Santander Art and Culture Law Review 2/2019 (5): 209-232
DOI: 10.4467/2450050XSNR.19.021.11569

# LEGAL COMMENTARIES

Mara Wantuch-Thole*

mwt@wantuch-thole.de
orcid.org/0000-0002-2366-0963
WANTUCH THOLE
Friedrichstraße 171
10117 Berlin, Germany

# The Export Regime for Cultural Objects under the German Cultural Property Protection Act of 2016

**Abstract:** This paper elaborates upon the German Cultural Property Protection Act, enacted in 2016. It enabled the transition from German cultural property law being scattered in many individual legal acts into one uniform and coherent Act. The paper first describes the two pillars of the new Act, the first pillar being the prevention of illicit trade in cultural property. It then continues to analyse the second pillar of the law, which is devoted to the protection of property being part of the German national cultural heritage from illegally leaving German territory. After examining the critical voices with respect to different aspects of the new Act, the article focuses on the export regime and its challenges for the art trade. In its last part, the paper describes and analyses case law under the old German cultural property regime and draws conclusions as to possible interpretations of the new Act on the ground of the already existing jurisprudence.

**Keywords:** export of cultural property, cultural significance, pre-emption right, Germany, EU

* **Mara Wantuch-Thole**, born in Warsaw, studied law in Heidelberg and Hamburg (Germany). In 2005, she completed her LL.M. in Comparative Litigation and Copyright Law at the University of London, submitting her Master Thesis on: "Art Loans as a Diplomatic Solution". She holds a Ph.D. in law (2013) from King's College London (UK) and Humboldt Universität Berlin (Germany). She is founding partner of WANTUCH THOLE (Restitution and Art Research) and has been a Senior Lecturer at Freie Universität Berlin since 2009 (Intellectual Property Law, Art Law, Restitution Law), a programme which is part of the interdisciplinary Master of Provenance Research in Berlin (since 2019). She also serves as founder and President of the European Association of Cultural Property Lawyers e.V. (formerly: Anwaltsverband Kulturgut und Recht e.V.; 2016).

Mara Wantuch-Thole

## Introduction

In August 2016, Germany adopted the Cultural Property Protection Act (CPPA).[1] Before its enactment, German provisions dedicated to the protection of cultural objects were scattered in several laws which were considered out-dated: the 1955 Act on the protection of German cultural heritage against export (amended in 1999 – hereinafter: "the 1955 Act");[2] the 2007 Act on the return of cultural property,[3] which implemented the Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State,[4] and the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("1970 UNESCO Convention").[5] In contrast, the new CPPA creates one coherent law for the regulation of the art market in Germany.[6]

### Overview of the newly enacted provisions of the CPPA

The new Act consists of two main pillars, the first of which is aimed at curbing illicit trafficking in cultural property; while the second focuses on the protection of national cultural property in Germany.

#### Preventing illicit trafficking of cultural property

In its first part, the new Act places a large emphasis on protecting international cultural property by introducing a system of import provisions, which go hand-in-hand with the Act's corresponding export provisions. The reason for improving the already existing system of protecting international cultural objects which left their country of origin illicitly or were stolen from their rightful owner was an evaluation report conducted by the German Government in 2013, which revealed the inef-

1 *Gesetz zum Schutz von Kulturgut*, Bundesgesetzblatt 2016, Part I, p. 1914, as amended by Article 6(13) of *Gesetz zur Reform der strafrechtlichen Vermögensabschöpfung* [Act on the reform of criminal asset recovery], Bundesgesetzblatt 2017, Part I, p. 872.

2 *Gesetz zum Schutz deutschen Kulturgutes gegen Abwanderung*, Bundesgesetzblatt 1955, Part I, p. 501.

3 *Gesetz zur Ausführung des UNESCO-Übereinkommens vom 14. November 1970 über Maßnahmen zum Verbot und zur Verhütung der rechtswidrigen Einfuhr, Ausfuhr und Übereignung von Kulturgut* [Act implementing the UNESCO Convention of 14 November 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property], Bundesgesetzblatt 2007, Part I, p. 757.

4 OJ L 74, 27.03.1993, p. 74.

5 14 November 1970, 823 UNTS 231.

6 For a commentary on the new Act see F. Berger et al. (eds.), *Das neue Kulturgutschutzgesetz: Handreichung für die Praxis*, March 2017, http://www.kulturgutschutz-deutschland.de/SharedDocs/Downloads/DE/HandreichungKGSG.pdf?__blob=publicationFile&v=2 [accessed: 8.11.2019]. For an analysis of the law cf. L. Elmenhorst, V. Wiese, *Kulturgutschutzgesetz: KGSG. Kommentar*, C.H. Beck, Munich 2018, Introduction, marginal notes 35 and 42, as of today the only available commentary on the new Act.

fectiveness of the German implementation law of the 1970 UNESCO Convention.[7] Most provisions of the 2007 German implementation of the UNESCO Convention had proven to be inefficient or inapplicable in practice. In particular, the requirement to individually register protected cultural property of foreign States in lists (the "listing principle"), which was also part of Germany's legal tradition for national cultural property, was identified as being without practical scope. The same was true concerning the provisions on import licenses for cultural property. The new German Act therefore abolished the "listing principle" with regard to cultural property protected by foreign States. It contains rules and provisions prohibiting the import of all cultural property unlawfully exported from or illegally excavated in other Member States of the 1970 UNESCO Convention. Moreover, the Act introduces licensing procedures for cultural property to be exported from Germany.

At the same time, the Act introduced provisions which make it possible to return unlawfully exported cultural property to their countries of origin.

Furthermore, a new and rather long overdue addition to the new Act in Germany are due diligence provisions for (1) anyone who would like to sell cultural property on the German art market, as well as (2) an increased due diligence obligation for "professionals in the art market".[8]

## Protection of the German national cultural heritage

The second big pillar of the new Act is the implementation of a regime for the protection of German national cultural property – the so-called "Abwanderungsschutz". Until 2016, Germany only provided for a limited export system, which only encompassed objects enlisted in a "list of cultural property of national importance". Until 2016, this list contained approximately 2,700 items (some of them contain several objects). These specific objects could only be exported if an export license was obtained. Export licenses also had to be obtained within the framework of Council Regulation (EEC) No. 116/2009 on the export of cultural goods, which prohibited the export of cultural heritage of Member States of the European Union (EU) into non-Member States.[9] *Res extra commercium* provisions did not exist in Germany.

---

[7] German Bundestag, *Bericht über die Auswirkungen des Gesetzes zur Ausführung des UNESCO-Übereinkommens vom 14. November 1970 über Maßnahmen zum Verbot und zur Verhütung der rechtswidrigen Einfuhr, Ausfuhr und Übereignung von Kulturgut* [Report on the effects of the law implementing the UNESCO Convention of 14 November 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property], BT-Drs. 17/13378, http://dipbt.bundestag.de/dip21/btd/17/133/1713378.pdf [accessed: 7.11.2019]. But see also R. Kugler, op. cit. For the most recent evaluation of the CPPA see German Bundestag, *Bericht zum Umfang des Verwaltungsaufwandes von Bund und Ländern – Zwei Jahre Kulturgutschutzgesetz* [Report on the extent of the administrative burden of federal and state governments – two years of cultural property protection law], BT-Drs. 19/7145, http://dipbt.bundestag.de/dip21/btd/19/071/1907145.pdf [accessed: 7.11.2019].

[8] Paragraphs 41-47 CPPA.

[9] Cf. Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods (codified version), OJ L 39, 10.02.2009, p. 1; B.T. Hoffman, *Art and Cultural Heritage: Law, Policy and Practice*, Cam-

By introducing a new regime for the protection of national cultural property, Germany has now caught up with most of EU and non-EU countries, which provide for a system to protect their own cultural heritage from export. In addition, the new system does not declare all excavated treasure automatically to be state property. As a result, Germany does not have a so-called "umbrella statute".

