

ART LAW

Switzerland



Art Law

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Quick reference guide enabling side-by-side comparison of local insights, including into buying and selling; export and import controls; taxation; borrowing against art; intellectual property rights; agency; consigning items; auctions; spoliation during Nazi era; lending to museums; cultural patrimony; anti-money laundering; endangered species; consumer protection; art market regulators; and recent trends.

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BUYING AND SELLING

Passing of title

When does ownership of art, antiques and collectibles pass from seller to buyer?

In principle, ownership passes to the buyer with the transfer of possession (article 714, Civil Code ; article 184, Code of Obligations). Instead of a physical transfer of possession, the parties may agree that the buyer receives the means to access the art, antique or collectible, for example because it will remain stored at a freeport (article 922, Civil Code). However, the parties may also provide that the buyer takes possession of the art, antique or collectible and acquires ownership only on receipt of payment. In the latter event, the seller's retention of title must be registered in the official debt enforcement register at the buyer's place of residence (article 715, Civil Code).

Law stated - 30 January 2023

Implied warranty of title

Does the law of your jurisdiction provide that the seller gives the buyer an implied warranty of title?

Statutory law provides a warranty of title according to which the seller must transfer the collectible free from any rights enforceable by third parties against the buyer that exist at the time the contract is concluded (article 192, Code of Obligations). Buyers are therefore entitled to a legal claim if they have bought a collectible that actually belonged to a third party. No implied warranty of title exists if, at the time of the agreement, the buyer knew or should have known of any third-party rights. Actions for breach of warranty of title regarding cultural property as defined by the Cultural Property Transfer Act (CPTA) become time-barred one year after the buyer discovered the defect of title, but in any event, 30 years after the contract was concluded (article 196a, Code of Obligations). To qualify as cultural property under the CPTA, the property must:

- belong to one of the categories provided for under article 1 of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the 1970 UNESCO Convention); and
- be meaningful property from a religious or secular point of view for archaeology, prehistory, literature, art or sciences.

The Swiss federal administration published a checklist to help determine whether a property can be considered as cultural property, which includes a description of categories of the 1970 UNESCO Convention and list of significant areas such as archaeology, art or science.

The implied warranty of title can be limited or excluded by contract. Such an agreement is, however, void if the seller has intentionally concealed the right of a third party. Owing to the protection of the good-faith purchaser, the warranty of title was of little practical relevance. Since the limitation period for a good-faith acquisition has increased to 30 years for cultural property, this is likely to change in the future.

Law stated - 30 January 2023

Registration

Can the ownership of art, antiques or collectibles be registered? Can theft or loss of a work be recorded on a public register or database?

No. Ownership of art, antiques or collectibles cannot be registered in Switzerland, nor is there any public register or database of stolen art. Storing cultural property at freeports is subject to inventory, registering a date of deposit, description of the object, its provenance, its value and the owner's identity.

In sale transactions whereby the buyer acquires possession of the property before payment is made, the parties may register the seller's retention of title in the official debt enforcement register at the buyer's place of residence, but this rarely occurs in practice.

Law stated - 30 January 2023

Good-faith acquisition of stolen art

Does the law of your jurisdiction tend to prefer the victim of theft or the acquirer in good faith of stolen art?

In principle, Swiss law protects the acquirer in good faith. The acquisition in good faith of an artwork in due possession of the transferor is not open to challenge, regardless of whether the transferor lacked actual power of disposal, unless the artwork was either stolen or lost or otherwise taken from the original owner against their will.

In the event of stolen or lost artwork, the original owner can claim it back (article 934, Civil Code). The claim to recover cultural property falling under the definition of the CPTA is limited to one year from the day the owner discovers the current possessor's identity and location of the object, and 30 years since the loss of the object. Before the entry into force of the CPTA on 1 June 2005, artworks and collectibles were subject to a five-year limitation period, which is still applicable for chattels other than cultural property.

For artwork sold at auction or by an art dealer, the original owner may only reclaim his or her property against the reimbursement of the price paid by the good-faith purchaser. This price does not include any increase in value of the artwork since the purchase.

The question of whether the purchaser was in good faith when buying the artwork must be determined based on the facts of the case. The good-faith purchaser must exercise the required care and attention in the particular circumstances. The Federal Court has not imposed a general duty on the buyer to investigate the seller's ownership title. Instead, it distinguishes between businesses that are particularly exposed to the supply of goods of dubious origin and those that are not so exposed. In the latter event, the buyer has a duty to investigate the seller's legitimacy only if any suspicions have arisen. In the former event, the buyer must be inquisitive at the outset of the transaction. Federal case law suggests that the antiquities market is considered a business that is particularly exposed to title risks, whereas the Federal Court has held otherwise for the sale of works of classical modern art from the former Soviet Union (see Federal Court decisions BGE 122 III 1 and BGE 139 III 305). More importantly, the courts take into account the buyer's expertise and knowledge of the market to establish the requisite level of due diligence. Heightened expectations are not only held against dealers and auction houses, but also collectors. Guidelines and ethics codes of dealers' associations may serve judges as a basis to determine the diligence required under the given circumstances. The CPTA provides further details.

