THE ART LAW REVIEW

Editors
Lawrence M Kaye and Howard N Spiegler

THE LAWREVIEWS

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This article was first published in January 2021
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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-567-2

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

AARNA LAW

AMINEDDOLEH & ASSOCIATES LLC

ANGUS FORSYTH & CO

BERGH STOOP & SANDERS

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PREFACE

We are pleased to introduce you to the very first edition of *The Art Law Review*. The field of art law has developed over many years to become a significant speciality in the law, as collectors, galleries, auction houses, museums and everyone else involved with art have expanded their collections and businesses throughout the world. Besides involving billions of dollars in the trade, art law has become the means by which the diverse cultures of our societies are governed and encouraged to develop.

We have invited leading practitioners in the field of art law around the world to detail the key developments in their respective countries pertaining to this dynamic and growing area of legal expertise. We have also asked that other leaders in the field focus on particular important issues in this area of law. We thank all our distinguished authors for their fine contributions. We hope you will find them informative, instructive and interesting.

By way of introduction, a brief overview of developments in this field during the past 50 years in the United States, where we practise, seems a good place to begin. Considering that English common law, upon which US law is based, originated in the early Middle Ages, the field of art law in the United States can rightly be characterised as a newborn. The roots of art law in the United States began in the form of intermittent cases in the early to mid twentieth century when visual artists began confronting problems in protecting their work – and themselves – particularly in the areas of copyright and obscenity.[1] Indeed, a body of law that could be characterised as art law did not really begin to take hold in the United States until the 1960s, and even then in a most disorganised fashion. The late and renowned Professor John Henry Merryman, who in 1972 offered at Stanford Law School the first formal art law class in a US law school entitled 'Art and the Law', wrote a few years later that he started the course partly out of 'a desire to determine whether "art law" really was a field' and noted that he 'took a good deal of ridicule from colleagues who thought the whole enterprise frivolous and insubstantial'.[2]

We have come a long way since then. A multitude of art law courses are now taught at US and European law schools and other institutions, such as the major auction houses.[3] And although in the late 1960s and early 1970s, when we began practising art law, one would have

1 See generally Joan Kee, *Models of Integrity: Art and Law in Post-Sixties America*, Introduction, 1-42 (University of California Press, 2019).

2 John Henry Merryman, 'Art and the Law, Part I: A Course in Art and the Law', 34 *Art Journal* 332, No. 4, 332 to 334 (Summer 1975).

3 See, e.g., Center for Art Law, 'Art Law Courses and Programs Worldwide', at www.itsartlaw.org (last accessed 29 October 2020).

been hard pressed to find anyone in the Martindale Hubble Law Directory designated as an 'art lawyer', today art lawyers proliferate in the directory; and for the New York area alone, where we practise, there are several pages listing lawyers who call themselves art lawyers.

So, what is art law? Professor Merryman observed that a primary reason for creating his new and novel art law curriculum was that 'the growth of American art and the emergence of the United States as a major art market involved problems and interests that were sufficiently substantial and complex to call for the services of specially attuned and trained practicing lawyers'.[4] Well, Professor Merryman's observation was quite prescient, for that is exactly what has happened during the past 45 years in the United States, and indeed throughout the world. Art law became a respected discipline within the law, and more and more practitioners around the globe began to specialise in the field as the nexus between art and law became more clearly defined.[5]

What had previously consisted of random cases involving visual artists and emerging issues affecting the growing art market started to morph into a cogent body of law. Even before Professor Merryman started his course and wrote the textbook to accompany it (*Law, Ethics and the Visual Arts*), in 1966 Scott Hodes published a book on the law of art and antiquities.[6] Many other texts followed.[7] Art law seminars and symposia began to proliferate and now take place almost every day somewhere in the world.

As the international art market grew and became more sophisticated, so did the practice of art law and the number of practitioners who began to devote themselves to the field. Today, art law is an amalgam of myriad legal areas that academicians, practitioners, lawmakers and judges have adapted to the specific needs of stakeholders in the art world, and art law specialists have learned how to apply traditional legal principles to art market disputes and transactions as the art world became more prevalent and more complex. The stakeholders in need of special art law expertise range from the poorest artists to the most sophisticated corporations and government entities. Even a partial list is daunting: museums, collectors, importers and exporters, galleries and dealers, auction houses, living artists (and even dead ones), including digital artists, families and family offices, estates, trusts and foundations, insurance companies, appraisers, art advisers, experts, consultants, corporate art collections, and national and state governments. To address the needs of these varied stakeholders, the experts in the field have taken general legal principles and areas of practice and applied them to the unique needs of the art law stakeholders, in addition to creating new specialities uniquely applicable to art law disputes and transactions. Among many others, these include property law, the law of contracts, consignments, torts, intellectual property, tax, trusts and estates, authentication, insurance, cultural property, moral rights, resale rights, free speech, sales and other commercial law, warranties, conflicts of law, private international law, comparative law, customs, criminal law and securities law. And the list goes on.

4 Merryman (footnote 2), at 332 to 333.

5 A practical and informative guide to the development of art law can be found in Kee (footnote 1). The early roots of art law are also explored in James J Fishman, 'The Emergence of Art Law', 26 *Clev. St. L. Rev.* 481 (1977).

6 *The Law of Art & Antiques: A Primer for Artists and Collectors* (Oceana Publications, 1966).

7 Notable among the many are Franklin Feldman and Stephen Weill, *Art Works, Law, Policy, Practice* (New York Practicing Law Institute 1974); Leonard Duboff, *Deskbook of Art Law* (Washington DC Federal Publications, 1977); and the seminal text on art law, Ralph E Lerner and Judith Bresler, *Art Law: The Guide for Collectors, Investors, Dealers & Artists* (Practicing Law Institute 1989), which is now in its fifth edition.

We have been practising art law since before it became a field, having started in the early 1970s. We believe our own professional journeys serve to illustrate some of the ways this area of law has grown and developed, so we would like to briefly share some of our experiences.

Larry first entered this field as a summer associate at the firm of Botein, Hays, Sklar and Herzberg in 1969. On reporting for duty at this first legal job, he was introduced to a brilliant attorney, who ended up serving as a revered mentor for both of us for many years to come, Harry Rand. Harry was representing the Weimar Art Museum, located in what was then East Germany, which was seeking to recover two paintings by Albrecht Dürer that were taken during the Second World War by US soldiers from a castle in which the paintings had been placed for safekeeping. East Germany (officially the German Democratic Republic), which owned the museum, sued a negligence lawyer residing in Brooklyn, New York, who had purchased the works from a US soldier who appeared at his door one day in 1946.

As it turned out, this was the first case of a foreign sovereign suing in the United States to recover cultural property. It involved many legal issues that took some 15 years to resolve finally in favour of East Germany, to which the paintings were ordered to be returned. The legal principles established in the *Weimar Museum* case continue to be cited in cases involving the recovery of artwork and other cultural property, especially those relating to the statute of limitations, and *Weimar Museum* stands as one of the iconic cases in this area of law.

During the pendency of the case, Howard joined Botein and started a professional relationship with Larry that has spanned many decades.

Our success in the *Weimar Museum* case and the publicity surrounding it attracted the interest of the Republic of Turkey, which was in a dispute with the Metropolitan Museum of Art (the Met) regarding a remarkable collection of ancient jewellery and other artefacts on display in the Met, which had been looted from caves in Turkey many years before. It turned out to be one of the leading cases involving the restitution of antiquities looted from foreign sovereigns, which led to a worldwide interest in trying to prevent such looting from countries around the world.

We sued the Met on behalf of Turkey and a six-year litigation ensued, largely spent defending dismissal motions brought by the Met on the grounds of the statute of limitations and other technical defences. But after we got past all that time-consuming and expensive motion practice, we then commenced the long discovery process, whereby we obtained information from the Met's own files about its knowledge of the objects' provenance or history, and its conduct in acquiring them. Nonetheless, the case presented significant obstacles for us. It was, after all, one of the first major cases brought against a major museum by a foreign government to reclaim looted cultural property. Indeed, at the time of its inception, most commentators were openly questioning how a previously undiscovered and undocumented collection of antiquities could be identified as having been looted from Turkey, let alone recovered.

However, we did prevail and the antiquities, known as the Lydian Hoard, were returned to Turkey in 1993 and exhibited at one of the great Turkish antiquity museums, the Museum of Anatolian Civilizations in Ankara, where it was greeted with great interest and excitement by Turkish visitors to the museum as well as those from other countries. We were privileged to visit the museum when the objects were displayed there, and we cannot adequately describe the excitement displayed by the Turkish viewers. Once the director revealed to them that we and our colleagues had assisted the government in securing the return of the objects, many people came over to thank us personally for helping to ensure that this important part of their heritage had been returned, to be viewed and appreciated by the Turkish people. The Lydian

Hoard case is considered by many as the starting point for the efforts by art-rich countries to reclaim their cultural property, which have continued and increased to this day.

As that case was ending, Botein closed shop and we joined our current firm, Herrick, Feinstein. We brought what was now a growing caseload of restitution work to Herrick, which until that time was a very successful firm that had no experience with art law. Indeed, there were still only a very few attorneys who regularly practised in this area of law.

By the mid 1990s, we were certainly known as art lawyers, particularly in the area of restituting looted antiquities to their country of origin. But then, for various reasons, the world's attention started to turn back to the Nazi era before and during the Second World War, and it became clear that the Nazis not only committed the most horrendous crimes against humanity, but they also committed the most extensive theft of cultural property in modern human history. As restitution experts, it was a natural fit for us to become involved in cases brought to recover artworks looted by the Nazis so that they could finally be returned to the families of the victims of the Holocaust. We would like to briefly mention two of those cases.

We were retained to handle one of the first important cases involving Nazi-looted art, representing the family of an art dealer who escaped from Austria after having had one of her paintings stolen by a Nazi agent. The painting by Egon Schiele is known as *Portrait of Wally*. The case started when the Wally was seized from the Museum of Modern Art (MoMA) in New York by state and then federal prosecutors after it was brought to the United States as part of an exhibition of work by Schiele in the collection at the Leopold Museum in Vienna.

Even though it took more than 10 years for the *Portrait of Wally* case to be finally resolved, it had an enormous influence from the moment it started. The fact that a loaned artwork at MoMA could be seized by US government authorities sent shock waves throughout the world and was a major factor in causing governments, museums, collectors and families of Holocaust victims to focus their attention on Nazi-looted art. Less than a week before the scheduled trial, the case was settled on three major terms:

a the Leopold Museum paid the family US$19 million, reflecting the true current value of the painting, in return for the surrender of their claim;

b a ceremony and exhibition was held at the Museum of Jewish Heritage in New York for three weeks before *Portrait of Wally* was returned to Austria; and

c the Leopold Museum agreed that signs would be permanently affixed next to *Portrait of Wally* at the museum and wherever it might be exhibited anywhere in the world, explaining the true facts of the painting's ownership history.

Shortly after the *Portrait of Wally* case commenced, we assisted the sole living heir of the renowned Dutch art collector and dealer, Jacques Goudstikker, to recover an extraordinary collection of Old Master paintings that had been looted during the Second World War by Herman Goering, who was second only to Hitler in the Nazi regime. With the adoption in 1998 of the Washington Principles, a non-binding international convention that for the first time brought together 44 nations in an effort to foster the restitution of property looted during the war, the Netherlands adopted a new restitution regime designed to right the wrongs of the past. To make a very long story very short, we assisted Marei von Saher in her Dutch restitution proceedings, and in 2006 we were able to effect the return of 200 works to her.

We also became involved in major art restitution cases brought against foreign sovereigns, which involved the Foreign Sovereign Immunities Act, a law that has been used in numerous cases since then as the basis for suing foreign sovereigns to recover artworks in their possession.

Over the years, we have also developed a wide-ranging practice in non-restitution art disputes, from simple breach of contract cases to more complex disputes involving dealers, collectors, artists and other art world stakeholders covering a wide range of disputes including trademark and copyright infringement, defamation, moral and visual rights, breach of warranty, misattribution, tax and trust matters, valuations, appraisals, experts and auctions.

We also became involved in the transactional side of art law. This aspect of our practice expanded when our restitution clients began asking us to handle transactions involving the sale and other disposition of major artworks and collections we had recovered for them. The transactional side included not only private treaty sales and auction sales, but also estate planning, providing tax advice, assisting not-for-profit entities, planning nationwide and international loans and exhibitions, and advising banks and collectors on using artworks as collateral for bank loans, among many other cutting-edge art law issues.