## Criticism concerning the new Act

From the publication of its first draft on 29 June 2015 until its final enacted version of 31 July 2016, the new Act was subject to a lot of scepticism and critical debate.[10] Major points of criticism included, e.g., the "boundless" definition of what constitutes cultural property under Section 2(1)(10) CPPA,[11] as well as generally the wide scope of Section 40 CPPA. Section 40(2) declares as void all transactions, contracts, and transfer agreements which concern cultural objects which had been lost, unlawfully excavated, unlawfully exported, or unlawfully imported into Germany. This concerns both the contractual transaction and the possessory transaction.[12] Critics claim that by enacting a provision which declares both of these above-mentioned transactions void, the Act is in breach of the most basic rules of the German civil code: The German civil code traditionally provides that a property transaction and contractual transaction have to be viewed separately from each other under the so-called principle of separation ("Abstraktionsprinzip").[13] According to this principle, the transfer of ownership requires not only a sale or donation agreement, but also an agreement on the actual transfer of possession and a contract to transfer remuneration. Taken together, the contract of the sale, the contract to transfer the possession of the chattel, and the contract to pay remuneration transfer the "ownership".[14] By breaking up all transactions to transfer property into three contracts, the principle of separation provides a secure legal framework for any property transaction.

bridge University Press, New York 2006, pp. 191-194.

10 Cf. P. Raue, *Und das soll keine Enteignung sein?*, "Tagesspiegel", 12 July 2015; H. Falckenberg, *Was auf dem Spiel steht*, "Frankfurter Allgemeine Zeitung", 16 July 2015; N. Maak, *Kunst der Panikmache*, "Frankfurter Allgemeine Zeitung", 16 July 2015.

11 Cf. H. Schack, *Zivilrechtliche Auswirkungen des KGSG: Importverbote und Transparenzpflichten*, "Kunst und Recht" 2018, Vol. 20(5), pp. 112-118.

12 Cf. Section 40(2) CPPA.

13 For a thorough critical analysis of Section 40 CPPA see especially ibidem and E. Jayme, *Zivilrechtliche Fragen zu abhanden gekommenen Kulturgütern: Betrachtungen zu der Neuregelung des § 40 KGSG*, in: N. Mahmoudi, Y. Mahmoudi (eds.), *Kunst*, *Wissenschaft*, *Recht*, *Management. Festschrift für Peter Michael Lynen*, Nomos, Baden-Baden 2018, pp. 239-245; E. Jayme, *Aktuelle Entwicklungen im Internationalen Kunstrecht*, "IPRax" 2018, Vol. 4, p. 455.

14 For an excellent comparative analysis, see A. Rahmatian, *A Comparison of German Moveable Property Law and English Personal Property Law*, "Journal of Comparative Law" 2008, Vol. 3(1), pp. 197-248. See also K. Sadowski, *The Abstraction Principle and the Separation Principle in German Law*, "Adam Mickiewicz University Law Review" 2014, Vol. 4, pp. 237-243.

German law recognizes such "short circuits" of the obligation and disposal transactions only in the cases of error identity, for example if the disposer was incapable of acting, i.e. if a person fell victim to usury or extortion, Section 138(2) of the German civil code, or if a person was fraudulently deceived, Sections 123 and 142 of the German civil code.[15] For these reasons, some critics view Section 40 CPPA as a violation of fundamental principles of German property law.

The newly introduced rights on pre-emption in Section 23(6)-(8) CPPA, as well as the due diligence rules – which did not exist in Germany in a codified manner prior to the CPPA – also met with scepticism.[16] Voices supporting the art trade allege that the new regime of protecting national cultural objects constitutes an "expropriation" of the objects from the owners, and the introduction of due diligence provisions will have a negative impact on Germany as a market country as such.[17] It was rumoured that many collectors had already removed their collections to other, more market-friendly countries.[18] Although the German Federal Administrative Court (BVerwG) has decided that export prohibitions on cultural objects per se do not constitute an expropriation according to Article 14 of the German Constitution[19], several lawsuits have been filed with the German Federal Constitutional Court to test the CPPA for its compatibility with the Constitution.[20]

As it is beyond the scope of this article to systematically analyse the various points of academic and public criticism in relation to the new Act, the article

15 Cf. H. Schack, op. cit.

16 These provisions were especially criticized by dealers and collectors. See e.g. B. Sturm, *Aspekte der Novellierung des Kulturgutschutzes*, "Kunst und Recht" 2016, Vol. 18(3-4), pp. 73-79; H. Falckenberg, op. cit. For an academic critical analysis of the new Act, see generally L. Elmenhorst, V. Wiese, op. cit., Introduction, paras. 34 and 45; for a systematic critical review, especially of Section 40 CPPA, cf. H. Schack, op. cit.; L. Elmenhorst, H. Strobl, *Anmerkung zur Entscheidung des OLG Nürnberg vom 6.9.2017 – 12 U 2086/15 Zum Verhältnis von Ersitzung und § 40 KGSG*, "Kunst und Recht" 2017, Vol. 19(5-6), pp. 158-159. For a more positive analysis see S. Jauss, *Zur Frage des Erwerbs abhandengekommener, rechtswidrig ausgegrabener oder unrechtmäßig eingeführter Kulturgüter*, "Neue Juristische Online-Zeitschrift" 2018, pp. 561-565; G. Winands, M. List, *Das neue Kulturgutschutzgesetz*, "Kunst und Recht" 2016, Vol. 18(6), pp. 198-206; K. von der Decken, *Das Kulturgutschutzgesetz von 2018 mit einem besonderen Fokus auf den Abwanderungsschutz für deutsches Kulturgut*, in: M. Weller, N.B. Kemle, T. Dreier (eds.), *Kunst und Recht – Rückblick, Gegenwart, und Zukunft*, Nomos, Baden-Baden 2017, p. 76.

17 Cf. P. Raue, op. cit. Actually, similar due diligence rules were introduced in Switzerland in 2005 and they seem not to have a negative effect on the art market in Switzerland, cf. Article 16(1) and (2) of *Bundesgesetz über den internationalen Kulturgütertransfer* [Cultural property transfer act], 20 June 2003, Systematische Rechtssammlung 444.1.

18 C. Tittel, *Grütters-Effekt. Sammler bringen Kunst ins Ausland*, "Die Welt", 11 October 2015.

19 For a thorough comment, cf. the analysis below on the *Guelph* case, BVerwG 27 May 1993 7 C 33.92.

20 Lawsuits nos. 1 BvR 1658/17, 1 BvR 1727/17, 1 BvR 1728/17, 1 BvR 1729/17, 1 BvR 1735/17, 1 BvR 1746/17 pending in the German Federal Constitutional Court concerning the question whether Section 21(2) CPPA in connection with Sections 24(1) and (2), 28, and 30 CPPA as well as Sections 40, 42, and 44 CPPA meet the standards of German constitutional law. As of 1 November 2019, no ruling has yet been issued. For updates see: https://www.bundesverfassungsgericht.de/EN/Verfahren/Jahresvorausschau/vs_2019/vorausschau_2019_node.html.

focuses on outlining Germany's introduction of the new system of protecting its own national cultural heritage and its consequences on national or international dealers and buyers of art on German territory. This study thus gives an overview of the scope and functioning of the new export regime for international and national cultural objects in the second part of this article. In the third part it explains the notion of "cultural heritage of national value" and examines existing case law, which is of relevance in respect of the interpretation of the new provisions in relation to Sections 6 and 7 CPPA. In the fourth part it analyses the existing case law with respect to its applicability for the new CPPA. Lastly, the fifth part of this article gives an overview of the new pre-emption right, or rather "option", provided by the CPPA in the event an export permit is denied.

## The Export Regime under the 2016 CPPA

It has already been mentioned that Germany never introduced a *res extra commercium* system of national heritage. Only those objects which had been inscribed in a "list of objects of specific significance for the German cultural heritage" required a license. The new regime provides for a graduated system, depending on the nature of the cultural object, its age, and the place of destination of export.

### General remarks on the new export regime under the CPPA

Sections 21-24 CPPA provide for the general implementation of an export licensing system for all cultural objects, which meet the thresholds of the directly applicable Annex I of Regulation (EC) No. 116/2009. As indicated, in contrast the old export regime provided that only objects, which were listed in the – very meagre – "list of objects of cultural importance" required an export license. Although Council Regulation (EEC) No. 3911/92 on the export of cultural goods[21] and its successor Regulation (EC) No. 116/2009 were directly applicable in Germany, as in any other EU Member State, the new regime nevertheless constitutes a "change of paradigm" in comparison to the previous German law.[22]

By introducing a tight regime on export, Germany now ensures that it actually filters through all objects which are intended to leave the country in order to determine whether any of the following criteria could apply to them:

(1) the object was unlawfully imported and consequently now cannot be lawfully exported;[23]

[21] Council Regulation (EEC) No. 3911/92 of 9 December 1992 on the export of cultural goods, OJ L 395, 31.12.1992, p. 1.