In terms of the burden of proof, there is a presumption of good faith (article 3, Civil Code). Hence, the party alleging bad faith bears the burden of proof (article 8, Civil Code), which can be difficult in practice.

Law stated - 30 January 2023

Acquiring title to stolen art through prescription

If ownership in stolen art, antiques or collectibles does not vest in the acquirer in good faith, is the new acquirer protected from a claim by the victim of theft after a period of time?

Yes, the acquirer in good faith of stolen or lost cultural property is protected upon expiry of the limitation period, that is if the original owner missed to file a claim one year after they knew about the current possessor's identity and location of the object, and 30 years after the loss.

Law stated - 30 January 2023

Can ownership in art, antiques or collectibles vest in the acquirer in bad faith after a period of time?

No, ownership never passes to a purchaser in bad faith (article 936, Civil Code).

Law stated - 30 January 2023

Must the professional seller of art, antiques or collectibles maintain a register of sales?

Yes if the sale concerns a cultural property item with a purchase or estimate price over 5,000 Swiss francs. The dealer must record the identity of the seller or consignee (such as name, address, nationality, date of birth, etc), the location of origin or discovery of the property, a description (including information such as the kind of object, its dimensions, weight, subject matter, any inscriptions, etc), date of the sale and sale price. The Specialised Body for the International Transfer of Cultural Property at the Swiss Federal Office of Culture (the Specialised Body) may request the dealer to consult the register.

Law stated - 30 January 2023

Risk of loss or damage

When does risk of loss or damage pass from seller to buyer if the contract is silent on the issue?

Risk of loss or damages pass from seller to buyer upon the conclusion of the contract, unless the parties have agreed otherwise (article 185, Code of Obligations). In practice, sale contracts frequently provide that risk passes upon delivery of the artwork to the buyer.

Law stated - 30 January 2023

Due diligence

Must the buyer conduct due diligence enquiries? Are there non-compulsory enquiries that the buyer typically carries out?

Buyers need to perform appropriate due diligence in order to rely on good faith. It will typically involve requesting information from the seller on the provenance of the work and consulting the relevant sale catalogues and stolen art registers.

Law stated - 30 January 2023

Must the seller conduct due diligence enquiries?

The CPTA establishes a general and a specific duty of diligence for the sale of cultural property. Both the general and the special duty of diligence apply only to transactions involving at least one person active in the art trade or auction business. These are defined as persons domiciled in Switzerland and companies having their registered office in Switzerland that acquire cultural property for the purpose of reselling it for their own account or on behalf of third parties. It also applies to persons domiciled abroad and to companies having their registered office abroad, provided they conduct more than 10 transactions with cultural property with a turnover of more than 100,000 Swiss francs a year for the purpose of reselling the property for their own or a third party's account.

Under the general duty of diligence, any seller must refrain from transferring ownership to the cultural property unless they can assume, under the given circumstances, that the object was neither stolen nor lost against the will of the owner or illegally excavated, and not exported in breach of a bilateral agreement (article 16(1), CPTA). This general duty of diligence only applies to art sales involving a transfer of ownership, unlike loans, storage, donations and other legal relationships. The person bearing the duty is primarily the owner of the cultural property or the intermediary acting on the owner's behalf.

Moreover, under the specific duty, professional sellers are obliged, according to article 16(2) of the CPTA, to:

- establish the identity of the supplier or seller and ask for a written declaration from them of their right to dispose of the cultural property;
- inform their customers about existing import and export regulations of the contracting states;
- maintain written records on the acquisition of cultural property by specifically recording the origin of the cultural property, to the extent known, and the name and address of the supplier or seller, a description as well as the sales price of the cultural property (such records must be stored for 30 years); and
- provide all necessary information on fulfilling this duty of diligence to the Specialised Body.

Art collectors who do not act as professionals pursuant to article 16 of the CPTA may be subject to criminal sanctions should they sell, import, distribute, procure, acquire or export cultural property stolen or otherwise lost against the will of the owner (article 24, CPTA).

Further due diligence requirements are provided by anti-money laundering provisions and import and export laws.

Law stated - 30 January 2023

Other implied warranties

Does the law provide that the seller gives the buyer implied warranties other than an implied warranty of title?

An implied guarantee of authenticity exists in art sale agreements provided the price paid is commensurate with the price that would have been paid for an original. It allows the buyer to rescind the sale because the artwork is a fake, was attributed to the wrong artist or was wrongly dated.

The seller may expressly or impliedly exclude any liability for authenticity (article 199, Code of Obligations). Such disclaimers are void for defaults that the seller fraudulently concealed from the buyer.

Law stated - 30 January 2023

Voiding purchase of forgeries

If the buyer discovers that the art, antique or collectible is a forgery, what claims and remedies does the buyer have?

The buyer of a forgery may rescind the sale agreement either on the grounds of a fundamental mistake or under the seller's liability against defects. Both are subject to any disclaimer included in the contract. Under a mistake claim, the seller must allege that the description of the object at sale, which is part of the contract, differed from what the object actually is – a typical example is the sale of a forgery (article 24, Code of Obligations). However, should the buyer have known about the art object's attribution, the court will likely reject their claim based on the principle of fairness in commercial transactions.