A sampling of the varied transactional matters we have been privileged to work on is a microcosm of the range of transactional matters that specialist art lawyers came to handle as the international art market expanded. To name but a few: we represented the Neue Galerie in New York in the acquisition of the famed *Woman in Gold* painting by Gustav Klimt, depicted in the film of that name, which has become the *Mona Lisa* of that museum's collection, regularly attracting huge numbers of visitors; we represented the European Fine Arts Foundation (TEFAF) in the creation of its New York Fall 2016 Art Fair; we represented the Malevich heirs in numerous auction sales during the course of 15 years, including the US$60 million sale of *Suprematist Composition* (1916), which set a world record for Russian art; we represented the Estate of Frances Lasker Brody in the historic sale of its art collection at Christie's (the highlight of which was a Picasso masterwork, *Nude, Green Leaves and Bust*, which sold for a then auction record of US$106.5 million); we represented a private art collector in one of the largest transfers of Mesoamerican art to a museum, and advised the collector's foundation dedicated to the study and advancement of Mesoamerican art; and we conducted an internal investigation on behalf of an internationally recognised art gallery concerning the authenticity of certain paintings bought and sold by the gallery.

Turning now to this Review, we open the volume with substantive chapters that present an overview of current and significant issues in some important areas of art law:

a cultural property disputes;
b the art market;
c art authentication;
d art and technology;
e international copyright issues;
f moral rights; and
g recent trends in art arbitration and mediation.

We then present reports on recent art law developments in 21 key countries. Each country's report gives a review of hot topics, trends and noteworthy cases and transactions during the past year, then examines in greater depth specific developments in the following areas: art disputes, fakes, forgeries and authentication, art transactions, artist rights, trusts and foundations, and finally offers some insights for the future.

We hope you enjoy reading all of these excellent contributions.

Lawrence M Kaye and Howard N Spiegler
Herrick, Feinstein LLP
New York
December 2020

Part I

General Papers

Chapter 1

CULTURAL PROPERTY DISPUTES

Leila A Amineddoleh[1]

I TURBULENCE IN THE ART WORLD IN 2020

i Controversies in cultural institutions

The year 2020 has been a turbulent one for art and cultural heritage, in large part because of two major global events: the covid-19 pandemic and the Black Lives Matter movement. The pandemic has led to major financial concerns for cultural institutions around the world, leading some museums to close permanently. Most surviving institutions have experienced intermittent periods of closure and a significant loss of revenues and donations. With budget concerns looming overhead, museums now face challenging financial decisions and must evaluate their current programming and acquisitions. In some instances, some institutions have made the difficult decision to deaccession, or sell, works of art from their permanent collections. The Association of Art Museum Directors (AAMD) generally prohibits this practice unless certain requirements are met, such as sales proceeds being used solely for art acquisitions. However, during an economic or global health crisis, particularly one a global scale, it may not be feasible for institutions to abide by these restrictions. The loss of revenue during covid-19 lockdowns made it impossible for museums to maintain their budgets, compensate employees and properly care for the items in their collections. This troubling scenario led the AAMD to temporarily loosen its restrictions, announcing that museums would not be penalised for deaccessioning art 'to pay for expenses associated with the direct care of collections'.[2] This measure, which started in April 2020, will be in effect for two years. Notably, the Brooklyn Museum took advantage of the new guidelines and consigned 12 works for sale at Christie's in October 2020, in a high-profile sale.[3]

In addition to the past year's fiscal challenges for cultural institutions, ethical considerations have also played a prominent role. International debates concerning controversial donors and gifts, the composition of museum boards and the ethics of displaying and collecting art and cultural heritage all took place. Museums faced protests related to the funds obtained from donors with problematic pasts, such as the Sackler family, which has been criticised for its role in the US opioid crisis. As the owners of the Purdue Pharma company, the family has been viewed as being responsible for deceiving the public about the safety of OxyContin, a highly addictive painkiller that has led to thousands of deaths and crippling drug addiction across multiple states. The family's role in manufacturing the

1 Leila A Amineddoleh is the founder of Amineddoleh & Associates LLC.

2 https://aamd.org/for-the-media/press-release/aamd-board-of-trustees-approves-resolution-to-provide-additional.

3 www.nytimes.com/2020/09/16/arts/design/brooklyn-museum-sale-christies-coronavirus.html.

drug also led to the growth of vast wealth and donations to high-profile cultural institutions in the United States and abroad. Although the Sackler name has been scrutinised for years now, the fallout from Purdue Pharma's closure[4] has led to fervent calls for the removal of 'toxic philanthropy' from cultural institutions. Some museums, such as the Louvre and Tate Modern, have already removed the Sackler name from their walls,[5] and other institutions may follow suit.

Another debate in the cultural realm over the lack of diversity in art institutions has been intensified by the Black Lives Matter movement calling for more diverse museum boards. Black trustees at art museums have joined forces to form the Black Trustee Alliance for Art Museums in an effort to recruit more Black directors, collect works by Black artists and to cultivate Black curators.[6] Although more diverse than they were five years ago, museum leadership roles and boards are still predominantly white. Employees at museums across the United States have demanded more diversity and representation within the institutions and for these establishments to eradicate racism from within their organisations.[7] This lack of diversity is also reflected in museum collections. The aim of initiatives such as the Black Trustee Alliance is for increased diversity on museum boards and the hiring of a more diverse group of curators to lead to a change in acquisition determinations and the allocation of funds. Yet these discussions have an effect beyond the Black community. Advocates have alleged that museums violate ethical practices concerning Native American objects when curators fail to confer with tribal representatives prior to their display. It is also derogatory for museums to refer to indigenous art as 'primitive' or 'tourist art' rather than fine art.[8] The controversies surrounding these artefacts are broader than those surrounding visual arts as they also affect performance arts companies and venues.[9] The art world can expect ongoing discussions for years to come as institutions continue to diversify their programming and attempt to accurately and respectfully represent diverse cultural backgrounds.

ii The repatriation of artefacts

Although present for decades, the call to return looted artefacts has intensified during the past year. The debate encompasses difficult discussions about artefacts taken during periods of armed conflict or colonialism, or those removed in contravention of national or international laws. Amid criticism about the development of museum collections as a result of violence and colonialism, a number of institutions have returned artefacts to origin nations (the places from which the objects were removed). For example, the Netherlands recently announced it would repatriate thousands of items from its museums to the former colonies from where they were forcibly taken. In January 2020, the Netherlands returned 1,500 historical

4 The company faces three criminal charges and has agreed to pay US$8 billion in penalties; www.cnn.com/2020/10/21/business/purdue-pharma-guilty-plea/index.html.

5 https://news.artnet.com/art-world/sacklers-name-museum-met-1917814.

6 www.nytimes.com/2020/10/09/arts/design/black-trustees-art-museums-diversity.html.

7 https://hypebeast.com/2020/9/art-museums-steps-to-address-racism-exclusive-interviews.

8 id.

9 www.washingtonpost.com/entertainment/theater_dance/challenged-to-examine-their-white-bias-some-theater-companies-are-taking-on-diversity--from-the-top/2020/09/16/4d094120-f6a1-11ea-a275-1a2c2d36e1f1_story.html; https://news.psu.edu/story/633085/2020/09/24/arts-and-entertainment/center-performing-arts-shares-statement-and-plan; https://lincolncenter.org/lincoln-center-at-home/message-on-our-commitment-to-change.

artefacts to Indonesia.[10] According to Hilmar Farid, the Director General of the Ministry of Education and Culture of Indonesia, 'This is the first time in the history of Indonesia that Indonesian cultural objects or artefacts that were taken [to the Netherlands] are returned . . . Hopefully this paves the way for the return of objects in other European museums.'[11] The Dutch nation also committed to the return of objects to another former colony, Sri Lanka. However, repatriation is complicated due to a lack of information about the rightful owners of the repatriated goods. The Netherlands is struggling with whether to return the objects to the nation of Sri Lanka or to the descendants of the original owners. This is made more challenging given the scant historical record supporting facts around the objects' prior ownership and the exact circumstances of their removal.[12]

Conversations about repatriations are occurring all over the world in light of the global Black Lives Matter movement, protests over controversial monuments and the recognition that some museums are comprised of colonial takings. While some institutions may have noble intentions of returning controversial objects, it is sometimes difficult to identify the rightful owners. For instance, borders and governmental entities have changed during the decades or centuries that have passed since the objects were transferred from their original location. One prominent group of works in the restitution debate that has attracted attention during the past few decades is the Benin Bronzes.[13]

The Benin Bronzes are perhaps the best known works of art from West Africa. A group of over a thousand masterful creations by the Edo people, the works were fashioned between the thirteenth and eighteenth centuries. They decorated the royal palace of the Kingdom of Benin (today part of modern-day Nigeria). However, most of the works were looted in 1897 by British forces during a punitive expedition[14] that took place during the 'Scramble for Africa'.[15] As a result, 200 of the Benin Bronzes were transferred to the British Museum while the rest were purchased by cultural institutions and private buyers in Europe and the United States. According to Dan Hicks, curator of the Pitt Rivers Museum at the University of Oxford, approximately 160 museums around the world currently possess objects forcibly taken from Benin.

Since gaining independence in 1960, Nigeria has continued to demand the repatriation of the Benin Bronzes.[16] The nation's fight for repatriation has gained widespread attention during the past few decades as museums have returned other culturally significant artefacts to origin nations. Nigerian officials believe repatriations are imminent as international protests raise awareness of historical cultural thefts from Africa and their negative impact on African

10 www.thejakartapost.com/news/2020/01/07/netherlands-returns-1500-historical-artifacts-to-indonesia.html.

11 id.

12 www.reuters.com/article/us-netherlands-colonial-artwork/dutch-ready-to-give-back-seized-colonial-art-but-to-whom-idUSKBN26Y1A8.

13 The name is a misnomer as the pieces are mostly made of brass, while some are made of a mixture of other materials, including bronze, wood and ceramic.

14 The expedition was in retaliation for the massacre of British officials who entered Benin City, against warning, during a ritual.

15 The period between 1885 and 1914 when European colonisers partitioned the largely unexplored continent of Africa into protectorates, colonies and 'free-trade areas'.

16 www.cnn.com/2018/11/26/africa/africa-uk-benin-bronze-return-intl/index.html.

communities that have no access to artistic or historical depictions of their heritage.[17] The nation is readying a new museum to display the valuable objects once they are repatriated, signalling its commitment to providing local communities with access to these unique pieces.

Other UK museums have also been called to task to return looted artefacts to Africa[18] and other nations.[19] Some critics have also used this opportunity to demand the repatriation of the Parthenon Marbles, violently removed from the Parthenon over two centuries ago and displayed at the British Museum ever since.[20] The trend in France is the same, as the nation has also been at the forefront of discussions about looting from African countries.[21] The Sarr-Savoy report, published in 2018, was a major step in this direction. Similarly, US institutions are restituting looted or questionably acquired items. In one case, the University of Pennsylvania's Penn Museum has removed a collection of human skulls from view and has vowed to repatriate or rebury the skulls.[22]

II PRIVATE CULTURAL HERITAGE DISPUTES

i Nazi-looted art

The theft and destruction of art committed by the Nazi Party is unparalleled in modern history, and thus legal systems around the world are still grappling with ways to return property to rightful owners and compensate those who suffered losses. One of 2020's most watched art disputes involves a rare and valuable collection of religious works that was purportedly sold under duress during the Nazi era. Although the sale occurred in the 1930s, prior to Nazi control of Germany, the heirs filed suit against the Republic of Germany in the United States to recover the items. The US Supreme Court agreed to hear *Philipp v. Federal Republic of Germany*,[23] a case that will have far-reaching consequences for Holocaust-looted art claims. The litigation concerns the Guelph Treasure, one of the most important collections of medieval German ecclesiastical art. It was named after the House of Guelph, which had owned the works since 1671. The princely house sold the collection, then comprised of 82 objects, to a consortium of four Jewish art dealers, for 7.5 million Reichsmarks in 1929. During the following years, a number of items from the collection were sold to private collectors and museums.

In 1935, the remaining 42 pieces of the collection were sold for 4.25 million Reichsmarks to agents of Hermann Göring.[24] Göring then presented the Guelph Treasure as a gift to Hitler and it was displayed in the Bode Museum in Berlin, where it remains to this day. The largest German ecclesiastical collection owned by a public institution, the Treasure belongs to the

17 www.reuters.com/article/us-global-race-nigeria-bronzes/nigeria-expects-more-benin-bronze-returns-as-soon-as-next-year-idUSKBN27S25V.

18 www.theafricareport.com/48536/ethiopia-the-fight-to-repatriate-artefacts-is-far-from-over/.

19 www.theguardian.com/world/2020/apr/14/exeter-to-repatriate-blackfoot-regalia-to-siksika-nation.

20 https://metro.co.uk/2020/11/04/stephen-fry-asks-uk-return-elgin-marbles-from-british-museum-13534742/; https://news.artnet.com/art-world/greece-parthenon-marbles-1870500.

21 www.theartnewspaper.com/news/black-lives-matter-movement-is-speeding-up-repatriation-efforts.

22 www.art-critique.com/en/2020/07/penn-museum-to-return-skulls-held-in-the-morton-cranial-collection/.