[22] Cf. L. Elmenhorst, V. Wiese, op. cit., Introduction, para. 28.

[23] Section 21(3) CPPA.

(2) the object was seized or is being held by the authorities and hence cannot be exported;[24] and
(3) the object is of cultural significance for German cultural heritage and therefore shall remain in Germany.[25]

The first two components of the export prohibition mirror the regulations concerning the import of works of art into Germany as stated in Section 28 CPPA and its corresponding Section 32. By introducing these provisions the German legislator intended to prevent Germany from becoming a transit country for illicitly obtained cultural objects.[26]

There is an exemption for temporary exports of objects of national importance in Section 22 CPPA, as well as an exemption for art looted during the Nazi era in Section 23(3) CPPA.[27] As a consequence of Section 23(3) CPPA, the export of a work of art which was determined to be of "national value and which would obtain an export prohibition, will nevertheless be permitted to leave German territory in the event the owner who restituted the work does not reside in Germany.[28] For example, in the case of the restitution of the *Berliner Straßenszene* by Ernst Ludwig Kirchner, the city of Berlin could have applied for its registration in the "list of objects of cultural significance".[29] The famous expressionist work depicted a scene which was significant for the city of Berlin and the Brücke-Museum. However, according to Section 23(3) CPPA, export would be allowed if such a case occurred under the new CPPA.

## General export permit in Section 24 CPPA

Section 24 CPPA distinguishes between exports to a country outside the EU, based on Regulation (EC) No. 116/2009, Section 24(1), and the export to another EU Member State, Section 24c(1) and (2). For an export outside of the EU the same rules apply which have been in force since 1993. The German legislator cannot unilaterally change these regulations.[30] Article 36 of the Treaty

[24] Section 21(4) and (5) CPPA.

[25] Section 21(1) CPPA.

[26] H.M. Heimann in: L. Elmenhorst, V. Wiese, op. cit., Section 21, para. 10.

[27] Cf. ibidem, Section 23, para. 16, which correctly states that the exception only applies to owners or applicants who live outside of the territory of Germany but not for German residents who successfully made a claim for restitution.

[28] Section 13(1) and (2) CPPA.

[29] On the *Kirchner* case, see e.g. M. Weller, *The Return of Ernst Ludwig Kirchner's "Berliner Straßenszene" – A Case Study*, "Kunstrechspiegel" 2007, Vol. 2, pp. 51-55; A. Blume-Huttenlauch, *Street Scences and Other Scenes from Berlin – Legal Issues in the Restitution of Art after the Third Reich*, "German Law Journal" 2006, Vol. 7(10), pp. 819-833.

[30] Cf. Regulation (EC) No. 116/2009.

on the Functioning of the European Union (TFEU) expressly permits this system as an exception to the free movement of goods.[31]

In order to facilitate trade within the internal market, the German legislator has set significantly higher age and value limits for goods, which are supposed to leave Germany to EU countries.[32] An export permit is only required for cultural goods which fall under the categories of Annex I (A) of Regulation (EC) No. 116/2009. These include, for example, archaeological objects, drawings, paintings, watercolours, sculptural objects, manuscripts, books, or certain antiques. Each category of cultural property is assigned an individual age and value limit. Only if the required minimum age and value are exceeded is a permit obligatory, and consequently an export permit must be provided for such a work to exit German territory. As such, this part of the law is a "permissive law with the reservation of prohibition".[33]

Under the new rules on export into the internal market, a painting only requires a permit if it is over 75 years old and worth more than €300,000. In contrast, under Regulation (EC) No. 116/2009 the limit is only 50 years and €150,000.[34] German export law is consequently more generous for export within the EU internal market than is in the case of export to non-EU Member States.

For exports to a country outside the EU,[35] the EU Regulation employs the stricter age and value limits of Annex I (A) of Regulation (EC) No. 116/2009. Pursuant to Section 24(5) CPPA, if there is no explicit export prohibition the permit must be granted.

## Specific export permit in Section 6 CPPA

A permit for the export of "national cultural property" now exists for cultural goods which, according to Section 6 CPPA, are cultural property (1) "publicly owned and part of the collection of a public-law institution preserving cultural property", (2) "owned by and part of the collection of an institution preserving cultural prop-

[31] Treaty on the Functioning of the European Union (consolidated version), OJ C 326, 26.10.2012, p. 47: "The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States".

[32] For an overview of the categories and age limits, see the website of the German Cultural Ministry: http://www.kulturgutschutz-deutschland.de/DE/Service/PublikationenMerkblaetter/UebersichtWertgrenzen.pdf?__blob=publicationFile&v=1 [accessed: 23.11.2019].

[33] A permissive law is a law where, generally, the matter regulated in the act is permitted, unless it is specifically prohibited. One example would be Section 137c SGB V (German Social Security Code) concerning the provision of insured persons with the necessary benefits within the social medical care.

[34] Cf. Annex I (A) of Regulation (EC) No. 116/2009.

[35] Section 24(1) CPPA.

erty which largely relies on public funding", or (3) which are "part of an art collection of the Federation or the Länder". Such goods shall be considered "national cultural property" and therefore are subject to the protection of the export regime.[36] If the requirements of Section 6 CPPA are met, a permit must be obtained. Contrary to the general export permit according to Section 24 CPPA, Section 6 CPPA constitutes a "prohibitive law with a reservation for permission".[37] This regime goes far beyond the old legal Act in Germany, where a permit was only required for goods which fell within the short list of "objects of cultural significance".

This system may not be as strong as the French system of protecting its "public property"[38] by declaring it *res extra commercium*, but compared to the list-system before the reform the CPPA has systemically introduced a more sophisticated export regime for its national objects, which constitutes real progress for the protection of national collections of museum quality. Since 1 August 2016, the CPPA also provides that archival material may be declared "national cultural property", meaning that under certain circumstances archival material may be subject to the requirement of an export permit, i.e. in the event it meets the threshold of Section 24 CPPA or fulfils the definition of "cultural heritage of national importance".

The relevant authority of the "Land" where the object is situated decides whether the license will be granted. In the event an object may qualify as one of "cultural property of national significance", according to Section 7 CPPA an independent expert committee decides whether the object in question is considered to be of "cultural property of national significance".

## Cultural Heritage of National Value According to Section 7 CPPA

In a comparative perspective, Germany was indeed one of the very few countries that had hardly any protection of its own cultural heritage.[39] Britain, which can be viewed as a market country rather than a source country, adopted the Waverley

36 Sections 7 and 21(1) CPPA.

37 See generally on this legal rule: C. Gusy, *Verbot mit Erlaubnisvorbehalt – Verbot mit Dispensvorbehalt*, "Juristische Arbeitsblätter" 1981, Vol. 13, pp. 80-84. A prohibitive law with a reservation for permission is for example the German law on weapons, cf. C. Klein, *Die Erlaubnis im waffenrechtlichen Straftatbestand*, "Juristische Rundschau" 2008, Vol. 5, pp. 85-188; cf. also academic comments on the General Data Protection Regulation (Datenschutz-Grundverordnung, in force since 25 May 2018).

38 J. Chatelain, F. Chatelain, *Oeuvres d'art et objets de collection en droit français*, Berger-Levrault, Paris 1990.

39 For a comparative perspective, see for example the French Cultural Property Regime, which adopts the *res extra commercium* principle for "public property" in museums; see e.g. M. Weber, *Unveräußerliches Kulturgut im nationalen und internationalen Rechtsverkehr*, De Gruyter, Berlin 2002, p. 64. Cf. also the *dominio eminiente* and Italy's export rules (Codice dei beni culturali e del paesaggio [Landscape and cultural heritage code], 22 January 2004, Gazzetta Ufficiale No. 45, now in its renewed version of 20 May 2006). For a comment on the Act, see L. Casertano, *The Law Governing Cultural Heritage in Italy: Universal Values Versus National Cultural Identity*, "Global Jurist" 2017, Vol. 17(3).

