

THE ART LAW
REVIEW

SECOND EDITION

Editors

Lawrence M Kaye and Howard N Spiegel

THE LAWREVIEWS

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AUSTRIA

Peter M Polak and Philipp Felbermair¹

I INTRODUCTION

The Austrian art market generates an estimated US\$2 billion of revenue per year and currently accounts for 2 per cent of the art market in the EU.² Its significance for the Austrian economy as a whole is relatively high because – in a global context – the art industry generates more jobs per capita in Austria than it does in any other country.

Next to the large international auction houses, the market is dominated by local player Dorotheum, the largest auction house in continental Europe. Smaller auction houses and a rising number of trade shows round up the offer for fine arts.

Add a rich musical tradition and corresponding education, an opera house and concert halls of world repute, and you get the gist of the art sector's significance to both tourism and the national economy.

II THE YEAR IN REVIEW

Since 2020, the covid-19 pandemic has had a significant impact on the Austrian art industry and society as a whole. Concrete data for Austria on losses or sales revenues of galleries as well as the art and antiques trade are not available as concerned parties have not disclosed numbers. However, there are indicators that provide clues in this regard. Specifically, the Austrian external trade statistics, which record Austrian trade in goods with third countries as well as with EU countries. According to preliminary data from the Austrian Statistics Bureau, surprisingly more art was exported in 2020 than in 2019, in contrast to the globally attested decline in exports of art objects. However, less art was imported into Austria. Between January and December 2020, art objects, collectors' items and antiques worth €156.5 million were exported, indicating a slight increase from €154.3 million in 2019.³

At the time of writing, the pandemic is still ongoing. In addition to the overriding issue of covid-19, the restitution of Nazi-looted art continues to be an issue. However, there seems to be a tendency to publicise these cases less, and give them a lower profile, than in the past.

1 Peter M Polak is a partner and Philipp Felbermair is an associate at Polak & Partner Attorneys-at-Law.

2 Depending on the source of the estimate; the numbers available vary significantly; www.derstandard.at/story/2000054364980/kunstmarkt-erwirtschaftet-milliarden; <https://de.statista.com/statistik/daten/studie/309409/umfrage/aufteilung-des-kunstmarkts-in-der-eu-nach-laendern/>.

3 www.derstandard.at/story/2000127525097/pandemie-beschert-heimischem-kunstmarkt-negative-aussenhandelsbilanz.

III ART DISPUTES

i Title in art

We focus on the title and transfer of property based on a purchase contract. Other civil contract types (e.g., service contracts) or non-contractual transfers (e.g., inheritance) are, of course, also possible and common, but rarely lead to title issues.

Purchase contracts, according to Austrian law, come into force through concordant declarations of intent regarding the object and price by both buyer and seller. Determinability of object and price are sufficient. Even the mere offer to sell or purchase extends limited binding effects. In light of the principle of *nemo plus iuris transferre potest quam ipse habet*,⁴ the seller is required to either be proprietor of the good sold or authorised to dispose of the good.

Under certain circumstances it is possible to acquire property even if the seller lacks both these prerequisites. One option is the good faith acquisition of property, which requires a transaction against payment and, further, that one of three conditions set forth in the law must apply:

- a purchase at a public auction;
- b purchase from an entrepreneur; or
- c purchase from a person of trust.

In practice, the most important of these is the acquisition from an entrepreneur. More precisely, the purchase has to be within the framework of his or her business. Further requirements include a technically successful acquisition of property (if property of seller were assumed). Most importantly, a transfer of ownership must take place in the sense that the modus of the transaction is effective. It does not matter which modus was chosen.

The requirements set for the good faith of the buyer are strict. Even slight negligence hinders good faith. The buyer will be considered to have acted in good faith if he or she ‘neither knew nor was supposed to know’ that the object did not belong to the seller.⁵ Further, good faith is presumed by law.⁶ Therefore, the burden of proof of its lack lies with the opposing party (i.e., in general, the person demanding restitutions). These good faith requirements pertain only to the buyer. Whether the seller is in good faith is irrelevant for the acquisition. Good faith acquisition of ownership can also take place for stolen or looted works of art.