23 *Philipp v. Federal Republic of Germany*, 925 F.3d 1349 (D.C. Cir. 2019) (petition of cert. granted 2 July 2020).

24 Göring, one of the most powerful figures in the Nazi Party, was an art collector who acquired portions of his collection by pressuring owners to sell their property.

Prussian Cultural Heritage Foundation (SPK). However, heirs of the consortium's members have brought their claims before courts in the United States, alleging that the sale to Göring was made under duress.

In 2008, heirs of the consortium contacted the SPK seeking the restitution of the Treasure. The SPK's internal investigation determined that the collection had been acquired legally. In 2014, the parties brought their dispute before the German Advisory Commission for the Return of Cultural Property Seized as a Result of Nazi Persecution (the Commission), an arbitration commission specialising in Nazi-looted art determinations. The Commission rejected the restitution claim based on the economic situation at the time of the sale; namely, the imminent Great Depression. During the arbitration, the heirs asserted that Jews were aware of their vulnerability under Nazi rule at the time, which led the consortium to sell the works. The SPK asserted that the Prussian state paid a fair market price for the works and so the consortium was compensated fairly. However, sales by Jewish German vendors occurring after 1933 are generally presumed invalid due to coercion, as the Nazis were already politically active during this period.

Finally, in 2015, three heirs of the consortium filed suit in the United States against Germany and the SPK, alleging that the Treasure had been sold under duress for one-third of its actual value and contending that the Prussian state discouraged other potential buyers from purchasing the works. Generally, foreign sovereigns are immune from suit in the United Sates under the Foreign Sovereign Immunities Act (FSIA). However, parties can overcome the presumption of immunity by proving that one of the FSIA's enumerated exceptions applies. Here, the heirs asserted that two exceptions applied: the commercial activity exception and the expropriation exception. The commercial activity exception dictates that sovereigns are not immune for engaging in activities in the United States that are commercial in nature.[25] The expropriation exception grants US courts jurisdiction over a foreign state when a dispute involves the taking of property in violation of international law, which has a commercial nexus with the United States.[26]

In March 2016, Germany filed a motion to dismiss under the FSIA, the international law principle of comity, *forum non conveniens*, and the expiry of the statute of limitations. Following the passage of the HEAR Act[27] and its six-year limitation period in the United States, Germany abandoned its statute of limitations argument, but the nation argued it was shielded from suit by the FSIA because the expropriation exception did not apply, claiming that it has a limited application to cases involving the seizure of property belonging to foreign nationals. Here, the Guelph Treasure was taken from German nationals, not foreign citizens. The nation also argued that US jurisdiction was inappropriate under the principle of comity; a party suing a foreign sovereign cannot seek redress in the United States until it has exhausted all legal remedies in Germany. Germany further argued that the United States was not the proper forum, and also alluded to the affirmative defence of laches (the unreasonable delay in making a claim that resulted in prejudice may lead a court to dismiss a case), because the collection has been displayed openly in Germany since 1963.

25 Determining whether something is commercial 'in nature' requires that the court ask whether the activity could have been done by a private party, not a sovereign nation. *Rep. of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992).

26 28 U.S.C. § 1605(a)(3).

27 Holocaust Expropriated Art Recovery Act of 2016, Pub.L. 114–308.

In 2017, the United States District Court for the District of Columbia (the DC Circuit) denied in part and granted in part Germany's motion. The Court ruled that seizures from a country's nationals are a violation of international law when the seizures are part of a policy of 'genocide'. The Court reasoned that the sale bore a 'sufficient connection to genocide such that the alleged coerced sale may amount to a taking in violation of international law'.[28] The District Court also found support for the plaintiffs' allegation that the Commission's decision was politically motivated, concluding that foreign policy supported the just and fair resolution of claims for Nazi-confiscated art and that no binding precedent from the DC Circuit required the claims to be 'exhausted' in Germany. Finally, the Court found that the balance of interests weighed in favour of the plaintiffs' choice of forum, particularly because three of the heirs are US citizens.

Germany filed an interlocutory appeal, arguing that the lower court incorrectly found that it had jurisdiction over the case. Germany restated the arguments that the lower court had rejected, including that allowing the claims to be heard would conflict with the US government's stated policies regarding Holocaust restitution. In July 2018, the DC Circuit affirmed in part, ruling that the claims against Germany and the SPK fell within the expropriation exception. However, the Court noted that the exception requires a 'commercial nexus' between the sovereign and the United States When the defendant is a foreign state, the commercial requirement is only satisfied if the property at issue 'is present in the United States'. Since the Guelph Treasure is in Germany, the Court was required to dismiss Germany from the lawsuit.

The DC Circuit rejected Germany's and the SPK's petition for a rehearing en banc, but the US Supreme Court granted Germany and the SPK's writ of certiorari. Oral arguments were held on 7 December 2020, and they addressed two questions: (1) whether suits concerning property taken as part of the Holocaust are within the expropriation exception, and (2) whether a foreign state may assert a comity defence. The US Supreme Court will make its jurisdictional determination in 2021. This case demonstrates the complexities surrounding Holocaust-looted art claims, not least of which are the non-legal and moral considerations in addition to legal arguments.

ii International antiquities disputes

In a very different type of cultural heritage dispute involving the FSIA, a foreign government was sued for contacting an auction house about an object with questionable provenance consigned for sale.[29] In *Barnet et al. v. Ministry of Culture and Sports of the Hellenic Republic*,[30] the dispute arose from Sotheby's planned auction of a Corinthian bronze horse. A few days prior to the sale, Greece sent Sotheby's a letter challenging the consignors' ownership, citing Greece's patrimony law and alleging that the bronze had been illegally removed.[31] Sotheby's then withdrew the antiquity. A few weeks later, Sotheby's and its consignors (the Barnets) filed a complaint in the United States District Court for the Southern District of New York, seeking a declaratory judgment that the Barnets were the lawful owners of the bronze and

28 *Philipp v. Federal Republic of Germany*, 248 F.Supp.3d 59, 71 (D.D.C. 2017).

29 By way of a disclaimer, the author of this chapter represented the Hellenic Republic in the litigation.

30 *Barnet et al. v. Ministry of Culture and Sports of the Hellenic Republic*, 391 F.3d 291 (S.D.N.Y. 2019).

31 Patrimony laws generally vest nations with ownership of antiquities discovered within their borders; if artefacts are discovered by illicit excavations or not properly reported to authorities, the objects become stolen property and are vulnerable to seizure or repatriation claims.

that Sotheby's was entitled to sell the item. Greece moved for dismissal under the FSIA, alleging that its actions qualified as sovereign, not commercial, activity. In June 2019, the District Court held that Greece lacked immunity, reasoning that the transmission of the letter to Sotheby's that ultimately halted the sale of the auction lot fell within the FSIA's commercial-activity exception. Greece appealed the decision in the Second Circuit.

In June 2020, the United States Court of Appeals for the Second Circuit reversed the District Court's decision.[32] It held that a foreign state's immunity is not lost under the FSIA when the foreign sovereign makes a communication about its ownership under a patrimony law because the enforcement of that law is inherently sovereign, not commercial, activity. A private party cannot assert ownership of an antiquity under a national patrimony law. The Court found that Greece's act of sending the letter was not in connection with a commercial activity outside the United States; thus, the direct-effect clause of the commercial-activity exception was not satisfied, and the District Court erred in concluding it had jurisdiction.

This litigation is a landmark case because it was the first time a foreign sovereign was sued for protecting its heritage via a patrimony law. Other foreign nations feared that the District Court's problematic ruling would prevent them from communicating with sellers and institutions in the United States regarding property protected under their national patrimony laws. However, the Second Circuit's unanimous decision supports foreign governments' role in the art market regarding issues of patrimony and protects them from suits in which they seek to protect property and claim ownership under patrimony laws. This is particularly significant in the context of antiquities, which are often looted from source countries before being sold in market countries to cultural institutions and private collectors.

Another case involving national ownership of antiquities is *Republic of Turkey v. Christie's Inc*.[33] The 28 April 2017 Exceptional Sale at Christie's featured the Guennol Stargazer, a 22.9cm tall Anatolian marble female idol of Kiliya type, carved during the third millennium BC. There are only 15 such figures in existence, but this one was particularly appealing because it was once part of the magnificent Guennol Collection, begun in 1947 by Alastair Bradley Martin and his wife Edith.[34] Expected to sell for US$3 million, the artefact was bought by an anonymous bidder for US$14.4 million.

As in the *Barnet* matter, the Turkish government informed the selling auction house that the government disputed the title to the object and had a valid ownership claim under its national laws. Nine days before the sale, the Consul General of Turkey informed Christie's that the idol originated from Turkey and was therefore considered 'state property'. The following day, Christie's challenged those assertions and declined to halt the sale. Representatives for the parties met to resolve the dispute, but were unsuccessful.

The day before the auction, the Turkish government filed an ownership claim in federal court and asked the court to stop the sale. The nation stated that the antiquity 'is an extremely rare artefact that is an integral and invaluable part of the artistic and cultural patrimony of the Republic of Turkey'. Further, it asserted that it was 'illicitly removed' from the country in contravention of a Turkish patrimony law passed in 1906 because it was looted in the 1960s, not discovered during a government-approved excavation and not reported to authorities. Christie's countered that Turkey did not provide factual evidence for its claims that the

32 961 F.3d 193 (2d Cir. 2020).

33 *Republic of Turkey v. Christie's Inc.*, 425 F.Supp.3d 204 (S.D.N.Y. 2019).

34 In December 2007, Sotheby's sold a Mesopotamian limestone carving from the collection; it went for US$57.1 million, setting a still-unbroken auction record for an antiquity.

artefact was looted and that the 1906 patrimony law was irrelevant to the sale. Moreover, the auction house argued that Turkey inexcusably delayed its demand for the return of the antiquity because it was openly displayed at the Metropolitan Museum of Art (the Met) and also appeared in several publications. Christie's asserted that Turkey should have known about the artefact's location years before.

The court rejected Turkey's request for a temporary restraining order to halt the sale, finding that any irreparable harm[35] to Turkey was 'substantially diminished' due to Christie's offer to delay receipt of funds and hold the work for 60 days following the auction to provide Turkey with an opportunity to provide evidence supporting its claim the piece was looted. However, the parties disputed whether the 1906 patrimony law was legally in effect at the time the artefact was removed. Turkey asserts that the law has been in effect since 1906. Christie's argued that the Republic of Turkey was not even in existence in 1906, but was rather established in 1923, and did not adopt the 1906 law or enact similar patrimony laws until the 1980s.

The court also raised concerns about the delay in demanding the return of the piece, questioning why a restitution claim was not filed while the artefact was at the Met. Christie's and the consignor, Michael Steinhardt, jointly filed a motion to dismiss, arguing that Turkey's claim was not timely under laches because the nation unreasonably delayed in filing the case. Turkey countered that the lawsuit was not time-barred because the statute of limitations does not begin to run until a claimant is aware of an object's location and knows it has an ownership interest. Turkey was unaware of its interest until the auction catalogue revealed that the artefact lacked provenance prior to the 1960s. Interestingly, in a rare move, the court ordered Christie's to reveal the identity of the anonymous winning bidder.

The answer filed by Christie's and Steinhardt's answer contained counterclaims against Turkey asserting the following: (1) that the consignor be declared the rightful owner; (2) that Turkey committed tortious interference with contract; or, in the alternative, Turkey committed tortious interference with prospective economic advantage. Both parties filed summary judgment motions. In September 2019, the district court denied Christie's and Steinhardt's motion for summary judgment and granted Turkey's motion for summary judgment on the tortious interference counterclaims.

The case is ongoing. Trial was initially scheduled for April 2020 but has been delayed due to the pandemic. The bench trial is now scheduled for April 2021. Like *Barnet*, this decision will have a tangible impact on antiquities litigation and foreign sovereigns' patrimony claims under their national laws in the United States.

iii Forfeiture claims

Cultural heritage disputes in 2020 also arose in the context of government seizures, including a number of high-profile matters. On 15 September 2020, the US government initiated a seizure against Erdal Dere and Faisal Khan.[36] Dere owns and operates Fortuna Fine Arts, Ltd and Khan is his long-time associate and co-conspirator. The defendants were indicted for an audacious years-long conspiracy to defraud buyers and brokers in the antiquities market with the use of false provenance documentation. Dere was charged with aggravated identity theft after misappropriating the identities of deceased collectors and using their names to

35 A legal standard for such requests.

36 *U.S. v. Dere and Khan*, No. 1:20-cr-00501 (S.D.N.Y. 15 September 2020).

fraudulently establish fabricated provenance for looted antiquities. Khan then assisted Dere in procuring buyers in the United States and abroad. The scheme was far-reaching, and included an unnamed New York auction house.