Criteria in the early 1950s in order to make the decision as to which artefacts and cultural goods can be exported from the UK without a license.[40] France employed an elaborate system of *res extra commercium* of public cultural property.[41] Not to mention that almost all source countries (e.g. Italy or Turkey) – out of necessity and in order to prevent plundering, illegal excavation, and illegal export – have adopted elaborate systems for protecting their own cultural heritage and sophisticated cultural heritage protection regimes, both in their public as well as in their criminal law.

The 2016 Act now provides that "cultural heritage of national value" is to be listed[42] and cannot be exported without a license.[43] What constitutes "cultural heritage of national value" is legally defined in Section 7 CPPA. An object cannot be exported without a license if it cumulatively meets the following criteria:

(1) "is particularly significant for the cultural heritage of Germany, its *Länder* or one of its historical regions";
(2) "and thus formative for Germany's cultural identity"; and
(3) "its removal would be a significant loss for Germany's cultural heritage so that keeping it in the federal territory is of outstanding cultural public interest".

As a result of the long debates and criticism of the art trade lobby against the new law, the requirement in Section 7 CPPA sets a high threshold by providing a *three-step test*, and further providing that all three criteria have to be met *cumulatively* in order for the threshold to be considered as having been met.

In comparison, the old 1955 Act only adopted the criterion set out in the third step: "an object was to be registered in a list of objects of cultural importance if its transfer into another territory would constitute a major loss for the German cultural heritage".[44]

An artefact which without doubt fulfilled those criteria according to the old law was the so-called Nebra sky disk (Himmelsscheibe von Nebra), a bronze disk of around 30 cm, illegally excavated in the small city of Nebra, Saxony-Anhalt, dated

[40] Cf. C. Maurice, R. Turnor, *The Export Licensing Rules in the United Kingdom and the Waverley Criteria*, "International Journal of Cultural Property" 1992, Vol. 1(2), pp. 273-296.

[41] For an overview see e.g. J.-F. Poli, *La protection de biens culturels meubles*, L.G.D.J., Paris 1996, pp. 78-80; K. Lubina, *Contested Cultural Property: The Return of Nazi Spoliated Art and Human Remains from Public Collections*, Maastricht 2009, p. 268; J. El-Bitar, *Der Schutz von Kulturgut als res extra commercium in Frankreich: ein Vorbild für Deutschland?*, in: S. Schoen, A. Baresel-Brand (eds.), *Im Labyrinth des Rechts? Wege zum Kulturgüterschutz*, Koordinierungsstelle für Kulturgutverluste, Magdeburg 2007; M. Wantuch-Thole, *Cultural Property in Cross-Border Litigation: Turning Rights into Claims*, De Gruyter, Berlin – Boston 2015, pp. 101-103.

[42] For the current version of the lists of the various German Länder, see: http://www.kulturgutschutz-deutschland.de/DE/3_Datenbank/dbgeschuetzterkulturgueter_node.html [accessed: 10.11.2019].

[43] Sections 7 and 21(1) CPPA.

[44] Section 1 of the 1999 Act.

back to about 1600 B.C. It was listed in 2012 in the "list of culturally significant objects". The sky disk was discovered by two metal detectorists and looted from the site in Saxony-Anhalt. The looters damaged the disk with their spade and destroyed parts of the site. The next day, the looters sold the entire hoard for DM 31,000 to a dealer in Cologne. The hoard changed hands within Germany over the next two years, being sold for up to a million Deutsche Marks. By 2001, knowledge of its existence had become public. In February 2002, a German archaeologist acquired the disk in a police-led sting operation in Basel from a couple that had put it on the black market for the price of DM 700,000. In June 2013, it was included in the UNESCO Memory of the World Register and termed "one of the most important archaeological finds of the twentieth century".[45] The fact that the sky disk was found in a part of Germany; the fact that it thus constitutes a part of German cultural heritage and largely contributes to the scientific knowledge about the history of the German people and their astronomical knowledge; as well as the fact that it is "one of a kind" makes it fulfil the criteria according to the old law, namely that the transfer of the sky disk outside of the territory of Saxony-Anhalt would constitute a major loss for the German cultural heritage and the region of Saxony-Anhalt. But would it also meet the new cumulative three-step-test according to the CPPA?

In order to fall under the new Act the sky disk needs to fulfil two more criteria, i.e. it has to be "particularly significant for the cultural heritage of Germany, its Länder or one of its historical regions"; and at the same time be "formative for Germany's cultural identity". Here we can agree that a find which is considered to be one of the most prominent finds in the history of archaeology, depicting a part of German craftsmanship and history in the region of Saxony-Anhalt, and especially its uniqueness, would meet both criteria cumulatively. It is easy to conclude that the sky disk would be listed under the new CPPA and thus its export would be prohibited.

## Jurisprudence in Relation to the Definition of Objects of Cultural Value According to the 1955 Act

So far, no current case law exists as to the interpretation of Section 7 of the CPPA. Until now only two applications for registration in the "list of objects of cultural significance" have been submitted since the enactment of the new law. Some orientation, however, may be found in cases concerning the old 1955 Act. There are several cases decided under that Act which dealt with the definition of what

[45] J. McIntosh, *Lost Treasures. The World's Great Riches Rediscovered*, Carlton Books, London 2010, p. 16; E. Pernicka, C.H. Wunderlich, *Naturwissenschaftliche Untersuchungen an den Funden von Nebra*, "Archäologie in Sachsen-Anhalt" 2002, Vol. 1.

would "constitute a major loss for the German cultural heritage". As this mirrors the third criteria now contained in Section 7 of the new Act, it is useful to consult these cases and draw conclusions with respect to the possible future interpretation of the new CPPA.

## The silver room of the Guelph family

The first case concerned the so-called "silver room of the Guelph family", once a ruling dynasty in Germany.[46] The German Federal Administrative Court decided that it was a national treasure, the transfer of which into a territory other than Saxony-Anhalt would constitute a "major loss for German cultural heritage".[47] The Court stated that the definition of cultural property of national significance was "open to interpretation and cannot be finely decided by the court but had to be viewed in an overall synopsis of facts". For this reason the Court took into account the following considerations: the object's (1) artistic mastery and distinctiveness; (2) its art historical importance and its cultural worth or significance; (3) its uniqueness or rareness; and (4) its meaning for the cultural development of Germany.

Furthermore, the Court found that in this case the fact that the treasure had been held in the possession of a German ruling dynasty and that it constituted proof of the way of life of the German monarchy made this treasure an "object of significant national importance". Also, the fact that the treasure was "specifically well known to the German common public" was taken into consideration.[48] The Court heard the testimony of a panel of specialists consisting of five experts stemming from the fields of art trade, academia, and the antiquarian society. In the end, the criterion of "artistic mastery and distinctiveness" applied by the Court was much wider than what is required under the criterion of "cultural significance" under Section 6 of the new CPPA. "Artistic mastery and distinctiveness" alone would be too wide a criterion in order to decide whether an object should remain in the country. An object can be of unique artistic mastery but have no relevance to German culture. In addition, an object can be of unique artistic mastery, but similar objects are

[46] Judgment of 27 May 1993, BVerwG 7 C 33/92 (in "Neue Juristische Wochenschrift" 1993, pp. 3280-3287). The Guelph treasure recently rose to prominence again for the restitution request on behalf of the heirs of some former dealers, who claimed that the sale of a part of the treasure was a "forced sale" during the Nazi regime. The heirs submitted a claim for the treasure's recovery from the German Cultural Property Foundation (SPK) in a US court. For further information see: *What Has Happened Since the 2008 Restitution Request for the Guelph Treasure?*, http://www.preussischer-kulturbesitz.de/newsroom/dossiers-and-news/all-dossiers/dossier-the-guelph-treasure/what-has-happened-since-the-2008-restitution-request-for-the-guelph-treasure/?L=1 [accessed: 23.11.2019].

[47] BVerwG 7 C 33/92, para. 9.

[48] Ibidem, para. 10.

already present in Germany. An interesting point is the criterion considered by the Court that the object was "specifically well known to the public".