Liability against defects is a cause of action specific to sale contracts. Upon the delivery of the object, buyers must immediately verify its condition and notify the seller of any defects. The buyer may then cancel the sale contract and request the reimbursement of the price paid plus interest and expenses against the restitution of the artwork.

Law stated - 30 January 2023

Voiding inadvertent sales of works by masters

Can a seller successfully void the sale of an artwork of uncertain attribution subsequently proved to be an autograph work by a famous master by proving mistake or error?

Sellers may rescind the sale agreement based on a mistake claim. A cause of action for mistake arises when the seller misconceived the art object's attribution, such as believing the painting to be by a follower instead of the master painter. The seller must show that, had they known about the true situation, they would not have concluded the sale agreement (or at least not under the same subject terms of the contract). Courts further assess whether any third party hypothetically placed in the position of the claimant would have considered the mistake to be decisive to such an extent that it would not have concluded the agreement, or at least only under different conditions. The mistake claim is subject to any disclaimer included in the contract.

For sales at auction, sellers may act based on the auction house's duty of care, the extent of which is determined by the parties' express or implicit agreement, including any disclaimer of liability. The duty of care supposes that the auction house acts in accordance with the level of diligence that may be expected of a knowledgeable professional acting under the same circumstances. Thus, it has an obligation to use all the diligence that a conscientious auction house would use in the same situation to attribute and evaluate the consigned artwork.

Law stated - 30 January 2023

EXPORT AND IMPORT CONTROLS

Export controls

Are there any export controls for cultural property in your jurisdiction? What are the consequences of failing to comply with export controls?

Under Swiss law, only a narrow range of cultural property, which is listed in the federal or cantonal register, requires specific authorisation to be exported. A specific export licence also applies to objects containing endangered species according to the CITES Convention. Moreover, Iraqi and Syrian cultural property that was stolen or illicitly exported from those countries is protected by specific legislation prohibiting their import, export, transit, sale and distribution. All

other cultural property can be exported upon customs clearance.

A person who exports or imports cultural property must include in the customs form the cultural property object type and a description of the place of manufacture, or if it originates from archaeological or palaeontological excavations, its place of discovery. The person importing cultural property from a 1970 UNESCO Convention contracting state must further indicate whether, according to the laws of that state, an export licence was required for the property. If so, the required licence must be submitted with the form.

In the case of suspicion, customs authorities may withhold cultural property. Illegally exporting cultural property is a criminal offence, which may lead to fines of up to 200,000 Swiss francs and imprisonment (article 24 et seq, Cultural Property Transfer Act (CPTA)). In some cases, tougher criminal rules may apply. Cultural property is confiscated if suspicion exists that it was stolen, lost against the will of the owner or illegally imported into Switzerland.

Law stated - 30 January 2023

Import controls

Other than in relation to endangered species, are there any import controls for cultural property in your jurisdiction? What are the consequences of failing to comply with import controls?

The import of cultural property (defined as 'significant property from a religious or universal standpoint for archaeology, prehistory, history, literature, arts or sciences belonging to the categories under article 1 of the UNESCO Convention of 1970', article 2, paragraph 1, CPTA) is subject to customs clearance requiring a detailed description of the object (eg, kind of object, place of manufacture or discovery, article 25, Cultural Property Transfer Ordinance). Import from a state with which Switzerland has concluded a bilateral agreement is subject to evidence of compliance with that state's export regulations and an export permit must be submitted. An intentionally false declaration or illicit import is punishable by imprisonment up to one year or a fine up to 100,000 Swiss francs (article 24, paragraph 1, CPTA). In the event of negligence, the sanction is a fee of up to 20,000 Swiss francs, and if the offender acts on a professional basis, the sanction is imprisonment for up to two years or a fine of up to 200,000 Swiss francs (article 24, paragraphs 2 and 3, CPTA).

Law stated - 30 January 2023

Export and import tax

Does any liability to pay tax arise upon exporting or importing art, antiques or collectibles?

Import and export of art, antiques and collectibles are subject to the usual customs and tax duties. Customs duty is generally not levied on such items but each property must be related to a specific tariff number to establish its treatment. Import VAT is, in principle, levied on import of art, antiques and collectibles (at a rate of 7.7 per cent and from 1 January 2024 at a rate of 8.1 per cent) and the valuation of these items is key and not always straightforward in practice (the market value must be determined – if documents are missing, an expert valuation can be carried out).

Specific regimes exist for art, antiques and collectibles to avoid taxes upon import. For example, items that will be sold by art galleries can be subject to the temporary admission procedure, which is limited to two years and can be extended. Specific customs declaration must be given and the necessary information must be gathered, such as the size of the painting, the name of the artist and proof of value or, in the case of an antique, its age. Items can also be stored in duty-free warehouses to avoid any tax and duties (transit items can be stored free of import tax; for items that will be sold, import duties only need to be paid upon the end of stockpiling).

Law stated - 30 January 2023

DIRECT AND INDIRECT TAXATION

Taxes

Outline the main types of tax liability arising from ownership and transfer of art, antiques and collectibles.

Various taxes can be levied on the transfer and ownership of art, antiques and collectibles.