Yet this was not the defendants' first problem with the law. Fortuna Fine Arts, Ltd had come under scrutiny on multiple prior occasions.[37] In 1993, the FBI confiscated items smuggled from Aphrodisias in Turkey by the company, and in 2018, the Manhattan District Attorney issued a seizure warrant for an Etruscan terracotta vessel due to concerns that it was illegally exported. In fact, Dere's father had purportedly been arrested and released by Turkish police for his connection to a smuggling ring before moving to the United States decades ago. He was implicated in the smuggling of a marble sarcophagus depicting the 'twelve labours of Hercules'. The sarcophagus was intentionally and irreversibly damaged to smuggle it more easily; the smugglers sliced the large object into pieces. A part of the sarcophagus made its way to the Getty Museum, which repatriated it to Turkey in 1983. The United States government now demands that Dere and Khan forfeit the objects in their possession, in addition to the funds earned from the sale of antiquities that were accompanied with fabricated provenances.

Another dramatic seizure involved the illicit transportation of Egyptian artefacts into the United States. Ashraf Omar Eldarir was indicted on two counts of smuggling after he imported looted Egyptian antiquities into the United States.[38] One count concerns approximately 590 artefacts, while the second involves a polychrome relief. The large cache was seized at New York's JFK Airport in January 2020 after Eldarir, a US citizen, arrived from abroad with three suitcases filled with undeclared Egyptian antiquities. Among the items were gold amulets from a funerary set; a relief with the cartouche of a Ptolemaic king that was originally part of a royal building or temple; wooden tomb model figures with linen garments dating to approximately 1900 BCE; and two complete Roman period funerary stelae of the type found at Kom abu Bellou in Egypt.[39] Eldarir falsely declared that he was carrying goods valued at US$300. In addition, he did not have legal documentation authorising the export of the artefacts from Egypt. The pieces had been recently removed from a dig site, as indicated by the presence of loose sand and dirt that fell out of the suitcases after officials opened them. Some of the items also smelled of wet earth, which was a further indicator that they had been recently excavated. If convicted, Eldarir faces a prison sentence of up to 20 years for each count. The indictment followed an investigation by US Immigration and Customs Enforcement and US Customs and Border Protection. Eastern District of New York US attorney Richard P Donohue stated: 'These cultural treasures traveled across centuries and millennia, only to end up unceremoniously stuffed in a dirt-caked suitcase at JFK.'[40]

But perhaps the most interesting government seizure in 2020 involves the storied 'Gilgamesh Dream Tablet', a looted cuneiform tablet exhibited in the Museum of the Bible and acquired by Hobby Lobby in 2014.[41] However, this was not Hobby Lobby's first problematic acquisition. From 2009, representatives of Hobby Lobby had purchased thousands of Biblical-era artefacts from Iraq that were intended for the future Museum of the Bible. However, the artefacts were actually looted and then shipped to Hobby Lobby with

37 www.theartnewspaper.com/news/two-manhattan-antiquities-dealers-arrested-on-charges-of-years-long-fraud-scheme.

38 *U.S. v. Ashraf Omar Eldarir*, No. 1:20-cr-00243 (E.D.N.Y. 2 July 2020).

39 www.justice.gov/usao-edny/pr/brooklyn-man-indicted-cultural-artifacts-smuggling-charges.

40 id.

41 The Museum of the Bible was founded by Steve Green, the president of Hobby Lobby, in 2017.

false provenance information. The information falsely claimed the items came from Israel or Turkey to avoid mention of Iraq as the true country of origin, due to public knowledge about extensive looting from that nation. In 2017, in response to a civil forfeiture action filed by the Eastern District of New York,[42] Hobby Lobby agreed to forfeit US$3 million to the US government and return over 5,500 artefacts to Iraq.

On 18 May 2020, the Museum of the Bible faced yet another front-page antiquities controversy when the United States filed an *in rem* proceeding against the Gilgamesh Dream Tablet. The small tablet was one of a dozen found in 1853 in modern-day Iraq and depicts what is believed to be the oldest work of literature, the epic of Gilgamesh. The tablet at issue was allegedly illegally imported into the United States. Artefacts found within Iraq's borders are subject to patrimony laws. These laws vest ownership of objects found within its borders to the Iraqi state, and prohibit their export. In addition to those laws, the US has placed import restrictions on Iraqi cultural property since 1990, and then again through the 2010 Iraq Stabilization and Insurgency Sanctions Regulations.[43] As such, the Gilgamesh Dream Tablet is considered stolen property under US law.

According to the government, the Tablet's provenance was falsified to show that the work had been discovered decades ago and had been inside a box purchased at a California auction in 1981. In truth, it had been purchased by a US dealer in London in 2003 and then brought to the United States. At the time, Iraq was experiencing widespread looting after the US invasion earlier that year. In 2013, the prior possessor of the Tablet (a dealer) contacted Christie's to consign the cuneiform piece for a private sale. The auction house contacted the dealer to confirm the provenance. Unusually, the dealer warned the auction house that the provenance would not withstand scrutiny and suggested that Christie's not use it in connection with a public sale. In response, Christie's offered the Tablet to Hobby Lobby via private sale. Hobby Lobby expressed concerns about the provenance but Christie's failed to provide the false provenance letter or the identity of the antiquities dealer after inquiries were made. Ultimately, Hobby Lobby purchased the Tablet for US$1.6 million from Christie's.

The day after the United States filed its civil forfeiture action, Hobby Lobby sued Christie's for breach of contract and fraud, seeking compensation and alleging that the auction house misrepresented the item's provenance. The case is ongoing and will doubtless prove interesting to the art community at large.

III CONCLUSION

A number of legal controversies in 2020 faced delays due to the coronavirus pandemic. As government offices, court houses, arts institutions, businesses and law firms reopen in 2021, the art market will be eagerly awaiting the outcomes of these matters.

42 *United States of America v. Approximately Four Hundred Fifty (450) Ancient Cuneiform Tablets; and Approximately Three Thousand (3,000) Ancient-Clay Bullae*. The author of this chapter consulted with the Eastern District of New York on this matter.

43 31 C.F.R. Part 576.

Chapter 2

RECENT DEVELOPMENTS IN THE ART MARKET

Tom Christopherson, Emelyne Peticca, Mona Yapova and Samuel Milucky[1]

The year 2020 has been one of uncertainty and challenge for the art market at least as much as for any other sector, with the market having to address the challenges of significantly increased levels of regulation while at the same time dealing with the real-time effects of the covid-19 pandemic and the uncertainties around the looming departure of the UK from the EU. With the UK accounting for the second largest share of the global art market,[2] the fact that all these factors bear most directly on the market in the UK will have both positive and negative effects on its competitor markets, while they in turn face their own political and regulatory challenges and seek to respond to the exigencies of the post-covid-19 world.

Only time will tell how the art market responds to these pressures; at the time of writing, it remains uncertain whether there will be a trade deal between the UK and EU, what form such a deal might take and the impact on the art market this might have. Covid19 appears to be resurgent in many parts of the world, and plans to open markets and build a return to normality are subject to constant revision. Over and above these uncertainties, the introduction through 2020 for the EU art markets (including the UK) of anti-money laundering and counter-terrorism regulatory controls under the EU Fifth Anti-Money Laundering Directive requires art market participants to re-evaluate their way of doing business in a fundamental manner, going to the heart of the art market's core values of informality, flexibility and discretion.

This chapter evaluates current progress and speculates about likely impacts of the triumvirate of trials of Brexit, covid-19 and greater regulation. The outcomes may be uncertain, but it is becoming clearer that the art market in five years' time will look different in many respects from the one we thought we knew on 31 December 2019.

At the time of writing, the UK and EU negotiators remain locked in the second or third last chance saloon for negotiations around a trade deal and it is difficult to predict whether there will be a comprehensive deal, a limited deal, a limited deal with grounds for later expansion or no deal at all. As with all sectors, this makes planning for art market participants extremely difficult and the effects of increased restrictions on trade between the UK and the EU would be significant for the art markets on both sides of the English Channel.

Not all cultural goods have enjoyed the freedoms offered by the EU single market, with items deemed by individual Member States to be 'national treasures' reserved to Member States' own policies by Article 36 in Chapter III of the Lisbon Treaty and its forebears. Nevertheless, the loss of the single market rights will impact on UK dealers' and auctioneers'

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2 *The Art Market 2020*, Clare McAndrew, Art Basel and UBS report, p. 17.

ability to move art easily and quickly around the EU and even if a trade deal is reached, Brexit is likely to result in significant delays and additional bureaucracy for those UK art market participants who have relied upon trade around the EU without customs declarations and border checks. Customs checks, transport delays and inadequate port facilities on either side of the Channel are likely to impede the swift movement of goods; by way of example, the UK has issued a list of 'designated ports' through which items requiring CITES licences must be shipped.[3] Reversing an earlier decision to exclude Dover and Eurotunnel from the list of CITES-designated ports was a welcome response to outcry from the art market, which relies heavily on these ports for art movements to and from the EU. However, the need for CITES licences for what had previously been intra-EU trade, and the requirement for licence verification at the port, will add to portside delay. This will be significant for an art market that has become accustomed to real-time transfers of works of art for auctions, art fairs, travelling exhibitions and private views between London and other art market centres around the EU.

Another Brexit-related challenge for the UK art market will be the likely restrictions on the movement of people to and from the EU. In maintaining its global entrepôt status for art transactions, and the key relationships that underpin such transactions, London has relied upon its ability to draw upon a reservoir of diverse and suitably educated personnel from across the EU, with wide-ranging linguistic and cultural skills to service an international clientele. While the ICM Unlimited and SQW report into the impact of Brexit on the arts and culture sector[4] was prepared for the Arts Council and concerned with the art world beyond the art market, its findings have resonance for the trade as well. A key finding of the ICM Unlimited report was that 'while only a minority of the organisations included in this survey employ EU nationals, this rises to a majority of the workforce among larger organisations and among organisations based in London'.[5] A similar situation applies for the London art market catering for an international clientele, often with EU nationals playing important client-facing and relationship-building roles, in many cases having come to London through the wide-ranging arts-related education programmes run by the major institutions and auction houses.

While the UK government has taken steps under its EU Settlement Scheme to protect the status of EU citizens wishing to remain in the UK at the end of 2020, it remains to be seen whether the London art world will be able to maintain the flow from the EU of culturally well-informed talent coming to work in London in the years ahead. This challenge presents itself for the art market and also the body of educational establishments that up to now have fed it with culturally diverse talent.

A corresponding challenge for UK art businesses will be to maintain their EU connections, be they associates and partners or clients and potential clients, with the greater restrictions on travel in the EU for UK citizens that will involve visa waivers, permits and potentially, in some cases, specific licences. In an art world dominated by personal interaction

3 Trading CITES-related specimens through UK ports and airports from 1 January 2021: Designated land, sea and air ports for trading or moving CITES-listed endangered animals, plants, or their parts and derivatives from 1 January 2021, Department of Environment, Food and Rural Affairs, 14 October 2020 (www.gov.uk/guidance/trading-cites-listed-specimens-through-uk-ports-and-airports-from-1-january-2021).

4 *Impact of Brexit on the arts and culture sector*, ICM Unlimited report, 20 February 2018.

5 ibid., p. 51.

and relationships, underpinned by short-term, often immediate, travel and fast-moving deals, the bureaucracy and delay caused by these arrangements may prove to be a significant trading disadvantage, over and above the additional costs incurred.

It remains to be seen whether these changes in the trading landscape will lead to changes in the structure of the European art market. Paris would appear to be the most likely art market to gain from any increase in obstacles to communication and trade between the EU and the UK, particularly at the middle and lower price points in the market. Paris has a long-standing and well-developed infrastructure of auctioneers, dealers, agents and ancillary services and also an extensive collector base, making it an attractive environment within the EU single market for trade in medium- and lower-value items. Paris has long held a primary position within the EU (including the UK) in categories such as the decorative arts and ethnographic art, and some commentators predict that Brexit might provide an opportunity to extend this dominance across the spectrum, even to include contemporary art, which had been a particular strength for London.[6]

The same may or may not be the case at the top end of the international art market. For sales of works of art over US$5 million, the market is markedly global and London enjoys a dominant role in terms of the overall EU art market,[7] competing directly with New York and China. With much of the art at these levels being owned and traded across the world, London's ability to maintain its significant entrepôt role may be affected by Brexit less than sometimes feared; the 2020 Art Basel report estimated that EU sales only represented 20 per cent of total imports and exports from the UK,[8] with the lion's share of sales (by value) coming from and returning to the rest of the world and (presumably) without direct effect from Brexit.