What is of additional interest in this regard is that the decision makes some significant statements as to the compatibility of the registration provision with German constitutional law. The judgment hence could play a decisive role in the lawsuits pending in the Constitutional Courts.[49] The judges in the *Guelph* case also ruled that the registration of the Guelph treasure was protected by Article 14 of the German Constitution, and that in the sense of Article 14 and its scope it did not qualify as "expropriation".[50] According to German law, restrictions on the use and possession of tangible property violate Article 14 of the German Constitution when they are an intolerable constraint on the freedom of possession of the owner,[51] and that the registration of a chattel as an object of significance to the cultural heritage of Germany does not violate Article 14. According to the Court, the 1999 Act protects German cultural heritage: "The aim of that law, to protect German cultural heritage which was drastically reduced during World War II, is a legitimate aim".[52]

The definition contained in the CPPA also encompasses the "social function" of objects of cultural value: In the view of the judges, they have to be of "national importance", meaning "according to its artistic character, according to its cultural worth, or in regards to its meaning for the German culture as a whole, they are regarded as a permanent, integral, and significant part of German cultural property".[53] In order to meet this goal, German law makes those objects subject to an authorization provision. According to the judges,

> the constraint on the freedom of possession of the owner is tolerable due to the fact that an economic exploitation of the object is still possible, although this possibility of exploitation is narrowed down by the law in that it prohibits the sale to a buyer outside of Germany.[54]

---

[49] Lawsuits nos. 1 BvR 1658/17, 1 BvR 1727/17, 1 BvR 1728/17, 1 BvR 1729/17, 1 BvR 1735/17, 1 BvR 1746/17 pending in the German Federal Constitutional Court, cf. footnote 20.

[50] BVerwG 7 C 33/92, para. 13. Cf. also German Federal Constitutional Court, Judgment of 14 July 1981, 1 BvL 24/78; German Federal Administrative Court, Judgment of 10 July 1987 (BVerwG 4 B 146.87).

[51] Cf. generally on the restriction of the freedom of possession under German Constitutional law see e.g. Judgment of the German Supreme Court of 18 November 1998, 1 BvR 21/97.

[52] Cf. the comment on the enactment of the law by the German Government, *Entwurf eines Gesetzes zum Schutz deutschen Kulturgutes gegen Abwanderung aus dem Gebiet der Bundesrepublik* [Draft law for the protection of German cultural property against export from the territory of the Federal Republic], BT-Drs. 2/76, p. 6, http://dipbt.bundestag.de/doc/btd/02/000/0200076.pdf [accessed: 23.11.2019].

[53] BVerwG 7 C 33/92, para. 6.

[54] Ibidem, para. 14. See also generally on the constitutionality of export prohibitions for cultural property BVerwG Judgment of 27 May 1993 (in "Neue Juristische Wochenschrift" 1993, p. 320) and B. Pieroth, B. Kampmann, *Außenhandelsbeschränkungen für Kunstgegenstände*, "Neue Juristische Wochenschrift" 1990, pp. 1385-1390, commenting on the 1955 Act.

The Court also declared that the regulations imposed by the 1999 Act are in line with TFEU. The Court cited Article 36 of the Treaty and stated that although

> it is correct that Articles 34 and 35 of the Treaty generally prohibit restrictions on imports and export in a quantitative manner, the general idea of the freedom of movement of goods may be narrowed if the protection of national cultural property of artistic, historical, or archaeological value is concerned.[55]

It is more than possible that a similar reasoning will be applied if a registration will be questioned under the new 2016 Act.

## The *Brilliantenschieber* case

This case, decided in 2015, was based on the old 1999 Act. It concerned three works by George Grosz as well as works by Hannah Höch, Otto Mueller, and Ernst Ludwig Kirchner.[56] In September 2013, the export of the said works was prohibited when the Berlin Senate applied for an export ban in an emergency ruling. After the works were indeed "listed" on the "list of works of nationally significant cultural goods" and thus placed under an export ban, the Berlin gallerist who owned the works in question applied for a court ruling to have the art works removed from the list. The owner argued that Berlin had placed the works on the list only in order to prevent them from leaving the capital. He also argued that the state protection devalued the art.

The court called upon an art expert to help determine the "significance of the art works for German cultural heritage". The findings of the expert are most interesting and relevant in respect of a possible interpretation of Section 7(1) No. 1 and No. 2. The expert found that Grosz was an artist of international importance and equally significant for the development of German art and culture. His work *Belebte Straßenszene* was specifically important for the history of the city of Berlin. The expert also evaluated Grosz's work *Brilliantenschieber im Café Kaiserhof* as important within the artist's oeuvre as a whole.[57] Regarding the other works of art subject to the court proceedings, the art expert stated that although Kirchner, Höch, and Mueller can be seen as artists who are important for the development of German

[55] BVerwG 7 C 33/92, para. 14.

[56] In particular, the case concerned the following works by George Grosz: *Belebte Straßenszene*, *Schönheit*, *Dich will ich preisen*, *Brilliantenschieber im Café Kaiserhof*, *Ertüchtigung* by Hanna Höch. By Otto Mueller the works *Zwischen Bäumen stehendes Mädchen*, *Große Frau im schwarzen Kleid*, *Großes liegendes Mädchen im Wald*, *Kauerndes Mädchen*, and *Zwei nackte Tanzende*. Furthermore, *Mädchen auf violettem Sessel* by Ernst Ludwig Kirchner.

[57] Administrative Court of Berlin, Judgment of 22 January 2015, VG 1 K 228.11, published in *Rechtsprechungsdienst Zeitschrift für Urheber- und Medienrecht* (2015), p. 611; J.O. Brelle, *Werk von George Grosz darf Deutschland nicht verlassen. Brilliantenschieber im Café Kaiserhof*, "Art Lawyer Magazine", 9 March 2015, https://www.art-lawyer.de/index.php5?page=Themen&id=Werk_von_George_Grosz_darf_Deutschland_nicht_verlassen [accessed: 8.11.2019].

culture, the specific works in question should not be viewed as important for the artists' works in their entire oeuvre.

In the court hearing itself, the expert extended her statement even further by declaring that the work *Brilliantenschieber* was not only a work of "importance, but of significant importance in the sense of the 1999 Act". On this ground, the court ruled that the six other works did not significantly contribute to the overall cultural development in Germany. Grosz's *Brilliantenschieber*, however, stemmed from a very small series of works in which Grosz utilized the mediums of collage and watercolour for the first time and therefore "significantly contributed to the new design principles of the German avant-garde". As a result, out of the seven works of art whose qualification as an "art work of significant cultural importance" was contested by the art dealer, the work *Brilliantenschieber* was the only one which made it on the "list of objects of cultural importance" and its export was consequently denied.

This ruling picked up the criterion from the previously discussed *Guelph* case where the court cited, amongst other things, the object's "uniqueness or rareness". The *Brilliantenschieber* case narrows down the scope of "objects of cultural significance" even further by allowing only for objects to be enlisted which stand out as "special in an artist's oeuvre". As a result, just because a German artist created a work it will not be automatically considered as "German cultural heritage". By narrowing down the scope of the listing criteria, the *Brilliantenschieber* case points to a realistic and narrower interpretation of the new criteria as intended by the legislators. In the author's view, a court, when confronted with a similar state of facts, would most likely follow the reasoning of the *Brilliantenschieber* case.

## The "Armorial Bearer" of Augsburg

The *Armorial Bearer* case stands out in stark contrast to the previously discussed *Brilliantenschieber* case. Although this case was decided as recently as November 2018, it gives us no new clues as to the definition and application of Section 6 CPPA. The 2016 Act is not retroactive and as such the old 1999 Act was again applied to this case. The court again had to decide whether an artefact, in this case a former Renaissance fountain figure made of marble – also known as the "Armorial Bearer" of Augsburg – was to be registered within the "list of cultural objects of significant importance for the German cultural heritage".[58]

The figure (2.5 m high) was attributed to the sculptor Maximilian Löscher, a known German Renaissance artist who created the figure around 1516. Around 1630, the "Armorial Bearer" was erected on a fountain in Augsburg, then further transferred to another location in a public space in Augsburg in 1778. In 1808, the marble figure was placed in storage with city of Augsburg, and in 1823 it was donated

[58] Administrative Court of Munich, Judgment of 8 November 2018, M 10 K 16.2700.

to the then-owner of the local Augsburg castle. In the year 2000 it was loaned to the Maximilian Museum in Augsburg. After the loan period expired, the owner attempted to transport it back to the castle, which was heavily criticized and eventually prevented by the city council of Augsburg. The Bavarian State, in the name of the Maximilian Museum and the city of Augsburg, applied for the object to be listed in the registry of treasures of national importance.