When individuals own art, antiques and collectibles, wealth tax may be levied on the market value of the property (the rates vary greatly depending on the canton, from 0.1 per cent in Nidwalden to 1 per cent in Geneva). For companies, art collections are treated as an asset of the corporation.

Under Swiss tax law, private capital gains are exempt from income tax. However, capital gains will be taxed (as income) if they are considered to be the result of professional trading (it is, therefore, essential to distinguish between the independent activity and the simple management of private assets, but it can be difficult to do so).

Consequently, it will be necessary to determine whether an art collector can be considered self-employed, regardless of their main activity in order to establish the tax treatment of his or her assets (and the potential profit made from selling the works of art).

The Federal Court refers to the following criteria (each of which may be enough to qualify the activity as professional) in order to separate taxable self-employed activity from the simple management of the private assets: the systematic or planned nature of the activities; the frequency of the transactions and the short period of ownership; the link between the taxpayer's professional activity, the use of special knowledge and the activity in partnerships; the access to foreign funds; and the use of revenue and the reinvestment.

An overview of the rulings of the Federal Court will be required in each case to determine the above criteria. In general, the Federal Court considers that the boundary between a taxable income generated by an independent activity and tax-free capital gains must be assessed by taking into account all of the circumstances of the particular case at hand. From an external point of view, whether the taxpayer takes part in the trade is not decisive. Moreover, the criteria developed by real estate and securities trading case law can be applied by analogy to the sale of works of art, although the peculiarities related to it (such as the irregularity of the income) must be taken into consideration.

If a Swiss company sells works of art, this activity is considered to generate taxable corporate income subject to the different applicable rates depending on the canton of incorporation of the company (eg, 13.99 per cent in Geneva).

A person is subject to VAT (article 10, Value Added Tax Act) if they operate a business and provides assets and services in Swiss territory through that business, or has their registered office, domicile or permanent establishment in Swiss territory (this individual is, however, exempt from tax liability if within one year they generate turnover, in Swiss territory and abroad, from supplies of less than 100,000 Swiss francs that are not exempt from tax).

Law stated - 30 January 2023

Tax exemptions

Outline any tax exemptions or special conditions applicable to art, antiques and collectibles.

In Switzerland, wealth tax is levied at the cantonal level (for movable assets, wealth tax applies if the taxpayer resides in Switzerland) and the rates vary considerably (from 0.1 per cent to 1 per cent). In terms of wealth tax, in Geneva the law expressly exempts certain art and scientific collections from wealth tax. However, collections held for a purely speculative purpose are not exempt. In any case, an artwork that is part of the taxpayer's business assets is taxable (professional trade of works of art). Therefore, the purpose and the use of the goods are crucial, and legal scholars

mention other criteria that must be taken into consideration, such as the relationship between the value of the work of art and the global assets or the manner in which the work of art is ensured. In this context, the high value of a painting cannot, in principle, constitute grounds for refusing tax exemption. However, collections simply stored in safes or freeports are normally taxable. The taxpayer bears the burden to prove that an artwork is exempt.

Specific indirect tax regimes exist for art, antiques and collectibles to avoid taxes upon import. Thus temporary admission procedures, duty-free warehouses and freeports may lead to avoiding tax and duties or postponing tax liability. Moreover, if an artist brings artwork they created into Switzerland, this may be done duty-free.

If the person liable for tax has acquired collectors' items, such as artwork or antiques, in order to calculate the tax, they may deduct the purchase price from the selling price provided they have not deducted input tax from the purchase price (margin taxation). If the purchase price is higher than the selling price, the loss may be set off, as the difference is deducted from taxable turnover (article 24a, Value Added Tax Act).

In some cantons, works of art may be used to pay a taxpayer's gift or estate tax.

Law stated - 30 January 2023

BORROWING AGAINST ART

Types of security interest

In your jurisdiction what is the usual type of security interest taken against art, antiques and collectibles?

The usual type of security interest is a pledge (the creditor has a right to the sale of the pledged asset if the amount due is not reimbursed) or a transfer of ownership as guarantee (the creditor becomes the owner of the asset).

Law stated - 30 January 2023

Consumer loans

If the borrower borrowing against art assets in your jurisdiction qualifies as a consumer, does the loan automatically qualify as a consumer loan, and are there any exemptions allowing the lender to make a non-consumer loan to a private borrower?

No, the loan does not automatically qualify as a consumer loan. The Federal Credit Consumer Act provides that a consumer concludes a loan for a purpose outside their commercial or professional activity (article 3). The Act does not apply to loans in excess of 80,000 Swiss francs and short-term loans of up to three months. If a borrower qualifies as a consumer, the provisions of the Act may not be waived at their expense.

Law stated - 30 January 2023

Register of security interests

Is there a public register where security interests over art, antiques or collectibles can be registered? What is the effect of registration? Is the security interest registered against the borrower or the art?

No.

Law stated - 30 January 2023

Non-possessory security interests

Can the lender against art collateral perfect its security interest without taking physical possession of the art?

In principle, nothing prevents the lender from having the art stored at a third-party place (such as a warehouse) under its control. With regard to the borrower, it cannot keep possession of the art (or have sole control over access to it).

