

Attorneys at Law

ZURICH
GENEVA
ZUG
LONDON
MADRID

Legal News from Switzerland

ART LAW

January 2005

New Swiss Law on the Transfer of Cultural Property

On 1 April 2005¹, a new law on the international transfer of cultural property will enter into force in Switzerland. The new law is the enabling legislation of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

Generally

- Up to now, there have been no Swiss Federal rules regulating the trade in cultural objects, which range from excavated archaeological and ethnological items to modern art treasures, such as paintings, engravings and sculpture. Each Swiss canton has had its own regulations regarding cultural goods and these have varied greatly in terms of how and what

cultural objects should be protected². Furthermore, a major problem for owners of stolen cultural objects has been the statute of limitations for adverse possession contained in the Swiss Civil Code, whereby the owner of stolen cultural objects is time barred from filing suit for return after only 5 years if the object was acquired in "good faith".

- The new law is designed to regulate the movement of cultural objects in and out of Switzerland and enhance Switzerland's reputation as an important centre for the trade in cultural items. Very importantly, the abovementioned 5 year statute of limitations has been extended to 30 years.
- Furthermore, the new law raises the standards of due diligence for those active in the art trade and auctioning business.

Exports

- Under the new regime, export restrictions will apply to cultural objects belonging to the Confederation and *of significant importance to the cultural heritage of*

¹ This date is subject to approval from the Federal government.

² For instance, certain Swiss cantons prescribe export restrictions to protect their cultural objects whereas others prescribe a right of pre-emption. In practice, it has been simple to get around these provisions and cantons have been unable to prevent cultural objects from exiting the Swiss border as the customs are under the regulation of the Swiss Confederation.

Switzerland. These objects will be registered in a *Federal Registry*³ which will be operated as a public electronic database. A new governmental body will be responsible for enforcement.

- Once a cultural object has been registered in the *Federal Registry*, it may not be acquired through adverse possession nor good faith and may only be exported, temporarily, if accompanied by an export certificate.
- If a cultural object published in the *Federal Registry* or a *cantonal registry* (see footnote 4) is illegally exported, the Federal Council may (on its own behalf or at the request of a canton) request its return. There will be no Swiss time limit to recovery.

Imports

- The new law does not directly regulate the import of cultural objects into Switzerland. Rather, the Federal Council may, at the request of other countries, conclude international treaties on the import and return of cultural property of *significant importance to the cultural heritage of the contracting state*. The cultural objects must be subject to export restrictions in the requesting state and the

contracting state must grant reciprocity. Swiss import regulations only come into effect after such international treaties have been concluded. The Federal Council plans to conclude a whole series of bi-lateral treaties. There are currently negotiations with Mexico.

- If a cultural property treaty has been entered into, the object can be imported into Switzerland from the country of origin provided it is accompanied by an export certificate⁴.
- The Federal Council may impose temporary emergency import, export and transit restrictions on cultural objects from a country whose cultural property is under serious threat (for instance during times of armed conflict, civil war or natural catastrophes)⁵.
- If a cultural object is illegally imported into Switzerland, the country of origin can request its return within one year from the date when it became aware of the whereabouts of the object and the identity of the possessor and not later than 30 years from the date the object was illegally exported.
- If an acquirer in good faith is required to surrender a cultural object, the requesting country must provide just compensation, based on the purchase price and on the necessary and useful expenditure incurred in the safeguarding and conservation of the object.

³ Each Swiss canton may compile a cantonal registry of cultural objects owned by the canton and by private individuals to the extent that they have given their prior approval. Furthermore, they may link these registries with the *Federal Registry*. This will allow for the greatest possible degree of transparency for the authorities, museums and the art trade.

⁴ The same rule applies to the storage of cultural objects in a Swiss free-port, in other words, they must be declared. This should discourage the interim storage of cultural objects of questionable origin.

⁵ This applies to all countries, regardless of whether the country is a party to the UNESCO Convention or not. Practitioners should be aware that, separate from the new law, the Federal Council imposed a ban in 2003 that covers the import, export and transit, (as well as selling, marketing, dealing in, acquir-

ing or otherwise transferring) of Iraqi cultural objects stolen in Iraq since 2 August 1990, removed against the will of the owner, or taken out of Iraq illegally. It includes cultural assets acquired through illegal excavations. Such assets are presumed to have been exported illegally if they can be proved to have been in the Republic of Iraq after 2 August 1990 – Ordinance on Economic Measures against the Republic of Iraq of 28 May 2003, SR 946.206.