One of London's traditional advantages over Paris has been its relatively lighter regime in areas such as general business administration and taxes. It is possible that London's ability to leverage its greater independence from EU-inspired regulation might allow it to maintain and develop these advantages.[9] This approach does have historical precedent, with the international art market effectively moving from Paris to London in the 1950s and early 1960s, driven by regulatory and fiscal administrative burdens imposed on the Paris market. One area in which the UK might benefit from regulatory advantage post-Brexit is in relation to the introduction of the EU Cultural Goods Import Regulation[10] discussed below. Equally, matters might go the other way as a result of separate developments, such as the announcement in October 2020 that the UK might reduce or withdraw the value added tax (VAT) Retail Export Scheme (VAT-free retail for tourists) from 1 January 2021. As the art trade pointed out, this would put the UK art market at a disadvantage compared to its EU counterparts.[11] Similarly, the coming into force of the Ivory Act 2018 (following the Supreme Court's decision denying a claim for judicial review) will introduce controls on ivory sales

6 'Paris, the new London?' Louise Darblay, *ArtReview*, 11 October 2019.

7 *The Art Market 2020*, Clare McAndrew, Art Basel and UBS report, p. 47. Clare McAndrew points that the EU's 32 per cent share of the global art market in 2019 would have dropped to 12 per cent with the UK's contribution removed for that year.

8 ibid., p. 47.

9 'Why Brexit Is a Golden Opportunity for the U.K. Art Market', Clare McAndrew, *Artsy*, 30 August 2018.

10 'Brexit: what's next for the UK art market?' Daniel Dalton, *The Art Newspaper*, 31 January 2020 (www.theartnewspaper.com/comment/brexit-challenges-and-opportunities-for-the-art-market).

11 'Trade fears axe of VAT-free shopping for tourists after Brexit', Frances Allitt and Laura Chesters, *Antiques Trade Gazette*, 31 October 2020, p. 4.

in the UK market that will be substantially more far reaching than in the EU or elsewhere, Furthermore, extra-EU regulatory advantage might also be partially offset for the London market by the effects of the new anti-money laundering regulations that are taking effect across the EU and the UK, as discussed below.

At this point several leading galleries, including David Zwirner and White Cube, have moved to open new premises in Paris and others are rumoured to be following them. Sotheby's and Christie's have maintained active salerooms in Paris since the French auction market was opened to foreign competition in 2001. Recent Paris sales at both auction houses have grown significantly, with Sotheby's increasing its French sales by a surprising 41 per cent from 2018 to 2019.[12] These developments indicate that major art market participants are hedging their bets between London and Paris; perhaps this might lead to the development of two leading European markets, with London continuing to offer a venue for art at higher price points for a global audience and Paris developing a leading role in the higher-volume middle and lower price ranges, catering for a strong domestic and intra-EU market.

Drawing the EU art market into the ambit of anti-money laundering and counter-terrorism regulated sector under the Fifth Anti-Money Laundering Directive will have an impact on both the EU and UK art markets, as the UK has made clear that Brexit will not interfere with its implementation of the Directive. Indeed, the regulations might have a disproportionate effect on the London market and its greater focus on international transactions, potentially reducing its historical regulatory advantage over its continental rivals.

The new anti-money laundering regulations apply to individual or linked transactions above a threshold of €10,000, where such transactions are for 'works of art', which (in the UK iteration) catches paintings, sculptures, limited edition ceramics, photographs and tapestries but does not include works of decorative art, furniture, jewellery and collectibles such as coins, stamps and cars.[13] The regulations, which in the UK came into force for the art market in January 2020, will have three principal effects: additional administration and bureaucracy for regulated entities; two levels of customer diligence (depending on the nature of the transaction and the parties); and levels of disclosure and transparency not hitherto seen in the art market (and not seen in competitor art markets outside the EU).

The regulatory requirements for nominated money laundering reporting officers and staff training programmes, as well as for procedures to identify, record and track clients, will presumably be helpful in combating potential money laundering through the art market in the EU. To banks and other financial institutions, these may appear to be extensions of normal practice, but to the art market they constitute cultural change and not insignificant cost for a market largely consisting of small businesses often dealing in high volumes at relatively low values. The largest area of cultural change concerns the identification of clients behind the parties with whom the art market participant is transacting, be they the principal acting through an agent, the ultimate beneficial owner of a corporate entity or chain of entities, or the principal beneficiary of a trust. While this may appear entirely sensible when looking to identify malefactors operating through third parties and behind corporate veils, it causes considerable difficulties for a market that has always depended on individual relationships

12 *The Art Market 2020*, Clare McAndrew, Art Basel and UBS report, p. 134.

13 The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 [SI 2017/692], as amended by the Money Laundering and Terrorist Financing (Amendment) Regulations 2019 [SI 2019/1511]. The definition of works of art derives from Section 21(6) of the Value Added Tax Act 1994, as amended.

and where many participants' assets are not the art being sold but their client lists and client contacts; disclosure of these to competitors represents a material business risk. Existing regulations were written for the financial sector and sit uncomfortably with the structure and business model of the art market, which is struggling to adapt to the regulations in an effective manner while preserving levels of business.[14] It is particularly unfortunate that this process of reconstruction is required at the very time covid-19 is having such a widespread impact on the art market and its related businesses, with many having to fight to stay afloat.

It remains to be seen whether the EU art market will be able to adapt to operate effectively under the new regime, particularly in the absence of similar regimes in competing markets around the world. In the UK, there have been attempts to create an effective and balanced interpretation of the regulations for the art market, in the form of the British Art Market Federation's Guidance on Anti Money Laundering for UK Art Market Participants[15] (the Guidance) and through continuing discussions with HM Treasury and HM Revenue and Customs, which is the new anti-money laundering supervisory body for the UK art market. However, there remain several areas of uncertainty over important aspects of the regulations, in particular concerning the extent of disclosures required to ensure effective due diligence while preserving the exclusivity of relationships that underpins the art market. In the relationship chains that characterise many art transactions, a due diligence free-for-all would lead to significant duplication, while unnecessary disclosure of client identities to competitors would be a serious threat to many businesses. The existing 'reliance' provisions in the regulations (which seek to avoid duplication of effort by allowing one regulated party to rely upon the due diligence carried out by another) do not appear to assist in the art market context. The Guidance seeks to address the issue by identifying the 'customer' on whom due diligence is required and the party responsible for that due diligence, thereby avoiding the need for all participants in a transaction to conduct due diligence on all the other participants. The Guidance effectively seeks to identify the 'hub' in each transaction, at the point the participants acting on the buyer's side meet the participants who in one way or another act for the seller. That hub – the clearest example being the auctioneer in an auction – has responsibility for investigating both buyer and seller and their intermediaries, but the due diligence obligation of those on either side of the transaction is restricted to other parties on their side of the deal. However, the matter remains complex and to an extent uncertain in the context of the wide variety of art market transactions. It will be a challenge to achieve a successful balance between the apparently contradictory forces of effective due diligence and client confidentiality between competitors, but this will be fundamental to enable regulated art markets to operate effectively in the UK and in EU Member States.

The money laundering regulations might have a disproportionate effect on the London (as opposed to the wider UK) art market, which by its nature is likely to give rise to a higher proportion of circumstances requiring 'enhanced' due diligence. This possibility arises from the high-value and highly international nature of the London art market. The major auction houses have dedicated compliance teams and long experience of many of the obligations of

14 'UK Dealers Are Scrambling to Make Sense of "Burdensome" New Anti-Money Laundering Regulations Quietly Passed Over the Holidays', Naomi Rea, Artnet (https://news.artnet.com/market/anti-money-laundering-regulations-uk-1749087).

15 Guidance on Anti Money Laundering for UK Art Market Participants, British Art Market Federation approved by HM Treasury, 24 January 2020 (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879925/BAMF-AML-Guidelines-approved-by-HMT-24-Jan-20.pdf).

the new regulations, but this is less the case among the dealer and gallery community who make up more than half the market. Both dealers and auctioneers in London benefit from a dazzlingly wide array of clients from almost every continent and it is this that underpins London's entrepôt status and its dominance in the EU art market. However, it is also this factor that requires greater focus on due diligence, with a more challenging clientele requiring resources and expertise, delay, uncomfortable client interactions and, always, cost. The ability of the London market, and its supervising authority, to address these issues in an effective but commercially sensitive manner will be particularly important.

London's principal competitors on the international stage are not at the time of writing subject to equivalent anti-money laundering rules. In the United States, dealers and auctioneers are not subject to the equivalent regulations under the Bank Secrecy Act 1970 and although the recent Senate inquiry into sanctions breaches[16] indicated that tighter regulation might be needed, the focus was on the authorities' domestic enforcement of international sanctions regulations and not on money laundering per se. There have been attempts to introduce anti-money laundering regulations for the US art market, the most recent being in 2020,[17] and it is likely that the United States will in time enact regulations that are similar to those of the EU, but progress is difficult to predict in the current political climate.

In September 2020, the Securities and Futures Commission of Hong Kong issued a formal consultation on proposed revisions to the province's money laundering and counter-terrorism guidelines for licensed corporations and associated entities. The proposals were prompted by the Risk-Based Approach Guidance for the Securities Sector, published by the Financial Action Task Force in October 2018, and bear a resemblance to many of the provisions of the EU Fifth Anti-Money Laundering Directive except that they do not appear to propose adding the Hong Kong art market to the regulated sector.

One future regulatory development for the EU is already in place, the Cultural Goods Import Regulation,[18] adopted in 2019 but which will come into effect over the next few years (with parts contingent upon the development of necessary electronic licensing processes). The regulation is complex and was much criticised by the art market during consultations, principally for its breadth and lack of detail.[19] In essence, the Regulation requires EU importers of 'high-risk' items (such as archaeological finds that are more than 250 years old) to provide the necessary export licences from the country of origin or discovery and, for other objects (cultural objects that are more than 200 years old with a minimum value of €18,000), they must provide an 'importer statement' in standardised form, confirming that the object has not been unlawfully exported from its country of origin or discovery. In both cases, there are provisions addressing objects that have been in countries other than their source country for more than five years, but failure to meet the requirements will prevent the importer from obtaining an EU import licence. In imposing high barriers to entry for non-EU cultural goods, the regulation will make it much more difficult to import such goods into the EU.

16 www.hsgac.senate.gov/subcommittees/investigations/media/07/29/2020/portman-carper-bipartisan-report-reveals-how-russian-oligarchs-use-secretive-art-industry-to-evade-us-sanctions.

17 'Senate investigation finds that oligarchs use art industry to avoid sanctions', Buckley LLP, 27 August 2020 (www.lexology.com/library/detail.aspx?g=46e539cc-b08a-45ca-a655-49a53656ec3d).

18 Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and the import of cultural goods PE/82/2018/REV/1.

19 'The Proposed EU Regulations on the Import of Cultural Goods', Pierre Valentin and Fionnuala Rogers, *Art@Law*, 15 January 2019 (www.artatlaw.com/blogpost/the-proposed-eu-regulations-on-the-import-of-cultural-goods).

The UK might have a regulatory advantage in this area post-Brexit; it will not be required to implement the Cultural Goods Import Regulation and has intimated that it will be unlikely to do so. The UK already has an effective cultural goods export licensing system acceptable to the EU (a key requirement for goods imported into the EU under the new regulation) so might become a useful location for EU buyers of cultural goods with international origins to bring them into the UK or to sell them from the UK, thus underpinning the UK art market's traditional status as an international entrepôt and entry point to important EU markets.

Covid-19 continues to provide a stern test for all aspects of the art market, as with all areas of the global economy, and it is too early to assess with confidence what the economic effects of the pandemic will be. Art businesses rely heavily on personal and group interaction and have been hard hit by lockdowns, travel restrictions and social distancing restrictions around the globe. In the first half of 2020, it is estimated that art gallery sales fell by an average of 36 per cent[20] and leading auction house sales fell by 49 per cent.[21] Art fairs have been particularly hard hit for obvious reasons, with galleries reporting that in the first half of 2020, 16 per cent of their income came from fairs, down from 46 per cent in the previous year,[22] with this also having a wide impact on the range of ancillary businesses dependent on art fairs.

Within these undoubtedly dire figures there have been interesting developments. While major auction sales may have declined by 49 per cent in the first half of the year, this may be partially explained by the postponement of major sales in the hope of a release of restrictions or while alternative sale platforms were developed. In June 2020, Sotheby's held a five-hour hybrid 'live-online' auction for buyers and sellers across the world, which achieved US$362 million; Christie's followed in July with a similar format amassing US$420 million with 100,000 online viewers.[23] For some years the art market has been grappling with the opportunities and challenges presented by the online world, with growth in the lower price ranges and to some extent in the middle market, but relatively little change in approach at the top end of the market. The restrictions prompted by covid-19 have compelled art businesses to re-evaluate how to reach existing and new customers. Additionally, back-room sale processes, costs and traditional mechanisms (for example, lavish printed sale catalogues) have had to be vigorously pruned to meet an environment dominated by furlough, staff working from home and reduced sale volumes. As Bruno Vinciguerra, the chief executive of Bonhams, remarked 'It was bound to happen over a few years, and it only took a few months – never let

20 *The Impact of COVID-19 on the Gallery Sector: A 2020 mid-year survey*, UBS and Art Basel report, Dr Clare McAndrew, p. 7 (https://d2u3kfwd92fzu7.cloudfront.net/The_Art_Market_Mid_Year_Survey_2020-1.pdf).