There is a limited duty of inquiry. The information provided by the seller must be subjected to a critical assessment. However, if the buyer had to raise well-founded suspicions due to the general conditions of the purchase (low price or knowledge about the previous owner, etc.), the buyer is obligated to investigate more thoroughly. However, the extent of this obligation, and the question of whether there is a general obligation to investigate in detail, are a matter of scholarly dispute. If the suspicion is dispelled in the course of the investigation, the buyer is considered *bona fide*. Relevant databases of stolen or looted art help to counteract the acquisition of property in good faith.

A professional gallery owner or museum must meet higher requirements in terms of good faith than an inexperienced buyer. Gallery owners and art dealers are subject to the

4 See Section 442 of the Austrian Civil Code.

5 id., Section 368.

6 id., Section 328.

due diligence standard of Section 347 of the Austrian Commercial Code with regard to their contractual relationships. They must possess the knowledge and skills that, according to the prevailing public perception, can be expected in the industry and in such a company.

ii Nazi-looted art and cultural property

The regime applicable to restitution of Nazi-looted art is determined by the current possessor. In the case of works of art owned by the federal government (via a federal collection), restitution can be applied for in accordance with the Art Restitution Act (KRG). Works of art in possession of one of Austria's nine states can be restituted in accordance with state legislation, which largely follows the provisions of the KRG. In principle, there is no restitution regime for works of art in private possession. Some private institutions nevertheless willingly submit to the provisions of the KRG. For conciseness, this chapter is limited to restitution under the KRG.

Under the KRG, the transfer of Nazi-looted artworks to their rightful owner or to the heirs of the last rightful owner can be applied for. The case will be assessed by a specially established Restitution Advisory Board. This council examines the factual and legal situation and issues a written recommendation. It is supported in this process by the Commission on Provenance. The board's recommendations are published online and usually include a very thorough historical analysis of the case.

The board's recommendation for restitution (or, as it may be, against restitution) is submitted to the competent Federal Minister. The latter is responsible for the final decision of whether to retribute or not. In theory, the Minister is not bound by the board's findings. In practice, however, the Minister has always adhered to the given recommendations for restitution.

Once the process has been set into motion, the applicant's possibilities of participation are limited. In particular, he or she has no legal remedies for challenging the decision. However, in individual cases, proceedings have been reopened, particularly where new facts have arisen. Further, it is important to understand that the applicant, even if the board decides in his or her favour, does not have a legal claim to restitution.

iii Limitation periods

If the strict rules of good will do not lead to acquisition of property (see Section III.i), acquisition through limitation may be resorted to by the buyer, to obtain property of an artwork that was purchased with a defective title. De facto, this is to be considered limitation of property from the owner's point of view, hence it follows stringent rules. As a result of the acquisition, the previous owner loses his or her property and the owner acquires original ownership. The former owner has no right of enrichment against the owner and new proprietor.

A prerequisite for this is qualified possession for a certain period of time, which is generally three years. If the prior owner was an entity under public or private law, this limitation period is doubled to six years.

Qualified possession in this sense is possession that is 'lawful, honest and genuine': lawful, as in the new owner had an appropriate title when obtaining the object (e.g., sale); honest, as in for probable reasons, the new owner may consider the artwork to be his or her property (this honesty must be present throughout the whole process of compilation (i.e., the entire limitation period)); and genuine, as in the new owner did not obtain the artwork fraudulently, through force or misappropriation.

Given these preconditions and the passing of the applicable limitation period, the person in possession obtains property of the artwork. The prior proprietor's right ceases.

iv Alternative dispute resolution

To maintain and promote Austria as an attractive place of arbitration – the International Arbitral Centre of the Austrian Federal Economic Chamber, the VIAC, contributes to its popularity – a modernisation and adaptation of arbitration law had become inevitable. The revamping of the relevant provisions on arbitration was based on the UNCITRAL Model Law, which today represents the international gold standard. Essential cornerstones of the reforms, the last of which was passed in 2013, are the reorganisation of objective arbitrability, liberalisation of the formal requirements for the arbitration agreement, the abolition of the requirement of a written special power of attorney for the conclusion of an arbitration agreement for entrepreneurs, the reorganisation of the relationship between ordinary courts and arbitral tribunals and the introduction of the possibility to order provisional and securing measures, as well as the revision of the grounds for annulment.

