the claim. However, this information request may only be made by a collecting society, which can even ask for access to the account books or to other documents if there is reasonable doubt as to the accuracy or completeness of the information provided. An art dealer or auctioneer may refuse to provide the name and address of a vendor if the dealer pays the share to the author.

73 Section 12, German Copyright Act (UrhG).

74 id., Section 13.

75 id., Section 14.

76 BGH, judgment dated 21 February 2019, Az. I ZR 15/18; BGH ZUM 2019, 528.

77 Section 26, UrhG.

78 This starts at 4 per cent for a sales price of up to €50,000 and reduces to 0.25 per cent for a sales price above €500,000. The royalty cannot exceed €12,500, however, regardless of how high the sales price is.

iii Economic rights

German copyright law provides, as a principle, that the author of a work should be appropriately remunerated for its exploitation. German copyright law⁷⁹ provides for the following economic rights:

- a* the right to make a work available to the public;
- b* the right of distribution;
- c* the right of reproduction; and
- d* the right of broadcasting.

Generally, each use of an artwork or its reproduction other than exhibiting the original artwork, requires the prior consent of the artist.

According to a case recently decided by the Court of Justice of the European Union,⁸⁰ this is slightly different in the case of ‘framing’ (i.e., the direct embedding of work from another website by automatic links). According to the Court, framing only constitutes an infringement if the copyright holder took technical measures to protect the content from being framed.

Reproduction rights, as well as ‘online rights’ and broadcasting rights, are administered by the German copyright collecting society, VG Bild-Kunst, or its international sister copyright collecting societies, if the artist concerned is a member.

Total buy-out contracts are regarded very critically and are often viewed as being invalid, particularly if the law of general terms and conditions applies.

iv Limitations to copyright law

One of the copyright challenges relating to visual arts is the use of pre-existing work by the public and by other artists. The German Copyright Act exhaustively lists limitations, such as the freedom of panorama, which gives the public the right to reproduce, distribute and make available works of art that are permanently located on public streets or squares by photographing or filming them.⁸¹ In addition, the right to quote allows the use of a reproduction for the purpose of quotation, provided that the extent of the use is justified by the specific purpose.⁸² As images must necessarily be quoted as a whole, in practice, a quote is only justified (if at all), if the quoting publication discusses the image scientifically.

In 2021, copyright limitations underwent an important change: the provision allowing for ‘free use’ was removed and the ‘pastiche limitation’ was inserted instead.⁸³ This change did not simplify the distinction between the acceptable use of an already existing copyrighted work and an infringing use. The legal basis for the pastiche exception originates from the Information Society Directive of 2001, which does not, however, provide for full harmonisation.⁸⁴ The reason for implementing this limitation in 2021 was to legalise (at

⁷⁹ Section 15 et seq., UrhG.

⁸⁰ *VG Bild-Kunst v. Stiftung Preussischer Kulturbesitz*, Case C-392/19, ECLI:EU:C:2021:181.

⁸¹ Section 59, UrhG.

⁸² *id.*, Section 51.

⁸³ *id.*, Section 51a.

⁸⁴ Directive (EU) 2001/29 of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

least to a certain extent), the art form of memes and remixes. The new limitation also covers caricatures and parodies. In the first court decision applying the pastiche limitation, the use of an entire component of an existing artwork in a painting was found not to be infringing.⁸⁵

VII TRUSTS, FOUNDATIONS AND ESTATES

There is no legal entity such as an ‘estate’ in German law. If an artist or a collector dies without estate planning, the heirs simply step into the shoes of the deceased person.⁸⁶ If there are several heirs, they will become a community of heirs (legally a community of part-owners). An inheritance can either be administered as a community or distributed.

During the lifetime or after the death of a collector or artist, there are different options to structure a collection or an artist’s legacy.