Law stated - 30 January 2023

Sale of collateral on default

If the borrower defaults on the loan, may the lender sell the collateral under the loan agreement, or must the lender seek permission from the courts?

According to the Federal Act on Debt Enforcement and Bankruptcy, the lender is not required to seek permission from the courts if the borrower has not lodged opposition to the payment order. In the opposite event, they must file a claim with the courts. The parties may not anticipate and forego this procedure by inserting a clause in the loan agreement.

Law stated - 30 January 2023

Ranking of creditors

Does the lender with a valid and perfected first-priority security interest over the art collateral take precedence over all other creditors?

Yes.

Law stated - 30 January 2023

INTELLECTUAL PROPERTY RIGHTS

Creator copyright

Does copyright vest automatically in the creator, or must the creator register copyright to benefit from protection?

Copyright automatically vests in the natural person who has created the work. An exception to this general principle concerns publishing contracts. According to statutory provisions (the Code of Obligations), where one or more authors accept a commission to work on a project originated by a publisher, the publisher owns the copyright to the work as a whole. In addition, copyright over software developed by an employee in the course of their professional duties belongs to the employer alone.

No copyright registration system exists under Swiss law.

Law stated - 30 January 2023

Copyright duration

What is the duration of copyright protection?

Copyright protection begins upon the creation of the work. For computer programs, the protection lasts 50 years following the death of the author. 'Non-individual' photographs (those without individual character) of three-dimensional objects benefit from copyright protection for a period of 50 years from the date of creation of the photograph. All other types of work are protected for 70 years following the death of the author.

Law stated - 30 January 2023

Display without right holder's consent

Can an artwork protected by copyright be exhibited in public without the copyright owner's consent?

Copyright owners have a moral right to decide if, when, how and under what name their artwork may be published for the first time (article 9(2), Federal Act on Copyright and Neighbouring Rights (FACN)). Once they have made use of this right and published their artwork, it may be exhibited in public without their consent.

Law stated - 30 January 2023

Reproduction of copyright works in catalogues and adverts

Can artworks protected by copyright be reproduced in printed and digital museum catalogues or in advertisements for exhibitions without the copyright owner's consent?

An exception to copyright protection exists for printed and digital museum catalogues if issued by the organiser of the exhibition. It extends to public and private collections, and temporary and permanent exhibitions as long as the exhibition is publicly accessible. It does not cover postcards, posters and websites. The same rule applies to the publication of auction, gallery and fair catalogues.

Law stated - 30 January 2023

Copyright in public artworks

Are public artworks protected by copyright?

Artworks that are permanently situated in a place that is accessible to the public or that are visible from such a place may be reproduced. The reproductions may be made available, sold, broadcast or otherwise distributed. However, the reproductions cannot be three-dimensional or serve the same purpose as the original.

Law stated - 30 January 2023

Artist's resale right

Does the artist's resale right apply?

There is no artist's resale right under Swiss law.

Law stated - 30 January 2023

Moral rights

What are the moral rights for visual artists? Can they be waived or assigned?

Visual artists have the right to be recognised as the author of their work and to decide whether, when and under what name their work shall be published for the first time (article 9, FACN). They further have the right to prohibit any distortion, mutilation or modification of their work that is prejudicial to their reputation or personality (article 11, FACN). Other moral rights that are less relevant in practice include the artist's right to seek access to their work from the current possessor if the access is essential for them to exercise copyright (article 14(1), FACN). The artist may also request the possessor to provide them with the work for an exhibition in Switzerland (article 14(2), FACN). The latter two moral rights are only granted upon the balancing of the interests at issue. Finally, artists also have a right to protect their single original work from destruction in that the possessor cannot destroy the work without first offering it to the artist against the price of the raw materials (article 15, FACN).

Moral rights are non-assignable by nature as they are considered to be inextricably linked to an author's personality. Nonetheless, artists often waive the exercise of their moral rights on a contractual basis. This practice is accepted as long as it does not appear inequitable (ie, an excessive restriction as regards the author's own personality (article 27(2), Civil Code)).

Law stated - 30 January 2023

AGENCY

Accounting to the principal

Does the law require the agent to account to the principal for any commission or other compensation received by the agent while conducting the principal's business?

The agent must perform the contractual obligation faithfully, which gives rise to several responsibilities (article 398(2), Code of Obligations). Primarily, the agent must safeguard the principal's interests and place them above any other interests. Moreover, the agent owes the principal a duty to inform regarding the diligent performance of the services and accountability of their agency activities. The extent of this duty is mainly dependent upon the parties' degree of specialisation and knowledge as well as their access to information. It does not require the agent to inform the principal on all essential facts in the contract. Brokers are not allowed to act for both parties by being involved in the contractual negotiations as this creates a conflict of interest amounting to a breach of his or her fiduciary duties. The Federal Court has not ruled on the matter of secret commissions in art transactions. Nonetheless, it may be held that if an agent conceals from the principal the ultimate price paid in order to earn an additional fee, they breach their fiduciary duty.

Law stated - 30 January 2023

Disclosed agent commission

Does disclosure to the principal that the agent will receive a commission allow the agent to keep the commission unless the principal objects?