The court commenced its reasoning by stating that the new 2016 Act is not retroactive and that cases under the old 1999 Act are to be reviewed under such, and not interpreted according to the existing new law.[59] It also added that "the criteria or the test according to which the decision is to be made whether an object is of cultural significance in its core has not changed as compared to the old law"[60] – a surprising statement in view of the intention of the legislator to create a very narrow scope for the definition of "cultural significance" by introducing a cumulative three-step test.

Both parties submitted art history experts' testimony as to the cultural significance of the marble fountain figure for Germany. The court decided that the testimony of the expert for Bavaria had more merit. The court recited the requirements according to the old 1999 Act and – basing its ruling on the expert opinions – ruled in favour of the state of Bavaria. The art expert for Bavaria stated that the "marble figure counts amongst the most significant sculptures of the German Renaissance period". In the early period of the Renaissance, Augsburg was the centre of a new cultural development in Germany. The expert then stated in a comprehensible manner why Löscher counts among the most important sculptors of his time. The administrative court followed the expert's opinion, which it found to be comprehensive.

The court also followed the expert's opinion that the figure should be registered "even in the event that the work could not be correctly attributed to the said sculptor/artist". The expert contended that in his opinion a "registration would be justified even if the attribution to a sculptor was unclear", based on the facts that the figure was of an "outstanding artistic quality and [of] extraordinary historical importance for the city of Augsburg".[61]

Furthermore, according to the expert the "Armorial Bearer" was "a rare example of German water art and a highly significant sculpture for the German Renaissance". The figure was to be regarded "as an example 'par excellence' of the Maximilian-era". As in previous judgments, the court confirmed that the registration of the figure does not violate the owner's freedom of possession under Article 14 of the German Constitution.

[59] Ibidem, para. 25.

[60] Ibidem: "In any event, the new test as stated in Section 7 CPPA compared to previous practice, is composed of two-step test. The general criteria for listing objects have consequently not changed in its core".

[61] Ibidem, para. 35.

An important factor in this decision was the relevance of the expert opinions and their vulnerability to the arguments of the defendant party. The judges stated that generally an expert opinion is "only vulnerable to argument if it contains shortcomings, which are the result of severe negligence and unresolvable antagonisms".

In the author's view, the judges of the administrative court in Bavaria erred in the *Armorial Bearer* case when it had to decide upon the registration of the "Bearer". The test on which the decision was based – whether an object is indeed "an object of cultural significance to the German cultural heritage" – has changed in that the threshold has been raised as opposed to the requirements in Section 1 of the former 1999 Act. As a result, the findings concerning the old Act cannot – without deeper investigation and interpretation – be simply applied to Section 7 of the CPPA.

The judgment stands in contrast to the previous case, which stated that the artistic significance as such is of less importance than the overall meaning of a particular work in an artist's oeuvre. However, the judges in the *Armorial Bearer* case referred to the fact that the "Bearer" was a rare example of German water art.

When looking at these three cases, the following considerations stand out: In their interpretation of "cultural significance", the courts considered:

- the work's artistic mastery and distinctiveness, its importance to art history, its cultural worth or significance, its uniqueness or its rareness, and its meaning for the cultural development in Germany;
- the fact that the treasure is specifically well-known to the German common public;
- the fact that it is a rare example of a German artistic era;
- the fact that its registration would be justified even if the attribution to a "certain artist was unclear", *if* the artwork is of "outstanding artistic quality and has an extraordinary historical importance for its region";
- *however*, just because an artist was important for the development of German culture is not in and of itself a criterion for listing. The artist's specific work has to be viewed as "important" for the artist's works in their entire oeuvre, while at the same time being "of significant importance in the sense of the 1999 Act".

## The Right of Pre-Emption According to Section 23(6)-(8) CPPA

As opposed to the British *Waverley* system and the French or Spanish systems, the German system does not provide for an obligatory pre-emption right.[62] Instead, the new Act introduced in Section 23(6)-(8) what can be rather regarded an "option"

[62] The old 1999 Act provided for a "fair solution in case of an economic difficult situation of the owner", cf. Section 8 of the old Act.

than a pre-emption right in the traditional sense.[63] According to Black's Law Dictionary, an "option to purchase" can be defined as "a contract by which an owner of an object enters an agreement with another allowing the latter to buy the property at a specified price within a specified time, or within a reasonable time in the future, but without imposing an obligation to purchase upon the person to whom it is given". The grant of the option imposes no obligation on the purchaser, but merely confers on him or her a contractual right to enforce the relevant disposition provided that (s)he has satisfied all conditions to which the option was made subject. Control over the exercise of the option thus lies wholly in the hands of the purchaser. An option gives the holder the power to compel the owner to sell the property regardless of the owner's desire to do so.

Under the CPPA, the owner is the one who has to initiate the process whereby the State makes an offer for the object for which an export license has been denied.[64] The application by the owner triggers an evaluation process by the government, which according to Section 23(6)(2) CPPA is organized by the Foundation for Cultural Property of the Länder (Kulturstiftung der Länder; KSL).[65] At this stage, the government decides how much it is willing to offer for the cultural object in question. It has been criticized that the value of an object for which export has been denied according to Section 21 CPPA could be drastically reduced, as foreign cultural institutions and buyers are excluded from the process.[66] The new Act does not contain assessment criteria according to which the value of the relevant object is to be assessed. Instead, the law relies on the general provision in Section 9(1) of the 1991 Valuation law.[67] The offer has to match "the fair market value, which is determined by the price that would be obtained within a short time in the normal course of business in accordance with the legal situation and actual economic situation". However, according to the evaluation system of the KSL, which is in charge of evaluating the work of art, the evaluation has to match the world market value of the relevant piece.[68]

After the government has made an offer, the owner has six months to decide whether to accept it. In the event the owner refuses to accept the offer, (s)he

[63] Generally, on the different manifestations and systematics of pre-emption right, option, and right of first refusal, cf. M. Wantuch-Thole, op. cit., pp. 81-96.

[64] Cf. H.M. Heimann in: L. Elmenhorst, V. Wiese, op. cit., Section 23, para. 25.

[65] The role of the KSL, which was founded in 1988, is to help with the funding acquisitions of cultural relevance for German institutions, cf. German Bundestag, *Entwurf eines Gesetzes zur Neuregelung des Kulturgutschutzrechts* [Draft law on the revision of cultural property protection act], BT-Drs. 18/8908, p. 89, http://dipbt.bundestag.de/dip21/btd/18/089/1808908.pdf [accessed: 23.11.2019].

[66] According to C.-H. Heuer, *Die Bewertung von Kunstgegenständen*, "Neue Juritische Wochenschrift" 2008, Vol. 61, p. 697, "the value for an object for which export permit has been denied can be reduced up to 75%".

[67] *Bewertungsgesetz*, Bundesgesetzblatt 1991, Part I, p. 230 (as amended on 1 July 2016).

[68] H.M. Heimann in: L. Elmenhorst, V. Wiese, op. cit., Section 23, para. 32.

can apply for another offer after five years from the expiration date of the last application.[69]

However, the CPPA has kept the rule that the government has an obligation to buy the respective object in question if the owner is "in an economic state of distress".[70] By legal definition this means that the owner would be unable to provide for his livelihood in case the sale of the object would not come into existence. The same applies if the maintenance of one cultural object can only be achieved by the sale of another cultural object.[71]

Indeed, the lack of a "proper" pre-emption right, which would mirror its counterpart in England, was one of the major points of criticism of the new law, a criticism which mainly came from the side of the art trade. The art trade alleged that the new regime would effectively lower market prices for a specific segment of art in Germany and thus encourage sellers to illegally move their works abroad. George Baselitz revoked the loans of all of his works from German museums out of fear that they would fall under the protective regime of the new Act,[72] although Section 7 states "works by living authors or creators may be registered only with their approval". At the same time, a major German auction house decided to open a place of business in Brussels instead of transferring its major business from Cologne to Berlin, as was initially planned before the enactment of the new law. It is understandable that some critical voices regard the "option" granted to the government under the CPPA as a form of expropriation. However, the fact is that under the new CPPA the owner is not forced to sell. (S)he is also not forced to accept the price suggested by the government committee. We will see whether the pending cases before the constitutional court will apply the reasoning of the *Guelph* case with respect to expropriation, as discussed above.

