

Loan agreement with declaration of 'nail-to-nail' liability - annotated model contract

→ Annotation by the touring artists editorial team:
The text of the Agreement is a translation of the "Leihvertrag mit Haftungserklärung 'von Nagel zu Nagel'" model contract of the Bundesverband Bildender Künstlerinnen und Künstler (BBK) (Source: Bundesverband Bildender Künstlerinnen und Künstler (Ed.), ProKunst 5, p. 178., 2012). The touring artists editorial team has amended the Agreement as appropriate with regard to contracts with partners abroad. *These amendments have been added in coloured text.*
This agreement and the → annotations are based on the assumption that the agreement in question was drafted by a contracting party in Germany: The lender is headquartered in Germany, the borrower abroad. The annotations indicate what has to be considered and noted with regard to such a cross-border agreement. Agreements are often drafted by the borrower or the borrowing institution. The explanations are therefore also of interest to lenders abroad loaning works to a borrower in Germany.

Disclaimer: The touring artists editorial team shall not be liable for the completeness of the model contract nor its suitability for use and shall not be responsible for ensuring that it duly reflects the interests of any specific user. It shall accept no liability for the currency of the contractual content. touring artists wishes to expressly point out that model contracts can only provide a starting point for an optimal final draft in a specific case of use and generally cannot be adopted without review, but must rather be adapted to the individual requirements. Model contracts are intended for orientation and inspiration. Their use cannot replace expert legal advice under any circumstances.

Loan agreement with declaration of 'nail-to-nail' liability

between

.....
(name of the borrowing institution)

.....
(name of the person in charge, authorized to represent the company) – hereinafter referred to as "Borrower" – and

.....
(name of the person loaning the work - hereinafter referred to as "Lender")

→
In general, contracts do not necessarily have to be concluded in writing. Verbal agreements between the contracting parties are also binding. However, a **loan agreement** regulates the rights and obligations of the borrower and the lender and contains arrangements regarding liability, transport costs, insurance policies, etc. For this reason, a loan agreement should always be concluded in writing.

The phrase '**nail-to-nail**' is an internationally-used term for the insurance of a work of art throughout the entire loan period. This means that the work is insured from the moment it is removed from the location where it was previously stored/exhibited. The borrower becomes liable for the art work as soon as it leaves its original location and remains so until the time it is returned.

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§ 1

The Lender hereby loans to the Borrower

.....
(title of the work, technique, dimensions, framing, year)

for the purposes of exhibition at

.....
(name and address of the exhibition venue and title of the exhibition)

from to

If a work of art is sold during the exhibition, the Borrower shall receive a commission of % of the sales price.



*This commission should not be higher than the percentage customary for a gallery owner in Germany, i.e. a maximum of 50%. In the agency sector, a **commission** of 15 to 20% is common.*

The Borrower is responsible for paying the transport and return costs **as well as for the insurance** of the work on loan. The obligations of the Borrower arising from the Agreement begin with the collection of the work and end with its return.

The loan must be returned to the place from which it was borrowed. It must be returned to (exact address)



*Especially for contracts with partners abroad it is useful to specify the **addresses for the transportation of the work to and from** the exhibition in the contract in order to avoid misunderstandings.*

In the case of a cross-border loan, the Borrower is responsible for completing all necessary import and export formalities and must pay any costs incurred.



*In the case of a loan originating in Germany which will be transported to a non-European country or vice versa, **import and export formalities** must be observed (see [Transport beyond European Union borders](#)).*

The Borrower is obliged to take out adequate insurance for the work on loan. **The value of the loaned work is** euros.



*The (potential) purchase price of the work can be considered an **appropriate insurance value**. In order to avoid disputes about the appropriate insurance coverage, it is useful to specify the value directly in the loan agreement. But be careful: Insurance companies are often only willing to pay*

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half of the insurance value if the work was borrowed directly from the artist's studio. This is because the lender would have received only 50% of the selling price in a gallery sale as well.

In the event of damage to the work of art, the Lender must decide whether restoration is possible or whether the work has to be destroyed.

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*In **the case of damage**, disputes often arise with insurance companies regarding the question of restoration or destruction. Insurance providers often request that the damaged works be handed over to them so they can have them restored and subsequently sell them. It should therefore be stipulated in the loan agreement that the decision on whether and how to restore the work should lie with the lender.*

§ 2

The Borrower is obliged to take the loan into safe keeping and to take good care of it.

§ 3

The Borrower shall be liable beyond the statutory borrower's liability for all damage to the loan from the time the loan is removed from its previous storage location for transport to the exhibition until the time when it has been transferred back to its previous storage location after the exhibition has ended.

→

*According to statutory **borrower's liability** (in Germany: § 599 BGB), the borrower is only liable for damage caused by wilful intent and gross negligence. This passage is thus important in order to make it clear that any liability for damage must be borne by the borrower, irrespective of the question of fault.*

§ 4

The Borrower undertakes to notify the Lender without delay of any damage to the loan.

§ 5

The Borrower is obliged to give credit to the author in a suitable way every time the work is mentioned in print or exhibited.

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*The author must be named in the catalogue and on advertising materials, as well as at any exhibitions that take place (e.g. by means of a name board). The legal basis for this is § 13 German Copyright Act (**Recognition of Authorship**).*

The Lender is a member of the collecting society. The rights of the Lender with

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regard to all fees for the use of a work payable in the country of the Borrower will be represented by the respective national collecting society in that country. (+)



(+) Delete if the Lender is not a member of a collecting society.

In Germany, as well as in Austria and Scandinavia, for example, extensive rights to produce work for promotional purposes ("Katalogbildprivileg") apply to exhibitions. Works that are shown in an exhibition may be reproduced in the catalogue and as part of exhibition advertising without the prior consent of the copyright holder.

In the case of loans to countries in which these rights are not in place (for example France or England), it should be pointed out that the rights that apply there are to be managed by the collecting society in the Lender's country of residence. This requires that the author is a member of a collecting society. The international network of collecting societies guarantees the representation of rights abroad; it is not necessary to become a member of a collecting society in each country. If no reference is made to the representation of the artist by the collecting society, the Borrower may assume that the Lender has agreed to free use, because he/she has not expressly asserted his/her rights.

In the event that an author who is not a member of a collecting society loans a work for an exhibition in a country without the right to reproduce works of art for promotional purposes, the planned use of the work (e.g. reproduction in the exhibition catalogue, use for exhibition posters or other advertising materials) should be discussed in detail and stipulated in advance. A license agreement may be drawn up for this purpose (see also License agreement - annotated model contract). The artist should reserve the right to approve the layout. A flat-rate fee should also be agreed.

§ 6

Amendments to this Agreement must be submitted in writing.
The law of the Federal Republic of Germany applies to this Agreement.
The place of jurisdiction is the domicile of the Lender.

Signature and date

City/Date,

Lender

legally binding signature

representing the borrowing institution

.....

legally binding signature



*If possible, the parties should agree that the agreement should be subject to the law with which the Lender is familiar - i.e. the law of his/her home country. This is also useful with regard to the **jurisdiction clause**, since it means that the law of the artist's place of residence can be applied in the event of a dispute.*

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