A rather classical option is to set up a private foundation, which, if it is recognised as being charitable, can lead to considerable tax benefits. To set up a foundation, the founder has to establish, via a public administrative body, that the foundation can permanently pursue its (charitable) purpose in a self-sustaining way with its assets. In particular, in times of very low interest rates or inflation, it takes a considerable financial effort to set up a foundation. Moreover, the foundation must have a long-term objective. As an alternative to the classical foundation, which has the purpose of existing forever, foundations can be set up for a limited amount of time only (for a minimum of 10 years, however) and these use their own assets to accomplish this purpose.⁸⁷ Following the latest reform of the law applying to foundations in the German Civil Code in July 2021,⁸⁸ it is possible to transform a foundation with a long-term objective into a ‘consumption foundation’ with a limited term if it is foreseeable that the foundation is unable to support itself any longer. However, this requires the consent of the foundation supervisory authority. Despite this new possibility, a foundation is not the most flexible structure.

Alternatively, it is possible to set up a limited liability company or an association or other type of entity for an estate.

All of these entities can, if they pursue a charitable purpose as defined by the law, apply for official non-profit status, enabling them to receive charitable gifts and obtain tax benefits. No gift or inheritance tax applies to gifts or bequests to non-profit organisations and non-profit museums.

Giving or bequeathing artwork can be beneficial in terms of gift/inheritance tax. Generally, the rate of gift/inheritance tax is currently levied at 30 per cent, 43 per cent or even 50 per cent in certain cases, depending on the asset type or degree of kinship of the parties. Gifts or bequests of artworks can be tax-exempt to up to 60 per cent, or even 100 per cent under certain additional conditions, if there is a public interest in safeguarding the artwork and if they are publicly accessible for at least 10 years.⁸⁹

85 Regional court of Berlin, verdict of 2 November 2021, 15 O 551/19, GRUR-RS 2021, 48603.

86 Section 1922, BGB.

87 *id.*, Section 80, Paragraph 2.

88 *id.*, Section 86–86h.

89 Section 13, Paragraph 1, No. 2(a), (b) of the Inheritance Tax and Gift Tax Law.

VIII OUTLOOK AND CONCLUSIONS

Art law in Germany is a complex field, as different kinds of general legal rules according to civil law, commercial law, public law and criminal law, as well as certain art-specific legal rules (e.g., those concerning cultural property), in addition to 'soft law' such as the Washington Principles or trade customs, apply. Art law in Germany is permanently evolving through case law and new legislation.

ABOUT THE AUTHORS

KATHARINA GARBERS-VON BOEHM

Büsing Müffelmann & Theye

Dr Katharina Garbers-von Boehm is a lawyer focusing on art law, intellectual property law and technology-related matters.

In her art law practice, her clients include family offices, private individuals, artists, galleries, art dealers and advisers, auction houses, banks, corporate collections, artists' heirs and collectors' heirs (advisory work and litigious matters as well as mediation). She is continually recognised by *Best Lawyers* and is continually ranked in Band 1 of the *Chambers HNW* guide for art and cultural property law.

She is a co-author of *Praxishandbuch Recht der Kunst* (C H Beck Verlag, 2019), for which she wrote chapters on looted art, export restrictions and auctions, as well as a chapter on financial transactions relating to artwork. In addition, she is a co-author of the first commentary on the German Cultural Property Protection Act (C H Beck Verlag, 2018), for which she wrote the chapters on the import of cultural goods and on listing proceedings. Katharina has also published extensively in relevant journals.

She is a frequent speaker and panellist at international conferences and was appointed to the original Court of Arbitration for Art arbitration and mediation pools in January 2020.

She is a member of various legal and cultural national and international institutions, in some of which she has board functions. She was elected to the advisory board of a midsize industrial company in Germany in 2019.

Katharina's educational background includes law studies in Heidelberg and Berlin, followed by a doctorate on the digitisation of museum archives, an LLM in international studies in intellectual property (Exeter and Dresden), a Master of Laws degree (specialisation in business law) from Paris II Panthéon-Assas University and a diploma in art law offered by the Institute of Art and Law (United Kingdom).

BÜSING MÜFFELMANN & THEYE

Kurfürstendamm 190/192

10707 Berlin

Germany

Tel: +49 30 88 03 0462

Fax: +49 30 88 03 0426

garbersvonboehm@bmt.eu

www.bmt.eu

ISBN 978-1-80449-143-0