When we look closely at the British export regime, it seems to strike a good balance between public and private interests. In the British export system, the owner is not obliged to accept the government's offer even if it matches the owner's demand or is considered to be fair market value. The owner can simply decide to change his or her mind and that (s)he does not wish to sell. In this case, the export license must be granted. However, the fact that the owner is not forced to sell the object in case an export license is denied often results in many owners withdrawing from the sale with the result that the object cannot be secured for public benefit. In this regard, the German system seems more effective, in that

69 Section 23(2) and (8) CPPA.

70 Section 23(1) and (2) and (7) CPPA.

71 Cf. Administrative Court of Hannover, Judgment of 3 August 1988, 6 VG 55/86, a case concerning the sale of the family archive owned by the von Bodenhausen family in order to be able to maintain their family castle in Hessia.

72 Cf. C. Schwarz, *Wie ersetzt man einen Baselitz*?, "Frankfurter Allgemeine Zeitung", 20 July 2015.

there is no possibility for the owner to withdraw from the sale in the event the government exercises its "pre-emption right", or rather "option to purchase".

By narrowing down the scope of objects which actually are encompassed by the export prohibition, namely by introducing a high threshold for the definition of objects that qualify for "the list of cultural objects of significance for the German heritage", the new German Act tries to strike a balance between on the one hand the public interest in its national cultural property and on the other hand the private rights of the owner to divest of his property.

## Practical Consequences of the CPPA in Germany

The new law has introduced some drastic changes. Although an export permit exists in EU law since 1993, the fact that the CPPA specifically requires every individual who wishes to export a cultural object which meets a certain threshold to apply for a license is a change of paradigm and will take a period of adaption and learning by owners, dealers, and the administration dealing with the process.

When it comes to the newly implemented regime for protecting German cultural heritage (Abwanderungsschutz), the case law decided under the old 1955 Act only partially lends support to the interpretation of the new 2016 Act. On the one hand, the new cumulative three-step test raises the bar to actually listing an object to be "of national significance" and creates a balance in favour of the owner, in contrast to the newly enacted "pre-emption right" in Section 23(6)-(8). The *Brilliantenschieber* case paints a realistic scenario as to the interpretation of the new test. The requirements are tight and only few works will actually pass the test. Indeed, the German auction house Villa Griesebach sold a Beckmann painting – *The Egyptian* (1841, oil on canvas, 60 × 30 cm, 23 5/8 × 11 3/4) – for the record sum of €4.7 million – after the enactement of the CPPA.[73] Although the work was created by a famous expressionist German painter, neither the owner nor the government applied for its registration. The high evaluation and the interest in the painting did not trigger any criterion for it to be registered as an object of cultural significance.

Those objects which do however fall within the scope of the test will have to remain in Germany. So far, the CPPA provides only an option for the State to buy the object in question. It is not a legal requirement that the State actually has to make an offer. There is also no requirement that those items which will be considered "national cultural property" have to be publicly displayed for the general public to enjoy. Whether these provisions together will be regarded in line with

[73] *Max Beckmanns "Ägypterin" für 4,7 Millionen versteigert*, "Der Tagesspiegel", 31 May 2018, https://www.tagesspiegel.de/kultur/rekordsumme-max-beckmanns-aegypterin-fuer-4-7-millionen-versteigert/22631118.html [accessed: 1.11.2019].

the German Constitution (especially its Article 14) according to the German Supreme Court will remain to be seen.[74]

The fact that export must be denied in case an object has entered the country illegally or has been removed illegally from its country of origin, unclear due diligence provisions, and a pre-emption right which carries no obligation to acquire an object for which an export permit was denied create insecurity within the German art market. The intention of the legislator was to curb and monitor the illicit trade in cultural property. However, as long as the interpretation of the obligations of the CPPA are not clear and obvious for sellers, dealers, and buyers, the law may indeed weaken the German art market. It may even promote the black market in cultural property when sellers and dealers try to circumvent the new provisions for reasons of lack of knowledge, out of fear of the administrative process, which comes with the application for a license, and possibly when the market tries to circumvent costs in connection with the research of provenance. Hence, in order to make the Act a feasible mechanism against the illicit trade, it is most important to make transparent any undetermined legal terms of the law, through academic comment, case law, and educational means. The German art market will at some point adapt to the new Act but it may take time.

Of course every legal act is the product of human intellect, and like every product of human intellect, it may contain gaps or unclarity. Hence, in the next few years, practitioners can help lawmakers to evaluate this very complex Act by asking questions regarding the interpretation of the act and by pointing out shortcomings on the ground of practical cases. Practitioners will also help to interpret the new Act by initiating legal proceedings and creating case law.

## References

Berger F. et al. (eds.), *Das neue Kulturgutschutzgesetz: Handreichung für die Praxis*, March 2017, http://www.kulturgutschutz-deutschland.de/SharedDocs/Downloads/DE/HandreichungKGSG.pdf?__blob=publicationFile&v=2 [accessed: 8.11.2019].

*Bewertungsgesetz* [Valuation law], Bundesgesetzblatt 1991, Part I, p. 230 (as amended on 1 July 2016).

Blume-Huttenlauch A., *Street Scences and Other Scenes from Berlin – Legal Issues in the Restitution of Art after the Third Reich*, "German Law Journal" 2006, Vol. 7(10).

Brelle J.O., *Werk von George Grosz darf Deutschland nicht verlassen. Brilliantenschieber im Café Kaiserhof*, "Art Lawyer Magazine", 9 March 2015, https://www.art-lawyer.de/index.php5?page=Themen&id=Werk_von_George_Grosz_darf_Deutschland_nicht_verlassen [accessed: 8.11.2019].

[74] For the view that the export prohibition under the current law is unconstitutional see e.g. S. Lenski, legal expertise at the public hearing in respect of the draft law of the 2016 Act, available at: https://www.bundestag.de/resource/blob/418286/18856eb4972db9e772533a1fa68e5e2c/Lenski-data.pdf [accessed: 23.11.2019].

*Bundesgesetz über den internationalen Kulturgütertransfer* [Cultural property transfer act], 20 June 2003, Systematische Rechtssammlung 444.1.

*Bürgerliches Gesetzbuch* [German civil code], Bundesgesetzblatt 2002, Part I, p. 42; 2003, Part I, p. 738.

Carman J., *Valuing Ancient Things*: *Archaeology and Law*, Leicester University Press, London – New York 1996.

Casertano L., *The Law Governing Cultural Heritage in Italy: Universal Values Versus National Cultural Identity*, "Global Jurist" 2017, Vol. 17(3).

Chatelain J., Chatelain F., *Oeuvres d'art et objets de collection en droit français*, Berger-Levrault, Paris 1990.

*Codice dei beni culturali e del paesaggio* [Landscape and cultural heritage code], 22 January 2004, Gazzetta Ufficiale No. 45.

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231.

Cookson N., *Archaeological Heritage Law*, Barry Rose Law, Chichester 2000.

Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State, OJ L 74, 27.03.1993, p. 74.

Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods (codified version), OJ L 39, 10.02.2009, p. 1.

Council Regulation (EEC) No. 3911/92 of 9 December 1992 on the export of cultural goods, OJ L 395, 31.12.1992, p. 1.

El-Bitar J., *Der Schutz von Kulturgut als res extra commercium in Frankreich: ein Vorbild für Deutschland?*, in: S. Schoen, A. Baresel-Brand (eds.), *Im Labyrinth des Rechts? Wege zum Kulturgüterschutz*, Koordinierungsstelle für Kulturgutverluste, Magdeburg 2007.