21 'Art market report shows the severe impact of Covid-19', Melanie Gerlis, *Financial Times* (www.ft.com/content/ff6530b4-1c40-497c-bd23-c5a70e552401).

22 ibid.

23 'Art Auctions Embrace a Future of Socially Distant Bidding', *New York Times*, 22 October 2020 (www.nytimes.com/2020/10/22/arts/auctions-technology.html?searchResultPosition=1).

a good crisis go to waste.'[24] In the first half of 2020, the Artnet Price Database estimates that Christie's, Sotheby's and Phillips held more than 131 online sales – more than twice as many as in the equivalent period in 2019.[25]

Galleries have similarly turned to online strategies where possible, with total online sales estimated to have grown from a 10 per cent share of galleries' business in 2019 to 37 per cent for the first half of 2020.[26] At the time of writing, Asian Art in London 2020 is planned to be a mixed live and enhanced online event, with many galleries and the event organisers creating Instagram videos, blogs and virtual galleries to engage with existing and potential clients. A few art fairs have managed to open on a reduced footfall and organisers continue to experiment with new partnerships and online fair equivalents. Direct-to-consumer sales models such as Instagram have long been used by new artists who lack gallery representation, but there are signs that more established artists have also been using online sale platforms to approach buyers without intermediaries,[27] and setting up online viewing rooms.[28]

There is no doubt that covid-19 has had and is continuing to have a significant impact on art businesses across the spectrum, and that 2020 will go down as a year of reduced sales and a struggle to survive. For some, that struggle may be terminal, particularly those without the resources or business model to adapt to a socially distanced online world. However, it is quite possible that covid-19 has also pushed art firms into an in-depth re-evaluation of their businesses and that a restructuring of parts of the art market will necessarily follow. The combination of this existential threat to much of the market with the effects of Brexit and the exigencies of new and anticipated regulation will mean that the art market in 2025 may well look very different from that of 2019.

24 ibid.

25 'Business as Usual Went Right Out the Window: How Lockdown Forced Auction Houses Into the Future – for Good', Eileen Kinsella, Artnet (https://news.artnet.com/market/covid-19-auction-houses-intel-report-2020-1909853).

26 'Art market report shows the severe impact of Covid-19', Melanie Gerlis, *Financial Times* (www.ft.com/content/ff6530b4-1c40-497c-bd23-c5a70e552401).

27 'The Future of the Art World Is Direct-to-Consumer: As the Market Shifts Online, a Growing Number of Artists Are Thriving Without the Middle Man', Sarah Cascone, Artnet (https://news.artnet.com/market/artists-selling-direct-to-consumer-1900345).

28 'How Artists are Adapting their Work to Virtual Fairs and Online Viewing Rooms', Anny Shaw, *The Art Newspaper*, 17 June 2020 (www.theartnewspaper.com/news/art-basel-ovr).

Chapter 3

ASSIGNING BURDENS OF DILIGENCE IN AUTHENTICITY DISPUTES

William L Charron[1]

I INTRODUCTION

Fake and forged art are hardly new problems for the art market. As art has become more highly commoditised, however, particularly among wealthy collectors who have the means to litigate (in what can often be time-consuming and expensive processes), sales of fake and forged art have become increasingly high-stakes problems. The problem is perhaps at its zenith when a 'sophisticated' collector buys inauthentic art from a 'reputable' seller. If litigation erupts, both sides will accuse the other of having not acted reasonably to ascertain, or to more fully disclose facts concerning, the possibility of inauthentic art. This chapter discusses an emerging trend in United States law to favour the role of the sophisticated collector over that of the reputable seller in such disputes.

II BACKGROUND: THE PROBLEM OF DETERMINING ART AUTHENTICITY

An assertion or implication of an artwork's inauthenticity by a seemingly credible source can have a devastating impact on that artwork's market value. Owners may sue those who 'disparage' and devalue their art simply by stating or implying that their works are not genuine.[2]

Nevertheless, resolving the bottom-line question of whether an artwork is authentic is not itself a legal question. Authenticity determinations fall to experts, including most notably to connoisseurs and scholars of an artist, to provenance researchers and art historians, and to forensic scientists and materials analysts: the 'three-legged stool' of art authentication.[3]

The job of the courts is not proactively to assemble such evidence in search of the ultimate 'truth' about a work of art. Courts are reactive bodies, and their job is to weigh and judge the evidence that is presented by the parties through an adversarial process. Courts

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2 Compare *Gerald Peters Gallery, Inc. v. Stremmel*, 815 F. App'x 138, 139–40 (9th Cir. 2020) (reversing summary judgment dismissal of defamation/business disparagement claim brought by the gallery against an art dealer who criticised the painting's authenticity), with *Mayor Gallery Ltd. v. Agnes Martin Catalogue Raisonne LLC*, No. 655489/2016, 2019 N.Y. Slip Op 32089(U), at *14 (N.Y. Sup. Ct. 2019) (dismissing product disparagement and similar claims against the catalogue raisonné committee for declining to include works in the catalogue raisonné because the plaintiff signed a submission agreement providing for the committee to exercise sole decision-making discretion, without 'explanatory reasons for its decisions to include or not include works').

3 Leila A Amineddoleh, 'Are You Faux Real? An Examination of Art Forgery and the Legal Tools Protecting Art Collectors', *Cardozo Arts & Entm't L.J.*, Vol. 34:59 (April 2016), at 72–73 (*citation omitted*).

decide which side's particular evidence seems stronger in a given case and, thus, which side should win or lose in that case; but that does not necessarily mean that the art at issue is actually genuine. Indeed, there can be (and have been) strange and confusing decisions where artists or leading connoisseurs of artists have disavowed works as 'by the artist's hand', but courts have been impressed by 'flawless' provenance research that strongly indicates the work did leave that artist's studio.[4]

These decisions may produce eventual victories as between the litigating parties, but the art market can do little more than shrug its shoulders at the results (thereby leaving the 'victor' in a case with a piece of paper finding in its favour, but not necessarily with a marketable work). Some courts have openly acknowledged this problem and have declared, unabashedly, that 'the market place is the appropriate place to resolve authentication disputes', not courthouses.[5]

III THE COMFORT ZONE OF COURTS: ASSIGNING BURDENS AND RISKS

Where artwork authenticity remains an elusive judicial concept, evaluating the dynamics of sales transactions is not. Courts assign burdens of diligence and risks of loss all the time. These are societal, organisational and public policy questions that turn on the following issue: was the buyer fairly equipped to fully understand the gamble it was undertaking in

4 See *Arnold Herstand & Co. v. Gallery: Gertrude Stein, Inc.*, 211 A.D.2d 77, 79–83 (N.Y. App. Div. 1995) (rejecting three untested 'certifications of falsity' by the artist, Balthazar Klossowski de Rola, and reversing summary judgment determination of inauthenticity and remanding the issue for trial because the 'provenance here points only in the direction of authenticity'.); *Greenberg Gallery, Inc. v. Bauman*, 817 F. Supp. 167, 174–75 (D.D.C. 1993) (finding that, 'more likely than not', a mobile attributed to Alexander Calder was authentic based upon its 'impeccable provenance', notwithstanding 'the great weight that must be accorded . . .' to a leading connoisseur who rejected the work's authenticity, and explaining that '[t]his is not the market, however, but a court of law, in which the trier of fact must make a decision based upon a preponderance of the evidence'.), aff'd w'out op., 36 F.3d 127 (D.C. Cir. 1994). For a case where a court seemingly over-deferred to a putative expert over the word of the artist, and allowed a case to go to trial on that basis, see *Fletcher v. Doig*, 196 F. Supp. 3d 817, 821–23 (N.D. Ill. 2016) (declining to exclude purportedly 'expert' evidence by an individual who had no familiarity with the artist's works and who had direct financial stake in the outcome of the case because his 'education and experience g[a]ve him the foundation necessary to opine on the provenance of a work of modern art based on his analysis of the piece and a comparison with the artist's other acknowledged work'.).

5 *Thompson v. Andy Warhol Found. for the Visual Arts, Inc.*, 103 A.D.3d 528, 529 (N.Y. App. Div. 2013) (citing *Thome v. Alexander & Louisa Calder Found.*, 70 A.D.3d 88, 103 (N.Y. App. Div. 2009) ("The point is that a declaration of authenticity would not resolve plaintiff's situation, because his inability to sell the sets is a function of the marketplace. If buyers will not buy works without the Foundation's listing them in its catalogue raisonné, then the problem lies in the art world's voluntary surrender of that ultimate authority to a single entity. If it is immaterial to the art world that plaintiff has proof that the sets were built to Calder's specifications, and that Calder approved of their construction, then it will be immaterial to the art world that a court has pronounced the work "authentic".')); see also *Mayor Gallery*, 2019 N.Y. Slip Op 32089(U), at *9 (finding that decisions not to include works in the artist's catalogue raisonné were not 'statements that a work is inauthentic' but were merely decisions of non-inclusion in that catalogue raisonné). A recently launched, specialised arbitration and mediation tribunal based in The Hague, called the Court of Arbitration for Art (CAfA), promotes itself as being better able to achieve the twin goals of decisional accuracy and market legitimacy in resolving art disputes by offering specialised expert pools and international art lawyers as neutrals who are more familiar with the legal and evidentiary issues attendant to these disputes. See www.cafa.world. The author of this chapter is a founder and board member of the CAfA.

making its purchase? This is more familiar and comfortable ground for courts than having to 'decide' the authenticity of art, and this is where court decisions are more instructive to future buyers and sellers of art.

A seller of art may affirmatively represent and warrant a work's authenticity in a sales contract, thereby providing the buyer with some measure of insurance and comfort.[6] On the other hand, a seller may expressly disclaim any such representation and warranty, thereby raising a possible 'red flag' for the buyer from the start.[7] Or the seller may say nothing on the subject of authenticity, thereby requiring statutory or common law to address the void.[8]

Frequently a buyer of art who had the benefit of a seller's representation and warranty of authenticity may not discover that the work is inauthentic until after the contractual or statutory limitations (and refund) period has run.[9] At that point, at least in the United States where the principle of *caveat emptor* (buyer beware) runs deep, the buyer is required to show some reason why it did not, and could not reasonably have, ascertained the work's inauthenticity sooner. Effectively, that requires a buyer to allege that it was deceived and defrauded by the seller.

Fraud and deception involve, at their core, showing that material information concerning an artwork's possible inauthenticity was deliberately misrepresented or concealed by the seller, and that the buyer was not reasonably in a position to have appreciated the problem and to have acquired more complete information for itself.[10] When the buyer is wealthy and sophisticated, the questions of what it reasonably 'could' and 'should' have done to uncover evidence of fake or forged art are not necessarily black and white. When the buyer purchases from a 'reputable' seller who, moreover, is marketing on behalf of an anonymous current owner (which is an accepted art market norm), those questions become even murkier.

A few notable cases have recently addressed this dynamic, and buyers and sellers of art should take careful note. In particular, courts appear disinclined to credit arguments by reputable sellers that sophisticated buyers should presume that a work of art may be fake and undertake independent diligence, despite the seller's imprimatur.

i Sophisticated buyers and non-reputable sellers: ACA Galleries v. Kinney

A sales dynamic that the federal courts in New York found relatively easy to resolve involved a sophisticated art gallery buyer and a non-reputable seller of art. In *ACA Galleries, Inc. v. Kinney*, the court unhesitatingly saddled the buyer with the risk of loss where it purchased fake art from an unknown seller, and where the buyer had apparently hoped to authenticate the art – and to substantially mark it up in price – later.[11]

6 See, e.g., *Fertitta, III v. Knoedler Galler, LLC*, No. 1:2014cv02259 (JPO), 2015 WL 374968, at *8–9 (S.D.N.Y. 29 January 2015) (denying motion to dismiss breach of warranty claim by the seller's alleged agent who helped to sell fake art).

7 See, e.g., *Overton v. Art Fin. Partners LLC*, 166 F. Supp. 3d 388, 401 (S.D.N.Y. 2016) (discussing how 'red flags' or 'warning signs' in art deals may create heightened duties of diligence).

8 In New York, for example, there is a statutorily imposed presumption that an artwork's authenticity is part of the 'basis of the bargain' and, therefore, is warranted as a matter of law by a seller who is an art 'merchant' selling to a non-merchant. N.Y. Arts & Cult. Aff. Law § 13.01.

9 E.g., *Fertitta*, 2015 WL 374968, at *8, N.Y. Arts & Cult. Aff. Law 9.

10 E.g., id.; *Greenway II, LLC v. Wildenstein & Co.*, No. 19 Civ. 4093 (JCM)(RWL), 2019 U.S. Dist. Lexis 175822, at *10 (S.D.N.Y. 8 October 2019).