Austria is one of the few countries in Europe with a comprehensive legal regulation for mediation in civil matters. On 1 May 2004, the Civil Law Mediation Act came into force. The goal of the Law is to ensure the quality of mediation. The Civil Law Mediation Act therefore primarily regulates the accreditation, training and duties of mediators. The scope of the Law only covers mediation by mediators registered under the Civil Law Mediation Act. Mediation by other, non-registered, mediators remains possible. Mediation conducted by registered mediators is subject to certain legal advantages, such as the right to refuse to testify and the suspension of the statute of limitations. However, the Civil Law Mediation Act does not contain any provisions on the mediation procedure itself or the final agreement reached by the parties, the enforcement of which is subject to the instruments of civil procedure (e.g., conclusion of a settlement).

The Court of Arbitration for Art (CAfA) is a specialised arbitration and mediation tribunal founded in 2018 exclusively dedicated to resolving art law disputes. CAfA conducts proceedings around the world, addressing the full spectrum of art disputes, including authenticity, contract and chain of title disputes and copyright claims.

The cases are heard by arbitrators and mediators who are seasoned lawyers familiar with industry practice and issues specific to art disputes. For arbitrations in which forensic science and provenance issues arise, tribunal-appointed experts provide neutral expert evidence.

IV FAKES, FORGERIES AND AUTHENTICATION

The prime method for preventing the acquisition of a fake, forgery or inauthentic artwork is ensuring the provision of a legal warranty. As a rule, title errors will also result in warranty cases. The aggrieved party has the duty to prove that the defect already existed at the time of delivery of the artwork. This is not usually a major problem in the case of title defects and with regard to fakes.

If the purchaser is aware of the defect at the time of conclusion of the contract, the warranty is void. The same applies to obvious defects. However, the same shall apply if the seller has concealed the defect or guaranteed the quality.

Under Austrian law, warranty claims have a time limit of two years from knowledge of the defect, in the case of defects of title. Theoretically, an exclusion of the warranty period is possible, but not where the purchaser is a consumer.

It is recommended that authenticity is explicitly defined in the contract at the time of purchase. Otherwise, the parties' intent must be determined based on the circumstances at the time the contract is concluded. A guarantee of authenticity can also be given tacitly, but in this case, there must be no doubt on the part of the buyer about the authenticity and that the seller actually intends to vouch for this authenticity. Factors to be taken into account include the artist's details (signed student's work, workshop artist), price, accompanying documentation, such as expert opinions and catalogues raisonnés, and description in the catalogue or promotion in the course of the business transaction.

Warranties cannot be excluded in sales to consumers. Members of the art industry, such as gallerists and auction houses, are held to a stricter standard.⁷

V ART TRANSACTIONS

i Private sales and auctions

In a broader sense, the term 'private sales' covers all sales where there is a consumer on the seller's side. As a result, the legal framework is less strict from the seller's point of view. This is particularly relevant in practice regarding the strict duties of care of the entrepreneur, which do not apply to a private seller.

Meanwhile, the seller (or his or her representative) can have an impact on the legal position of the buyer in those circumstances in which the title of the seller is defective (i.e., in the case of acquisition of ownership in good faith). This is, as described in detail above, only possible in certain circumstances that are precisely defined by law. When buying from a private person, two of these three defined conditions are usually ruled out. De facto, this means that a bona fide acquisition of property from an unauthorised private person is usually only possible if the (unauthorised) seller is a 'trusted person' of the actual owner. This means a person to whom the owner has entrusted the artwork, as in the owner has voluntarily transferred it into the exclusive custody of the trusted person.⁸ This situation is quite rare in practice, which is why title defects in the context of private sales in the narrower sense have to be solved via the rules of acquisition by limitation.

On a practical note, private sales are usually handled with the support of professional tradespeople – be it galleries or auction houses. Consumer protection rules apply when a business directly contracts with a consumer. A business in this sense is any organisation of independent economic activity on a permanent basis, even if it is not aiming to make a profit. This will generally apply to art dealers, auction houses and galleries. Granted, this distinction may be more difficult to make in the case of private foundations. Here, an analysis is required in each individual case.