Elmenhorst L., Strobl H., *Anmerkung zur Entscheidung des OLG Nürnberg vom 6.9.2017 – 12 U 2086/15 Zum Verhältnis von Ersitzung und § 40 KGSG*, "Kunst und Recht" 2017, Vol. 19(5-6).

Elmenhorst L., Wiese V., *Kulturgutschutzgesetz: KGSG. Kommentar*, C.H. Beck, Munich 2018.

Falckenberg H., *Was auf dem Spiel steht*, "Frankfurter Allgemeine Zeitung", 16 July 2015.

German Bundestag, *Bericht über die Auswirkungen des Gesetzes zur Ausführung des UNESCO-Übereinkommens vom 14. November 1970 über Maßnahmen zum Verbot und zur Verhütung der rechtswidrigen Einfuhr, Ausfuhr und Übereignung von Kulturgut* [Report on the effects of the law implementing the UNESCO Convention of 14 November 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property], BT-Drs. 17/13378, http://dipbt.bundestag.de/dip21/btd/17/133/1713378.pdf [accessed: 7.11.2019].

German Bundestag, *Bericht zum Umfang des Verwaltungsaufwandes von Bund und Ländern – Zwei Jahre Kulturgutschutzgesetz* [Report on the extent of the administrative burden of federal and state governments – two years of cultural property protection law], BT-Drs. 19/7145, http://dipbt.bundestag.de/dip21/btd/19/071/1907145.pdf [accessed: 7.11.2019].

German Bundestag, *Entwurf eines Gesetzes zum Schutz deutschen Kulturgutes gegen Abwanderung aus dem Gebiet der Bundesrepublik* [Draft law for the protection of German cultural property against export from the territory of the Federal Republic], BT-Drs. 2/76, http://dipbt.bundestag.de/doc/btd/02/000/0200076.pdf [accessed: 23.11.2019].

German Bundestag, *Entwurf eines Gesetzes zur Neuregelung des Kulturgutschutzrechts* [Draft law on the revision of cultural property protection act], BT-Drs. 18/8908, http://dipbt.bundestag.de/dip21/btd/18/089/1808908.pdf [accessed: 23.11.2019].

*Gesetz zu der Konvention vom 14. Mai 1954 zum Schutz von Kulturgut bei bewaffneten Konflikten* [Act on the Convention of 14 May 1954 on the Protection of Cultural Property in Armed Conflicts], Bundesgesetzblatt 1967, Part II, p. 1233.

*Gesetz zum Schutz deutschen Kulturgutes gegen Abwanderung* [Act on the protection of German cultural heritage against export], Bundesgesetzblatt 1955, Part I, p. 501 (in its 1999 version).

*Gesetz zum Schutz von Kulturgut* [Act on the protection of cultural property], Bundesgesetzblatt 2016, Part I, p. 1914.

*Gesetz zur Reform der strafrechtlichen Vermögensabschöpfung* [Act on the reform of criminal asset recovery], Bundesgesetzblatt 2017, Part I, p. 872.

Gusy C., *Verbot mit Erlaubnisvorbehalt – Verbot mit Dispensvorbehalt*, "Juristische Arbeitsblätter" 1981, Vol. 13.

Heuer C.-H., *Die Bewertung von Kunstgegenständen*, "Neue Juritische Wochenschrift" 2008, Vol. 61.

Hill G., *Treasure Trove in Law and Practice*, Clarendon Press, London 1936.

Hoffman B.T., *Art and Cultural Heritage: Law, Policy and Practice*, Cambridge University Press, New York 2006.

Jauss S., *Zur Frage des Erwerbs abhandengekommener, rechtswidrig ausgegrabener oder unrechtmäßig eingeführter Kulturgüter*, "Neue Juristische Online-Zeitschrift" 2018.

Jayme E., *Aktuelle Entwicklungen im Internationalen Kunstrecht*, "IPRax" 2018, Vol. 4.

Jayme E., *Zivilrechtliche Fragen zu abhanden gekommenen Kulturgütern: Betrachtungen zu der Neuregelung des § 40 KGSG*, in: N. Mahmoudi, Y. Mahmoudi (eds.), *Kunst, Wissenschaft, Recht, Management. Festschrift für Peter Michael Lynen*, Nomos, Baden-Baden 2018.

Klein C., *Die Erlaubnis im waffenrechtlichen Straftatbestand*, "Juristische Rundschau" 2008, Vol. 5.

Kugler R., *Die Praxis des Kulturgüterrückgabegesetzes*, "Kunstrechtsspiegel" 2010, Vol. 4.

Lubina K., *Contested Cultural Property: The Return of Nazi Spoliated Art and Human Remains from Public Collections*, Maastricht 2009.

Maak N., *Kunst der Panikmache*, "Frankfurter Allgemeine Zeitung", 16 July 2015.

Maurice C., Turnor R., *The Export Licensing Rules in the United Kingdom and the Waverley Criteria*, "International Journal of Cultural Property" 1992, Vol. 1(2).

*Max Beckmanns "Ägypterin" für 4,7 Millionen versteigert*, "Der Tagesspiegel", 31 May 2018, https://www.tagesspiegel.de/kultur/rekordsumme-max-beckmanns-aegypterin-fuer-4-7-millionen-versteigert/22631118.html [accessed: 1.11.2019].

McIntosh J., *Lost Treasures. The World's Great Riches Rediscovered*, Carlton Books, London 2010.

Pernicka E., Wunderlich C.H., *Naturwissenschaftliche Untersuchungen an den Funden von Nebra*, "Archäologie in Sachsen-Anhalt" 2002, Vol. 1.

Pieroth B., Kampmann B., *Außenhandelsbeschränkungen für Kunstgegenstände*, "Neue Juristische Wochenschrift" 1990.

Poli J.-F., *La protection de biens culturels meubles*, L.G.D.J., Paris 1996.

Rahmatian A., *A Comparison of German Moveable Property Law and English Personal Property Law*, "Journal of Comparative Law" 2008, Vol. 3(1).

Raue P., *Und das soll keine Enteignung sein?*, "Tagesspiegel", 12 July 2015.

Sadowski K., *The Abstraction Principle and the Separation Principle in German Law*, "Adam Mickiewicz University Law Review" 2014, Vol. 4.

Schack H., *Zivilrechtliche Auswirkungen des KGSG: Importverbote und Transparenzpflichten*, "Kunst und Recht" 2018, Vol. 20(5).

Schwarz C., *Wie ersetzt man einen Baselitz?*, "Frankfurter Allgemeine Zeitung", 20 July 2015.

Sturm B., *Aspekte der Novellierung des Kulturgutschutzes*, "Kunst und Recht" 2016, Vol. 18(3-4).

Tittel C., *Grütters-Effekt. Sammler bringen Kunst ins Ausland*, "Die Welt", 11 October 2015.

Treaty on the Functioning of the European Union (consolidated version), OJ C 326, 26.10.2012, p. 47.

Von der Decken K., *Das Kulturgutschutzgesetz von 2018 mit einem besonderen Fokus auf den Abwanderungsschutz für deutsches Kulturgut*, in: M. Weller, N.B. Kemle, T. Dreier (eds.), *Kunst und Recht – Rückblick, Gegenwart, und Zukunft*, Nomos, Baden-Baden 2017.

Wantuch-Thole M., *Cultural Property in Cross-Border Litigation: Turning Rights into Claims*, De Gruyter, Berlin – Boston 2015.

Weber M., *Unveräußerliches Kulturgut im nationalen und internationalen Rechtsverkehr*, De Gruyter, Berlin 2002.

Weller M., *The Return of Ernst Ludwig Kirchner's "Berliner Straßenszene" – A Case Study*, "Kunstrechspiegel" 2007, Vol. 2.

*What Has Happened Since the 2008 Restitution Request for the Guelph Treasure?*, http://www.preussischer-kulturbesitz.de/newsroom/dossiers-and-news/all-dossiers/dossier-the-guelph-treasure/what-has-happened-since-the-2008-restitution-request-for-the-guelph-treasure/?L=1 [accessed: 23.11.2019].

Winands G., List M., *Das neue Kulturgutschutzgesetz*, "Kunst und Recht" 2016, Vol. 18(6).