11 *ACA Galleries, Inc. v. Kinney*, 928 F. Supp. 2d 699 (S.D.N.Y. 2013), aff'd, 552 F. App'x 24 (2d Cir. 2014).

The seller in *ACA*, an individual and non-dealer of art from North Carolina, contacted the buyer-gallery in New York by email with an offer to sell a purported Milton Avery oil painting.[12] The seller shipped the painting to the gallery for an unfettered inspection.[13] The gallery's president inspected the painting, believed it to be authentic, and authorised its purchase for US$200,000, without any representations or warranties of authenticity by the seller.[14] After buying the painting, the gallery then contacted the Milton Avery Foundation soliciting an authentication opinion; but the Foundation determined the work to be inauthentic.[15] The gallery demanded a refund, which the seller refused to give.[16] The gallery sued the seller for breach of contract/mutual mistake of fact and for fraud.[17]

Despite uncontested evidence that the painting was a fake, the district court awarded summary judgment dismissing the gallery's claims.[18] In particular, even assuming an intent to deceive by the seller, the court found intolerable the gallery's conscious, and apparently strategic, avoidance of the Avery Foundation during its diligence efforts.[19] The court dismissed the gallery's breach of contract/mutual mistake of fact claim because 'the doctrine of mutual mistake "may not be invoked by a party to avoid the consequences of its own negligence"'.[20] The gallery 'was aware of [its] limited knowledge but acted anyway'.[21] The court similarly dismissed the gallery's fraud claim because 'a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it'.[22] The court specifically found that 'ACA cannot establish justifiable reliance because it had the opportunity to fully investigate the authenticity of the painting but failed to do so'.[23]

The appellate court affirmed, putting a finer point on the fact that the buyer had its eyes open to the (mis)calculated gamble it was taking:

> *ACA was aware that an authentication by the Foundation 'would make the painting more saleable at a higher price'. . . . ACA could have accepted the higher price that accompanies certainty of authenticity, but chose instead to accept the risk that the painting was a forgery. The contract is not voidable merely because the consciously accepted risk came to pass.*[24]

The result in *ACA* is a cautionary flag that 'buyer beware' operates with full force when a sophisticated buyer acquires art from a non-merchant seller who does not warrant authenticity (the proverbial 'back of a turnip truck' transaction). But sophisticated buyers are more likely

12 928 F. Supp. 2d at 700.
13 id.
14 id.
15 id., at 701.
16 id.
17 id.
18 id., at 701–04.
19 id., at 702.
20 id., at 701 (*citation omitted*).
21 id., at 702.
22 id., at 703 (*citation omitted*).
23 id.
24 552 F. App'x at 25.

to deal with reputable, merchant art dealers. How the courts assign burdens of diligence and disclosure in those transactions are more significant issues to the market. Two post-*ACA* cases illustrate that the buyers appear to be receiving the benefit of the doubt in such sales settings.

ii Sophisticated buyers and reputable sellers: Hilti v. Knoedler Gallery

Shortly after *ACA* was decided, its limits were put to the test by a formerly reputable seller of art against claims brought by a wealthy and sophisticated collector. In *Martin Hilti Family Trust v. Knoedler Gallery, LLC*, the buyer of a fake Mark Rothko painting sued what had been one of the most prestigious art galleries in the US (prior to its abrupt closure due to the revelation that it had been selling fake modern art for over a decade).[25]

The buyer had purchased the painting in 2002, and, while the gallery had warranted the art's authenticity, the statute of limitations on that warranty had long run.[26] The question, therefore, was whether the buyer had been placed on sufficient 'inquiry notice' that its painting was a fake such that its fraud and civil racketeering claims were also time-barred.[27] The court rejected the gallery's motion to dismiss these claims.[28]

The most relevant facts are that the gallery had provided the buyer with an invoice and fact sheet offering a purported provenance and exhibition history of the painting (while maintaining the current owner's anonymity), together with a copy of a letter from the director of the Mark Rothko Catalogue Raisonné Project indicating that the painting would be included in a potential catalogue raisonné supplement.[29] The gallery additionally provided a copy of a *New York Times* article commending the quality of the painting.[30] The gallery's president had also touted the painting as a 'fantastic Rothko' and had shipped the painting to the buyer in Europe so that it could 'live with it' before deciding whether or not to buy.[31] During that time the buyer's curator examined the painting's aesthetics and condition and determined that it was appropriate for the buyer's collection.[32]

Relying heavily on the decision in *ACA*, the gallery in *Hilti* argued that the buyer had been put on inquiry notice of inauthenticity through several purported red flags, including: (1) the buyer's curator should have ascertained that the painting was a fake during his examination; (2) the *New York Times* article's report that the painting had been exhibited at a particular fair, which was not included in the gallery's fact sheet, should have alerted the buyer that the gallery's purported background for the painting was false; and (3) a later essay by an art historian, which mentioned the painting and described a different provenance than that represented by the gallery, should have put the buyer on notice that the gallery's background information about the painting had been false.[33]

The court in *Hilti* declined to extend the principle of *caveat emptor* to the buyer on the bases of these facts. Underlying its decision, the court found that 'Hilti purchased the purported Rothko from Knoedler – at that time, one of the most established and reputable art

25 *Martin Hilti Family Tr. v. Knoedler Gallery, LLC*, 137 F. Supp. 3d 430 (S.D.N.Y. 2015). The author of this chapter represented the plaintiff in the case.

26 id., at 465–66.

27 id., at 461–62.

28 id.

29 id.

30 id.

31 id.

32 id.

33 id.

galleries in the world'.[34] The gallery's reputation, its warranty, its offering of purported facts about the painting (within the accepted norm of not disclosing the current owner's identity), and its president's, as well as the *New York Times*', proclamations of the painting's excellence, were all hallmarks of a bona fide transaction and painting that did not give any reason, 'as a matter of law', to impose a heightened duty of diligence on the buyer.[35] At one point the court labelled the gallery's position as 'frivolous'.[36] Relying on an earlier, pre-*ACA* decision against the same gallery by another, similarly situated victim of this scandal, the court found that the buyer in *Hilti* had 'no reason to suspect the authenticity of their painting' at the time of purchase, and thus had no reason to conduct independent diligence into the painting.[37]

The decision in *Hilti* reflects an important boundary on the principle of 'buyer beware' in the high-stakes art market. The gallery in that case and in related cases repeatedly contended that society should not tolerate a world where wealthy buyers may spend more time test-driving a new car than testing the authenticity of a multi-million dollar painting for sale. While this argument may have sound bite appeal, it is overly facile.

For one thing, the argument disregards the fact that new cars, unlike paintings (and purported masterworks in particular), are fungible products. A potential buyer of a car can take considerable time deliberating with the comfort of knowing that there are multiple versions of the same car available to be sold. The same is not true of original art. The urgency to buy and the 'heat' that is brought to bear on a potential buyer of original art is qualitatively different from the 'new car' scenario.

Second, the diligence that must be conducted into an artwork's authenticity (the 'three-legged stool' factors of connoisseurship, provenance and forensic science) is considerably more than a test drive. It seems unreasonable to impose the duty to conduct such extensive (and, with respect to scientific analysis, invasive) examinations on potential buyers of even high-value art; and it seems equally unrealistic to expect that sellers of such art would agree to hold or surrender the art for such pre-sale examinations.

Third, the role of a reputable seller in an art transaction is key. A buyer of a purported Rolls Royce from a Rolls Royce dealer is unlikely to have the car's engine tested to ensure that it actually originated from a Rolls Royce factory; some facts seem worthy of being accepted as true at face value. The decision in *Hilti* evidences that the same should be true for art, particularly where a reputable dealer commands behind-the-scenes knowledge about the art's background that will not be revealed to the buyer as a matter of market customs and norms.[38]

iii Somewhere between ACA and Hilti: Greenway II v. Wildenstein & Co

The reasoning of *Hilti* was recently embraced in the case of *Greenway II, LLC v. Wildenstein & Co* at the motion to dismiss stage, although with a potentially important qualification that may eventually lead this case to follow the reasoning of *ACA*.[39]

The wealthy buyer in *Greenway* (a trust) had purchased a painting in 1985 purportedly by Pierre Bonnard from a dealer with 'an established reputation as an expert in French

34 id., at 461.

35 id., at 461–62.

36 id., at 462.

37 id. (citing *De Sole v. Knoedler Gallery, LLC*, 974 F. Supp. 2d 274, 298 (S.D.N.Y. 2013)).

38 See id., at 446 ('Purchasers of Rosales Paintings were never told that Knoedler had repeatedly changed its account of the provenance of the Rosales Paintings.').

39 2019 U.S. Dist. Lexis 175822.

Impressionist art, and particularly in the work of Bonnard'.[40] Following revelation that the painting is a forgery, the buyer's successor-in-interest sued the dealer for fraud, alleging that the dealer had expressly represented the painting's authenticity to the buyer at the time of sale, while failing to disclose that the work was not included in the Bonnard catalogue raisonné.[41]

The dealer moved to dismiss upon the argument that the buyer 'was a sophisticated collector and that he had an obligation to conduct his own due diligence' rather than rely solely on the dealer's representation.[42] In particular, the dealer argued that the buyer should have consulted the Bonnard catalogue raisonné for itself.[43] That fact, according to the dealer, should have caused the buyer to doubt the dealer's representation of the painting's authenticity.[44]

The court rejected the dealer's argument as 'obviously meritless', at least at the pleadings stage.[45] Relying on the dealer's reputation and the decision in *Hilti*, the *Greenway* court found that the buyer of the painting 'did not have a duty to look behind Wildenstein's representations'.[46] This is one of the most significant takeaways from *Greenway*: the dealer had basically advocated for a ruling, as a matter of law and at the pleadings stage, that sophisticated buyers of art should presumptively suspect that the art may be inauthentic and conduct independent diligence, despite a reputable seller's approbation and even guaranty of the art's authenticity. The *Greenway* court refused to go that far, explaining:

> *[T]he usual rule is that there is ordinarily no duty for a party to a transaction to exercise due diligence in the absence of an obvious fraud . . . . No fact alleged in the complaint tends to show that [the buyer] was or should have been on notice that Wildenstein was lying to him about the Painting's authenticity – which is the only thing that might have triggered any duty by the [buyer] to investigate the matter further.*[47]

Nevertheless, the court noted the possibility that discovery might show 'the pleaded facts are wrong', and that the buyer 'was in fact a sophisticated collector in 1985 who knew about the Bonnard catalogue raisonné, or at least that he had the means available to learn on his own that the Painting was not included in the catalogue'.[48] Were that to be the case, then the court left room for a possible summary judgment dismissal based upon the buyer's inability to establish justifiable reliance because, as in *ACA*, the buyer may have consciously disregarded reasonably available information.[49]

The results in *Greenway* and *Hilti* should give comfort to sophisticated buyers that, at least at the pleadings stage, reliance on a reputable seller's representation of authenticity is per se 'justifiable', provided there are no other pleaded facts that indicate the representation was false. The risk of caveat emptor seems allayed by a reputable seller's guaranty.

If facts later come to light showing that the buyer had reasonable cause to doubt the seller's guaranty, however, then the principle of 'buyer beware' may resurge. Just what

40 id., at *4.
41 id., at *10.
42 id.
43 id.
44 id.
45 id.
46 id., at *12.
47 id., at *12–13 (*citation omitted*).
48 id., at *11.
49 id., at *10–12.

cause may be 'reasonable' will be case-specific. Moreover, whereas the courts in *ACA* were particularly troubled by the gallery-buyer's intent to flip the art in that case after authenticating it, the court in *Greenway* might ultimately find that a collector-buyer who was not looking for an immediate and profitable resale may have more legitimately relied on the dealer's representation of authenticity without doing anything further, despite information from the relevant catalogue raisonné suggesting a possible problem with the work.

IV CONCLUSION

Sophisticated buyers of art should, in the first instance, know their sellers. If the seller is reputable, then even a wealthy and sophisticated buyer should be entitled to rely on the seller's warranty of authenticity, without presuming the warranty to be false and without conducting independent diligence. If it can be shown that the buyer appreciated a potential problem with the art's authenticity and turned a blind eye to other reasonably available sources of information concerning the art, that buyer stands a greater risk of loss. In the absence of such facts, however, reputable sellers seem unlikely to shift the loss based upon hindsight arguments that their buyers should have viewed the sale dynamics with automatic suspicion from the start.

Chapter 4

ART DISRUPTION – ART AND TECHNOLOGY IN THE TWENTY-FIRST CENTURY

Massimo Sterpi[1]

I INTRODUCTION

Nowadays, the concept of art is evolving at an extraordinary and exponential speed, and the impact of technology on art is completely changing the concepts of creation, distribution and ownership of artworks.