If the broker is involved in the negotiation of the sale contract, they are not allowed to act for both parties at the same time. Consequently, they lose their entitlement to a commission (article 415, Code of Obligations).

Law stated - 30 January 2023

Undisclosed agent commission

If a third party pays a commission to an agent that is not disclosed to the principal, can the principal claim the commission from the third party?

There is no specific statutory basis for such a claim. The principal may have to consider the general provisions in tort (article 41 et seq, Code of Obligations).

Law stated - 30 January 2023

CONSIGNING ITEMS

Protection of interests in consigned works

How can consignors of artworks to dealers protect their interest in the artwork if the dealer goes into liquidation?

A consignment contract or a deposit contract that makes it clear that the consignor is the actual owner of the work is the most practicable option. There is no register under Swiss law whereby consignors can register interest in consigned artworks. If the artwork is stored at a freeport, it is listed in an inventory together with the identity of its owner.

Law stated - 30 January 2023

AUCTIONS

Regulation

Are auctions of art, antiques or collectibles subject to specific regulation in your jurisdiction?

No specific regulation exists on a national level, except for articles 229 to 236 of the Code of Obligations. These statutory provisions concern very specific aspects of compulsory and voluntary auctions. More specifically, provisions on voluntary auctions pertain to: the conclusion of the sale upon the fall of the auctioneer's hammer; the binding nature of bids at auction; the ability to file a claim for auction whose outcome was influenced by any unlawful or immoral means; the applicable warranty and possible disclaimer; and the transfer of ownership for the sale of movable property upon the fall of the hammer.

Several cantons have implemented laws on procedural matters including the required authorisation to conduct an auction sale, the publicising of the sale, and the responsibility of the auctioneer and the bailiff. Most of these cantonal provisions are mandatory and subject to criminal or civil liability.

Switzerland has no law that governs online art sales.

Law stated - 30 January 2023

May auctioneers in your country sell art, antiques or collectibles privately; offer advances or loans against art, antiques or collectibles; and offer auction guarantees?

There is no law that specifically prohibits such practices – they are subject to general contract law.

Law stated - 30 January 2023

SPOLIATION DURING THE NAZI ERA

Claims to Nazi-looted art

In what circumstances would the heirs of the party wrongly dispossessed typically prevail over the current possessor, if a court in your country accepted jurisdiction and applied its own law to a claim to art lost during the Nazi era?

Title never passes to a purchaser in bad faith (article 936, Civil Code) and no time limitation applies to the restitution claim (see article 641, Civil Code). Hence, the wrongly dispossessed party would have to show that the current possessor acquired the art in bad faith, and that all previous owners did so too.

Law stated - 30 January 2023

Is there an ad hoc body set up to hear claims to Nazi-looted art?

The government has set up the Contact Bureau on Looted Art, which responds to claims regarding Nazi-looted art in public collections (the federal art collections, the National Museum and the National Library). The Bureau also relays claims regarding art held by other institutions or private parties to the relevant institution or person. It promotes an amicable resolution approach to such disputes with the aim of reaching a just and fair solution as promulgated by the 1998 Washington Principles on Nazi-Confiscated Art. Factors to be considered are the unequivocal determination of the artwork's provenance and the multitude of solutions in respect of ownership and acknowledgment of the circumstances. In terms of the dispute resolution process, the Bureau either intervenes as an intermediary facilitator or refers to the UNESCO mediation and conciliation process, and to the International Council of Museums art and cultural heritage mediation.

The Swiss government is in the process of establishing a commission to hear claims to Nazi-looted art. So far, no details on the scope of action and procedure of this commission have been published.

Law stated - 30 January 2023

LENDING TO MUSEUMS

Responsibility for insurance

Who is responsible for insuring art, antiques or collectibles loaned to a public museum in your jurisdiction?

The framework contract of the Swiss Museums Association provides that all fees resulting from the loan, including insurance costs, are borne by the borrowing institution. The property on loan must be insured for its full value as per the lender's evaluation agreed by the borrower before its delivery. Moreover, the insurance must designate the lender as the beneficiary and cover all risks on a nail-to-nail basis, including transit, transport and storage. Regular insurance cover limitations for damage caused by events such as ordinary wear and tear, cleaning or restoration, war, terror, strikes, nuclear radiation, and earthquakes or volcanic eruptions are permitted.

Law stated - 30 January 2023

Immunity from seizure



Are artworks, antiques or collectibles loaned to a public museum in your country immune from seizure?

The Cultural Property Transfer Act (CPTA) provides for an anti-seizure regime regarding cultural property on temporary loan from a 1970 UNESCO Convention contracting state for an exhibition in a museum or other cultural institute in Switzerland (articles 10 to 13, CPTA). The art must qualify as cultural property according to the 1970 UNESCO Convention and be the subject of a loan agreement for a temporary exhibition. The loan agreement must stipulate that the cultural property will be returned to its country of origin following the conclusion of the exhibition. The lender may be either a private or a public institution, or an individual. The borrower must be a museum or any other cultural institution in Switzerland that has a collection open to the public. To obtain such a return guarantee, the borrowing institution must file a request with the Specialised Body to issue a return guarantee to the lender for the period of the exhibition. The application must be submitted at least three months before the intended import date of the cultural property into Switzerland, together with a copy of the loan agreement.