Swiss museums

- A US style immunity from seizure has been introduced by the new law. Accordingly, a foreign lender of cultural objects to a Swiss museum (or other cultural institution in Switzerland) for the purpose of a temporary exhibition may request immunity from seizure for the duration of the exhibition.
- This differs from the position in the UK where cultural objects on loan from a foreign country are not immune from seizure.

Persons active in the art trade and auctioning business

- The new law raises the standards of due diligence applicable to persons active in the art trade and auctioning business. The statutory definition of those subject to the new due diligence requirements is being revised and is expected to be published in the coming months before the entry into force of the new law⁶.
- The statutory due diligence requirements are as follows:

Dealers and auctioneers have a duty to:

- Inform their clients of Swiss and foreign regulations governing the import and export of cultural property;

- Identify the supplier or seller of a cultural good and require a written declaration from the same of his or her right of disposal; and
 - Maintain written records of the acquisition of cultural goods. The records must include the origin of the object, the name and address of the person who delivered or sold the item and a description and the sales price of the object⁷.
- The governmental body in charge of enforcement of the new law will have broad powers including the power to enter the premises of a dealer or auctioneer to ascertain compliance.

Improving the rights of owners of stolen cultural objects

- Swiss domestic law has been put in line with prevailing standards regarding the statute of limitations for adverse possession, raising from 5 to 30 years the period during which a lost or stolen cultural object may be recovered from an owner in good faith⁸. This absolute time limit of 30 years is supplemented by a relative time limit of one year: The person entitled to commence proceedings for return must do so within one year of determining where and with whom the object is located, under penalty of forfeiture.

⁶ The current position is that the new due diligence requirements apply only to those who carry out more than 10 commercial transactions involving cultural objects (as defined by the new law) a year or achieve a net revenue of more than 20,000 Swiss francs per annum. The transaction must also involve a transfer of property as opposed to a transaction which the dealer/auctioneer transacts on his own behalf or on behalf of third parties.

⁷ These records must be held for 30 years.

⁸ There is no time limit for the recovery of cultural objects acquired in bad faith.

Non-retroactive effect

- The new law is not retroactive. Accordingly, any cultural objects acquired in good faith before 1 April 2005 will be safe from suit after a period of 5 years, as under the current regime. Obviously, an owner in good faith will have to prove

that he/she acquired the object before the entry into force of the new law. Therefore, owners of cultural objects may want to draw up inventories of their collection before the 1 April 2005 (accompanied by a photograph and proper description of each object, dated, signed and duly witnessed).

For more information:

Bruno Boesch in London,
tel. +44 (0)20 7236 6000, fax +44 (0)20 7248 0209, bboesch@froriep.ch

Philippe Pulfer in Geneva,
tel. +41 22 839 6300, fax +41 22 347 71 59, ppulfer@froriep.ch

Dr Mathias Plutschow and **Alexander Krausz** in Zürich,
tel. +41 1 386 6000, fax +41 1 383 6050, mplutschow@froriep.ch, akrausz@froriep.ch

Dr Jean-Marie Vulliemin in Madrid,
tel. +34 91 523 77 90, fax +34 91 531 36 62, jmvulliemin@froriep.ch

©Froriep Renggli 2005. This newsletter provides general information on legal developments in Switzerland and is not intended as advice on specific matters. Reproduction is authorised if the source is indicated.

Bellerivestrasse 201
CH-8034 Zurich
Tel. +41-1-386 60 00
Fax +41-1-383 60 50
E-Mail: zurich@froriep.ch

4, rue Charles-Bonnet
CH-1211 Geneva 12
Tel. +41-22-839 63 00
Fax +41-22-347 71 59
E-Mail: geneva@froriep.ch

Baarerstrasse 37
CH-6304 Zug
Tel. +41-41-710 60 00
Fax +41-41-710 60 01
E-Mail: zug@froriep.ch

1 Knightrider Court
GB-London EC4V 5JP
Tel. +44-20-7236 6000
Fax +44-20-7248 0209
E-Mail: london@froriep.ch

Antonio Maura 10
E-28014 Madrid
Tel. +34-91-523 77 90
Fax +34-91-531 36 62
E-Mail: madrid@froriep.ch