In practice, the sale through auction houses is one of the most important distribution channels for works of art. Auction houses in this sense are physical auction houses. This type of sale must be distinguished from sales via online auctions, which, according to the prevailing case law, are considered normal sales contracts in the context of e-commerce.⁹

Depending on the legal position of the seller and the auctioneer – above all, depending on in whose name and on which account the auction is conducted – the applicable rules can

7 See Section III.i for a discussion on Section 347 of the Austrian Commercial Code.

8 Austrian Supreme Court (OGH) 6 Ob 549/85.

9 OGH 4 Ob 204/12x.

be quite different. Most often, auction houses act as sales commission agents, auctioning works of art owned by the seller in his or her own name. However, a different arrangement is permissible, and the contractual framework must therefore be assessed in each individual case.

As a rule, contractual relationships exist between the auction house and the seller and between the auction house and the buyer. No direct contractual relationship is established between the seller and the buyer.

The auction house as commission agent has advisory and informational duties. This includes the commission agent ensuring that the commission property is free of defects. He or she must examine the work of art for recognisable defects and notify the seller of any objectively existing doubts about the authenticity of the work of art.¹⁰ The auction house is also obliged to check the works of art accepted for auction against databases of stolen or looted works of art.

The auction house shall be liable as expert regarding the estimated price. The auction house is theoretically able to reduce the opening bid in the absence of bids in the auction. However, the seller then has the right to reject the transaction. This right must be executed immediately after the auction house's notice of sale. In theory, the auction house then has the possibility to pay the difference.

Should it turn out after the auction and transfer of ownership that the work of art does not originate from the stated artist or contains other defects, several legal bases for the reverse transaction of the purchase may be resorted to. In this case, the seller shall repay the proceeds and the auction house shall also return what it has received as commission. The general terms and conditions can effectively provide that a rescission of the transaction due to warranty is excluded. Exceptions to such exclusion shall apply to consumer transactions. Here, however, the auction house has fiduciary duties towards the seller. The auction house may only cancel the transaction with the consent of the issuer. In the event of a conflict of interest, the auction house is not neutral but must protect the interests of the seller.

ii Art loans

Under certain conditions, Austrian law allows for the application for material immunity of artworks on loan that are imported into the country. The Federal Law on the Temporary Material Immunity of Loans of Cultural Property for the Purpose of Public Exhibition¹¹ provides that, before foreign cultural property is imported, immunity in respect of the works of art may be requested by ministerial decision. This promise of immunity cannot be revoked.

A commitment can only be given if the picture is to be exhibited in a federal museum. The artwork is then protected against official and private access. Courts that are called upon to secure a claim must reject the action. Most of Austria's nine states have enacted comparable state legislation with regard to their state museums.

iii Cross-border transactions

A strict regime of export restrictions is set forth in the Cultural Heritage Protection Act. In general, the export of protected cultural property as well as the export of cultural property not yet protected is subject to permission by the authorities.

¹⁰ OGH 4 Ob 167/09a.

¹¹ Austrian Federal Law Gazette No. 133/2003.

Concerning the former, export regulations are very stringent, and export permissions will only be granted in crucial cases, meaning in cases where the value of the export of the object outweighs the public interest that led to its protection as cultural property in the first place. Burden of proof lies with the proprietor of the object.

Concerning the latter, the competent Ministry regularly publishes a decree of *de minimis* thresholds, below which permission is not necessary. Should the authorities conclude that an object not formally protected may not be exported, it is obliged by law to initiate protection proceedings concerning the object. Thus, a request for granting export permission may lead to unpleasant consequences for the owner of a cultural object.

An exception to this rule encompasses works of contemporary art, which may be exported without the need for permission, unless they have been formally declared public heritage. Further exceptions apply in cases of temporary import of artworks to Austria.

In the first instance, the applicant requesting permission to export is the only party before the responsible office. The advisory board will be called upon in a consulting role. On appeal before the Administrative Court, the responsible office is reduced to being a regular party defending its decision. In general, there is no cost compensation in these proceedings. Duration depends on the workload of the office or court but lies within EU averages.