If the request meets these requirements, the application form, together with a description of the item and information on the provenance of the cultural property, is published in the Federal Bulletin. Any person whose rights might be affected by the contemplated immunity, in particular any person asserting title to the cultural property, may file a written objection to the Specialised Body within 30 days of publication. In the absence of any objection, the return guarantee will be issued provided the import meets the requirements of the CPTA (articles 7 and 8). The effect of the guarantee is to protect the cultural property from any legal claims by private parties or authorities while in Switzerland. However, the guarantee does not stand in the way of action by Swiss criminal enforcement authorities.

Law stated - 30 January 2023

CULTURAL PATRIMONY

National treasures

Is there a list of national treasures?

The Cultural Property Transfer Act (CPTA) provides for a federal inventory of cultural objects that are of significant importance for cultural heritage and are the property of the state (article 3). It also enables the cantons to draw up their own inventories of cultural property. As a consequence of their registration, these objects cannot be acquired in good faith, and their return is not subject to any statute of limitation. Their export from Switzerland is also prohibited. Listed objects must qualify as cultural property according to the 1970 UNESCO Convention. The federal inventory is published online. Cantons have established inventories of monuments that may not be exported out of the canton without a licence or without notifying the authorities. No process exists under Swiss law whereby private property can be considered as national treasure and therefore be blocked from being exported.

Law stated - 30 January 2023

Right of pre-emption

If the state is interested in buying an artwork for the public collections, does it have a right of pre-emption?

No.

Law stated - 30 January 2023

Automatic vesting in the state

In what circumstances does ownership in cultural property automatically vest in the state?

Excavation findings of scientific interest belong to the canton in which they were found (article 724, Civil Code). Ownership in such objects is thus automatically vested in the canton.

Law stated - 30 January 2023

Illegally exported property claimed by foreign states

How can a foreign state reclaim in your jurisdiction cultural property illegally exported from its territory?

Switzerland has signed and implemented the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Moreover, Switzerland signed the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects on 26 June 1996, but it has not ratified it.

Switzerland has concluded nine bilateral agreements thus far allowing for the repatriation of cultural property imported into Switzerland in breach of the contracting state's export regulation (article 9, CPTA). The agreements are with Italy, Greece, Colombia, Egypt, Cyprus, China, Peru, Mexico and Turkey. All of the agreements have entered into force except for the most recent one concluded with Turkey. Repatriation claims must be filed within a year of the authorities gaining knowledge of where and with whom the cultural property is located and, at the latest, within 30 years of its illicit export. The requirements of the repatriation claim, applicable law and rules governing the procedure are laid out in the respective bilateral agreement.

Where no bilateral agreement exists, the import of cultural property into Switzerland may only be held to be illegal under Swiss law if the object was lost against the will of the owner or incorrectly declared during import or transit.

If the current possessor acquired the cultural property in good faith and must return it owing to a repatriation claim, they have a right to be compensated. Such compensation is based on the purchase price and necessary and useful expenses for protecting and maintaining the object. It is due by the requesting state and must be paid before the repatriation.

Law stated - 30 January 2023

NON-FUNGIBLE TOKENS

Regulation and case law

How are non-fungible tokens (NFTs) regulated in your jurisdiction? Is there any case law on NFTs in your jurisdiction?

There is no specific regulation applying to NFTs, nor is there any known case law on NFTs to date. Some scholars suggest that certain kinds of NFTs may fall under the legal regime applicable to ledger-based securities (article 973d et seqq Code of Obligations).

Law stated - 30 January 2023

ANTI-MONEY LAUNDERING

Compliance

What are the anti-money laundering compliance obligations placed on the art trade?

Under Swiss criminal law, any person who carries out an act that is aimed at frustrating the identification of the origin, the tracing or the forfeiture of assets that he or she knows or must assume originate from a felony or aggravated tax misdemeanour is liable to a custodial sentence not exceeding three years, or to a monetary penalty (article 305-bis, Criminal Code).

Since 1 January 2016, the Anti-Money Laundering Act applies to all natural persons and legal entities that deal in goods professionally and receive cash payments of more than 100,000 Swiss francs. Accordingly, they must comply with specific obligations (unless the amount above 100,000 Swiss francs is processed by a financial intermediary covered by the Act), including verifying the customer's identity and transaction, establishing the identity of the beneficial owner and keeping records. In some cases, a clarification of the economic background of a transaction is necessary (eg, if the transaction appears unusual, unless its legality is clear). In the event of serious suspicion, the dealer or intermediary must report the transaction to the Money Laundering Reporting Office Switzerland.

Moreover, the Customs Ordinance stipulates various rules for freeports, which must hold an inventory with the address and name of the owner of the property, etc. However, no inventory of the beneficial owner is compulsory to date.

Law stated - 30 January 2023

ENDANGERED SPECIES

CITES

Is your jurisdiction a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)?

Yes, Switzerland is a party to the CITES Convention. It entered into force in 1975. The Federal Council has the power to sign international conventions on the cross-border movement of endangered species. The Federal Food Safety and Veterinary Office (FSVO) (part of the Federal Department of Home Affairs) is the competent authority to approve any changes to CITES Appendices and to deal with any issues that arise with regard to their application.

Law stated - 30 January 2023

Is the sale, import or export of pre-CITES endangered species subject to a licence?

Yes. The FSVO will issue an import licence for species listed in CITES Appendices I-III that were acquired before the provisions of CITES applied to that specimen, provided that the competent authority in the country of origin has issued a certificate to that effect. For the re-export of such species, the FSVO issues a certificate subject to the same condition as when they are imported into Switzerland. In the event of an export of such species out of Switzerland, the FSVO requires sufficient proof that they were acquired before being listed in the CITES Appendices in order to issue a certificate to that effect (article 11, CITES Ordinance).

Law stated - 30 January 2023

Is the sale, import or export of post-CITES worked or antique endangered species authorised? On what conditions?

The import, export and transit of worked endangered species listed in CITES Appendices I-III require authorisation from the FSVO. No import or transit licence is required for products made of skins of animals listed in CITES Appendices II and III (article 10, CITES Control Ordinance). Customs verify the import licence (if applicable) and the CITES export licence issued by the authorities of the country of origin. The requirements to obtain a licence are listed in articles 8 to 10 of the Ordinance on the transfer of animals and plants of protected species. Upon customs clearance, the item must be presented at one of the species conservation control offices that will verify whether they are consistent with the accompanying documents. The process to obtain a licence for the export or import generally takes five working days. As items are originally imported into Switzerland, they are dated and identified by the authorities of the country of origin. The item must be documented by import papers or certificates of origin. For items of a species that is not critically endangered, authorities may also accept purchase receipts, delivery confirmation, photographs or witness testimony as evidence if the likelihood that the item is illegally circulating on the market is low (article 4, CITES Control Ordinance).

Law stated - 30 January 2023

Specific endangered animal products

Are there any special rules for works of art made of elephant ivory, rhino horn or other specific endangered animal products?

These items are subject to the same licence requirements as any other endangered species falling under the scope of CITES.

Law stated - 30 January 2023

CONSUMER PROTECTION

Cancelling purchases

In what circumstances may consumers cancel the sale of art, antiques or collectibles?

In contrast to EU law, which allows consumers to cancel an online sale 14 days after the date of sale, Swiss law has no such cancellation right for consumers unless the contract is concluded by phone (article 40a et seq, Code of Obligations). In any other event, statutory law on the sale of goods applies.

Swiss law provides an alternative place of jurisdiction to consumers as they may apply to a court in their place of residence and, in the case of an international contract, invoke the law of their place of residence.

Law stated - 30 January 2023

Duties of businesses selling to consumers

Are there any other obligations for art businesses selling to consumers?

For telephone sales, art businesses must inform the consumer in writing of their right to cancel the contract, as well as how and within what time frame they must do so (article 40(d), Code of Obligations). If the consumer rescinds the sale, both parties must reverse their actions (eg, return the artwork and reimburse the purchase price).

REGULATION**Art market regulator**

Is there a specific regulatory body overseeing the art market or certain business activities carried out within the art market in your jurisdiction?

There is no specific regulatory body overseeing the art market in Switzerland. Several cantonal laws foresee that a third party intervenes in an auction sale. The third party (eg, huissier in Geneva, Gemeindeammann in Zurich and Versteigerungsbehörde in Lucerne) is a representative of the cantonal authorities who ensures the orderly running of auctions. Cantons often require auction houses to obtain authorisation to organise auctions, another supervisory element in the process of auctions.

Law stated - 30 January 2023

Other regulators

What other forms of regulation are professional art market participants in your jurisdiction subject to?

Regulations concerning consumer protection, anti-money laundering and terrorist financing and trade in endangered species involve specific regulation and a supervisory authority. However, there is no cross-market supervisory authority for the art market.

Law stated - 30 January 2023


UPDATE AND TRENDS**Key developments of the past year**

Are there any other current developments or emerging trends that should be noted?

On 1 January 2021, the latest amendment to the Cultural Property Transfer Act (CPTA) came into force. A new article 4a was adopted, following, among other things, a decision of the Swiss Federal Court, which highlighted the lack of definition and clarity regarding the notions of 'illicit import' and 'incorrect declaration'. According to article 4a of the CPTA, 'Any person who imports, carries in transit or exports cultural property [...] must declare it to customs'. Also, the CPTA now provides for two distinct criminal offences for the illicit import of cultural property and an incorrect customs declaration (article 24, paragraph 1, letter c and c-bis, CPTA). As a consequence, the inaccurate or missing customs declaration when importing or exporting cultural property is subject to criminal sanctions, regardless of whether a bilateral agreement pursuant to article 7 of the CPTA exists.

Law stated - 30 January 2023

Jurisdictions

	China	Jingtian & Gongcheng
	France	UGGC Avocats
	Germany	SKW Schwarz
	Greece	KYRIAKIDES GEORGOPOULOS Law Firm
	Hong Kong	Angus Forsyth & Co
	Italy	CBM & Partners – Studio Legale
	Mexico	Galicia Abogados SC
	Switzerland	Borel & Barbey
	United Kingdom - England & Wales	Constantine Cannon LLP
	USA	Kaye Spiegler PLLC