There are some exceptions to the general rules stated above. Temporary export may be permitted in return for a security deposit amounting to two times the market value of the object, so long as the return of the object to Austria is not endangered.

Legal consequences of a breach of these provisions are stringent. In addition to monetary fines, the Austrian legal framework provides for restoring orders: where cultural property is exported without permission, the authorities may order the exporter to effect appropriate measures to retrieve the object at its own expense. This may include the order to purchase the object. Objects retrieved this way may be expropriated by the state.

iv Art finance

There has been a strong rise in demand – especially from foreign clients – for finance via art loans. Art loans are known to be very popular in countries where it is not necessary to hand over the pledged work of art. In principle, Austrian law does require the handover of the work of art in addition to the pledge agreement. However, there is an important exception: if the artwork is in the custody of a third party (e.g., a museum), the pledge can be perfected by a pledge agreement and the formal instruction by pledgor and pledgee, sent to and received by the third party, that the chattel is pledged to the pledgee and that the third party is instructed to hold the pledged chattel for and on behalf of pledgee. Decisive for the applicability of Austrian law is the place where the work of art is located. The lender is obliged to ensure the careful storage of the pledged work of art.¹²

In accordance with EU legislation, Austria has strict rules in place to implement money laundering and know-your-customer provisions. In practice, this means that auction houses and galleries must identify and verify the identity of the contracting parties for transactions exceeding €10,000 (whether in one transaction or in several transactions). In the case of natural persons, this means the presentation of an official photo identification. In the case of legal persons, the upright status, name, legal form, power of representation and registered office of the legal person as well as the identity of its beneficial owners must be verified.

12 OGH 10 Ob 19/03x.

VI ARTIST RIGHTS

i Moral rights

Austrian copyright law provides for robust protection of the author's moral rights. The author has the inalienable right to claim authorship if it is contested or the work is attributed to someone else. This right can also be exercised by the person to whom the copyright has been transferred after the death of the author. However, this right does not protect against incorrect attribution (i.e., where a work is incorrectly attributed to a particular author who did not create it). Therefore, it will not provide sufficient means for the handling of counterfeits that are not copies of actually existing works, but rather new creations that contain false signatures. Such cases will have to be dealt with under regimes different to copyright law. Section 20 of the Austrian Copyright Act further determines whether and in what manner the author's designation is to be provided.

The protection of the integrity of works provides the author the means to bar others from making changes to the work. This may be abbreviations, additions or other changes to the work itself, the title or the author's designation, unless approved by the author or permitted by law. The author's consent to modifications does not prevent him or her from opposing distortions, mutilations or other modifications that seriously affect his or her intellectual interests in the work.

ii Economic rights

Economic rights conferred to artists by Austrian copyright law are largely aligned with harmonised EU copyright law. Section 14 of the Austrian Copyright Act acts as an introduction to economic rights and defines their character as exclusive rights. They enable the author to exclude others from executing them. For the sake of brevity, this chapter focuses on a selection of those economic rights deemed most relevant in an art law context.

Section 15 confers the right to reproduction of the work exclusively to the author. The concept of reproduction is to be interpreted very broadly and includes permanent and transient copies. It covers any reproduction, no matter by what technique and by what means. The reproduction of parts of a work is also protected and requires the consent of the author. De facto, it is the most important protective mechanism of the author, as it allows him or her to keep control and an overview of his or her work.

The distribution right, as set forth in Section 16 of the Copyright Act, confers the author the exclusive right to distribute the work (i.e., to offer it for sale or put it into commercial circulation). Offering for sale in this sense is realised by both offering the work or copies thereof. Putting into circulation hinges on the transfer of ownership. The distribution right is based on a physical concept of a work. The wireless transmission of works or the performance of works does not normally fall under this distribution right. (However, other economic rights (e.g., the right to broadcast, right of making available or performance right) may apply here.)

Noteworthy in this context is the principle of European exhaustion (or European first sale doctrine). Once a specific specimen has been put into circulation in the European Economic Area with the consent of the author, it can be freely redistributed without requiring the author's consent.

The right to broadcasting encapsulates the right to make content protected by copyright perceptible to a remote public by means of technical transmissions at a given time within a given territory. It regulates broadcasting, in principle, irrespective of the technical means of distribution (including the internet).

However, not every broadcast via the internet is an infringement on the right to broadcast. Due to rapid technological development, a clear-cut definition of what is to be construed as broadcast is not always possible. As a rule of thumb, live streaming falls under the right to broadcast, whereas on-demand streaming, where the user chooses the time of the broadcast, is not covered by the broadcasting right.

Right of recital, performance and presentation as set forth in Section 18 of the Copyright Act combines several forms of communication to the public of different categories of works. The author is not only granted the exclusive right for direct performance but also for performance by means of audio and video carriers, loudspeakers, screens and such like. Central to its scope is the somewhat opaque concept of the 'public'.

Finally, the Section 18 of the Copyright Act right of making available to the public grants an exclusive right for the monetisation of a work over the internet (or comparable networks accessible to the public). It grants the author the exclusive right to exploit his or her work in the form of offering it for interactive retrieval. In this situation, it is therefore up to the public to choose the time and place of consumption.

iii Resale rights

In slight divergence from the above-mentioned economic rights, the resale right (*droit de suite*) of Section 16b of the Copyright Act is not an exclusive right, but a right to remuneration. It grants authors a claim to a part of the sales price if their works of fine art are resold. This entitlement is subject to certain conditions such as minimum proceeds and the participation of a representative of the art market.

The legal framework is harmonised throughout Europe by the Resale Rights Directive,¹³ the aim of which was to ensure that artists can participate in the creation of value in their works. Authors, such as authors of plays or composers, can derive income on a continuous basis from the physical forms of exploitation (reproduction and distribution) on the one hand, and from communication to the public (broadcasting and making available) of their works on the other. Visual artists are restricted to a single sale. To counteract this, the legislator has decided to create a further channel of remuneration for visual artists.

Subjects of the resale right are original works of art either created by the author or produced in limited edition under his or her supervision, authorised by him or her, or otherwise considered originals. The resale right fee is degressive and is calculated as a percentage of the sales proceeds. It is capped at €12,500. Hence the Austrian transposition is a minimum transposition of the Directive.

13 Directive 2001/84/EC of 27 September 2001.

VII TRUSTS, FOUNDATIONS AND ESTATES

A frequent instrument for the preservation of collections or the organisation of artists' estates is the endowment into a foundation. When the foundation is set up, assets are dedicated to a specific purpose and become an independent entity. They cease being the owner's property and are administered in accordance with the foundation deed.

Foundations are not companies under Austrian law, but nevertheless have legal personality.

The dedicated assets upon establishment of a private foundation must amount to at least €70,000, whereby a foundation entrance tax of 2.5 per cent must be considered. The foundation must have one or more beneficiaries and is managed by a foundation board, which may consist of at least three members. The founder may also be a member of the board, but only if he or she is not also a beneficiary.

Subsequent amendments to the foundation deed are possible, provided the founder has reserved the right to amend the declaration of foundation. Otherwise, the foundation deed may only be amended with the consent of the court.

VIII OUTLOOK AND CONCLUSIONS

As in 2020, few other issues have been as dominant in 2021 as the covid-19 pandemic. The impact of the pandemic on the arts industry will be the defining issue of the coming months and years and unfortunately still cannot be assessed with the necessary certainty.

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Peter M Polak is the name partner of Polak & Partner. He graduated from the University of Vienna School of Law with a JD in 1982. In 1984, he obtained a master of laws degree (LLM) from the University of California, School of Law (Boalt Hall) and was subsequently admitted to the California Bar in 1986. He was admitted to the Austrian Bar in 1989. Before establishing Polak & Partner, he worked as an associate at Gibson, Dunn & Crutcher (1984–1985) and as an associate and then partner at Preslmayr & Partner (1986–1990). He has also been an associate professor at the Webster University, St Louis, Vienna Campus (1989). Peter Polak is author of numerous publications in the areas of corporate, tax and anti-trust law and a certified court interpreter for the English language.

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