Artists were among the first to experiment with the 'disruptive technologies', sometimes even delegating most of the creative process to artificial intelligence (AI) or creating artistic autonomous entities that can replicate themselves based on blockchain and smart contracts; at the same time, new technology is also impacting how art is distributed and traded, from the tokenisation of artworks to the creation of art-based cryptocurrencies.

This chapter presents a comprehensive analysis of the impact of new technologies on art and is divided into two main parts: the creation of artworks and new art market services.

II CREATION

With reference to the relationship between art and technology, it should be first pointed out that the Greek word *téchne* indicated both the concept of art and that of technology. In our time, on the other hand, we distinguish 'artistic creativity', which primarily has a symbolic and communication value, from 'technical creativity', which primarily has the purpose of solving functional problems. However, in both cases there is a creative act at the origin. Today, this distinction is disappearing with the overwhelming entry/utilisation/exploitation of technology in the process of artistic creation, as well as in the distribution of works, thus returning to a more unitary meaning of *téchne*.

i Blockchain and smart contracts

To explain how blockchain technology can contribute to the creation of art, we discuss an artwork conceived by Primavera De Filippi,[2] a software scientist turned artist (and not the only one, as discussed below).

1 Massimo Sterpi is a partner at Gianni & Origoni.

2 Primavera De Filippi is a permanent researcher at the National Center of Scientific Research in Paris, a faculty associate at the Berkman Klein Center for Internet & Society at Harvard University and a visiting fellow at the Robert Schuman Centre for Advanced Studies at the European University Institute.

Her artistic project *Plantoid* was conceived with the goal of showing the potential of technology in creating blockchain-based life forms, meaning independent algorithmic entities capable of sustaining and reproducing themselves autonomously, without human intervention.

How does *Plantoid* work?[3] It is made up of metal sculptures as well as software embedded directly in a blockchain (generating a distributed autonomous organisation). More specifically, it is formed by a series of plant-like metal sculptures, characterised by individual distinctive DNA structures (e.g., rules about their shapes and relationships with donors), associated with a unique digital wallet accepting cryptocurrency from the public. Each plantoid thanks every donation received by moving itself and by playing sounds and lights, in a kind of machine dance. Upon receipt of a predetermined amount of money in a wallet related to a plantoid, a smart contract registered in the blockchain system automatically launches a competition to design a new plantoid, different but based on the same basic DNA. Among all of the projects received from (still human) designers, the donors (bees) select the winning project by sending micro sums to the preferred project. The winning designer then receives the sum in cryptocurrency through a smart contract and he or she can create a new plantoid. And so on. Thus, *Plantoid* is an autonomous system that could invade the planet with a potentially infinite number of plantoids.

Another example of a conceptual artistic project based on blockchain technology is the 'Scarab' experiment, aimed at creating an artist collective bound by a single cryptocurrency, named the Scarab.[4] For each Scarab project, a thousand people submit one or more artworks and receive a Scarab token in return. Those who have received the Scarab token vote to choose which of the received artworks will be mixed by an AI charged with the task of digitally manipulating images to create one single image. In this example, a thousand people are co-authors, together with the AI, of the final work,[5] thus creating a new kind of 'crowd-creation' where humans and AI work together.

Finally, the blockchain has recently attracted the attention of the famous Ai Weiwei, who partnered with Irish–US artist Kevin Abosch to create blockchain-based work called *Priceless*.[6] *Priceless* is made up of two standard ERC-20 tokens on the Ethereum blockchain with the name PRCLS and works as follows:

> *One of the tokens is not available at all, the other is divisible up to 18 decimal places and is to be given away one quintillionth at a time, for free. That is enough for every person on earth. A small amount of the distributable token was instead put into inaccessible digital wallets; the codes for the 12 wallets were printed on paper and sold to art buyers. The codes represent a personal moment in time shared by Ai and Abosch, for example, walking down a street in Berlin, where Ai lives. The pieces of paper are practically worthless, and the codes are a proxy for a fleeting human experience and refer to a valueless token – priceless.*[7]

3 See www.okhaos.com/plantoids/.

4 See www.thescarabexperiment.org/.

5 'SCARAB is not attached to a physical work of art or digital object because the cryptocurrency itself is the art, chosen by the artist to be, act, and represent the linguistic term of what an artwork is' (www.thescarabexperiment.org).

6 See www.vice.com/en/article/qvmm9m/ai-weiwei-kevin-abosch-blockchain-art-priceless.

7 See www.thepeakmagazine.com.sg/lifestyle/cryptocurrency-prices-artwork-maecenas-dadiani-syndicate/.

ii AI and algorithmic creation

Other examples of creation through or with the support of AI are three different projects: *The Next Rembrandt*, the works of the French art collective Obvious, and the collaborations between Ahmed Elgammal and AICAN.[8]

The first example is the project named *The Next Rembrandt*, conceived by the advertising agency J Walter Thompson and commissioned by ING Bank. It is based on a study of all the artworks created by Rembrandt;[9] in particular, all data related to Rembrandt's artworks were collected in a software to analyse the main distinctive features of the artist (e.g., brush strokes, chosen subjects and the way of alternating lights and shadows) and, based on the patterns that emerged from such analysis, an AI algorithm created a new and entirely original artwork, in the Rembrandt style. The work was then printed onto canvas using a 3D printer, programmed to release a quantity of ink suitable to recreate, even in terms of thickness, the same effect of Rembrandt's works.[10]

The second example is the artwork *Portrait of Edmond de Belamy*, created by a French collective of artists called Obvious, starting with 15,000 portraits dating back to the period between the fourteenth and twentieth centuries and using a generative adversarial network (GAN).[11] A GAN is a pair of neural networks: the first neural network, which is called generator, randomly mixes all the images that have been put into its memory and creates random combinations; the second, which is called discriminator, selects random results produced by the generator: the ones that better respond to the recurring pattern that had been identified in the original images; the discriminator tries to reproduce human judgement, discarding all the paintings that are not so plausible as potential works created by a human artist. The *Portrait of Edmond de Belamy*, one of an edition of 10, was auctioned at Christie's in New York on 25 October 2018, and sold for US$432,500 (starting from an estimate of US$7,000 to US$10,000); it was the first AI artwork to be sold through a major auction house.

The use of GANs generates considerable problems in terms of authorship; for example, who is the author of the *Portrait of Edmond de Belamy*? The basic algorithm that makes the GAN work was developed by Ian Goodfellow (whose name is evoked in the Belamy surname given to the imaginary character portrayed in the painting),[12] while a second programmer – Robbie Barrat – set the parameters used by the algorithms and loaded the 15,000 ancient portraits into the GAN's memory, making it available online to be freely used by anyone. From there, Obvious slightly modified the software and generated a series of portraits that seem to belong to the same family (named 'the Belamy family'). Finally, Obvious printed the selected images on canvas, gave them a title, and decided to sign them

8 Meaning 'artificial intelligence creative adversarial network'.

9 See www.nextrembrandt.com.

10 The project's creators described the operational procedures, by stating that: 'We examined the entire collection of Rembrandt's work, studying the contents of his paintings pixel by pixel. To get this data, we analyzed a broad range of materials like high resolution 3D scans and digital files, which were upscaled by deep learning algorithms to maximize resolution and quality. This extensive database was then used as the foundation for creating *The Next Rembrandt*' (www.nextrembrandt.com).

11 'Obvious is a collective of researchers, artists, and friends, working with the latest models of deep learning to explore the creative potential of artificial intelligence. They are behind the sale of the first AI artwork to go through a major auction house. They use their work to share their vision of artificial intelligence and its implementation in our society' (www.obvious-art.com/).

12 Goodfellow almost translates as *bel amie* in French.

with a portion of the algorithm created by Ian Goodfellow, symbolising the signature of the AI at the base of the entire process. In this case, who is the author of the painting? The basic algorithm (as the signature pretends)? The individual who set the parameters and fed the algorithm with images? Obvious, who chose the images to print, signed them, and gave them a title? Or a combination of all of them?[13]

Some critics argued that this creation by Obvious was nothing more than a reinterpretation of the concept of the *objet trouvé* or of Marcel Duchamp's readymades or, brilliantly, that the *Portrait of Edmond de Belamy* could be called 'a machine learning equivalent of a urinal on a plinth'.[14] In other words, the work created by a GAN would be nothing more than a mere material object, which is transformed into a work of art by giving it a title, signing it and putting it into the art circuit.[15] After all, in conceptual art, the work of art is not the artefact itself, but it is the artistic action with which the author makes art out of an object, just as Marcel Duchamp took a porcelain urinal, named it *Fountain*, signed it using the pseudonym 'R Mutt', and then exhibited it in a museum.

Moreover, in early 2019, the HG Contemporary Gallery in New York presented a series of paintings in an exhibition named 'Faceless Portraits Transcending Time',[16] in which the exhibited works were presented as a collaboration between an AI (AICAN) and its creator, Dr Ahmed Elgammal, another professor of computer science turned artist.[17]

The works were based on a set of 3,000 Renaissance portraits. Differently to Obvious, Dr Elgammal used a creative adversarial network (CAN), and not a GAN (in the exhibition labels, the paintings were defined as: 'creative adversarial network print'): Dr Elgammal explained that a CAN is composed of a generator (the same as a GAN) and a second neural network (which we may call a twister) that does not limit itself to judging whether the results conform to the pattern detected in the initial data (such as the discriminator of GANs), but prizes the addition of new elements (deviations) within a given style.[18] In this way, the CAN reproduces the natural evolution of art, which normally does not proceed by radical changes, but through small alterations of a pre-existing style.[19]

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13 For an analysis on the IP implications of *Portrait of Edmond Belamy*, see www.ipkitten.blogspot.com and www.moc.media/en/2527. The following is also reported by one of the co-founders of the Obvious collective, Hugo Caselles-Dupré: 'If the artist is the one that creates the image, then that would be the machine. If the artist is the one that holds the vision and wants to share the message, then that would be us.'

14 See www.theatlantic.com/technology/ archive/2019/03/ai-created-art-invades-chelsea-gallery-scene/584134/.

15 As Mario Klingemann, a German artist who has won awards for his own work with GANs, commented, 'I wonder why [Obvious] missed the opportunity to declare their work as an AI-readymade and bring us the first digital Duchamp.'

16 See www.hgcontemporary.com/exhibitions/faceless-portraits-transcending-time.

17 Dr Ahmed Elgammal is a professor at the Department of Computer Science, Rutgers University. He is the founder and director of the Art and Artificial Intelligence Laboratory at Rutgers. He is also an Executive Council Faculty at Rutgers University Center for Cognitive Science. Dr Elgammal is the founder and CEO of Artrendex, a start-up that builds innovative AI technology for the art market.

18 The CAN is described in a 2017 paper by Ahmed Elgammal: 'The system generates art by looking at art and learning about style; and becomes creative by increasing the arousal potential of the generated art by deviating from the learned styles' (*CAN: Creative Adversarial Networks, Generating 'Art' by Learning About Styles and Deviating from Style Norms*, Ahmed Elgammal et al., June 2017, www.researchgate.net/publication/317823071_CAN).

19 See Zack Thoutt, 'What are Creative Adversarial Networks (CANs)?', https://hackernoon.com/what-are-creative-adversarial-networks-cans-bb81d09aa235.

After the above pioneering works of Obvious and Dr Ahmed Elgammal, an entire artist movement has started, called 'Generative Art'. The opening page of their flagship website states:

> *Generative Art is a process of algorithmically generating new ideas, forms, shapes, colors or patterns. First, you create rules that provide boundaries for the creation process. Then a computer (or less commonly a human) follows those rules to produce new works. In contrast to traditional artists who may spend days or even months exploring one idea, generative code artists use computers to generate thousands of ideas in milliseconds. Generative artists leverage modern processing power to invent new aesthetics – instructing programs to run within a set of artistic constraints, and guiding the process to a desired result.*[20]

Thus, neural networks, GANs and CANs have rapidly become a new addition in the twenty-first century artist's toolkit, but people still firmly overlook their output.

iii Art and law in the digital age

Is there a legal notion of what is an artwork? Whereas in many jurisdictions artworks are defined by the medium they are incorporated into (paintings, etchings, sculptures), in others – including Italy – this concept is left open and generally defined by reference to what is recognised as such in the relevant fields, even if this approach is not always seamless.

The huge growth of the forms of expression, the extreme variability of approach to art themes and, lately, the inclusion of disruptive technologies in the creative process, still create many interpretation issues.

Almost a century after *Brancusi v. United States*[21] – where the Custom Court found that 'while not resembling a bird', the Brancusi sculpture *Bird in space* was 'beautiful and symmetrical in outline' and, taking into account the emergence of abstractionism, it could be qualified as an artwork and exempted from custom duties[22] – a new tax case concerning art created with disruptive technologies is taking a much less progressive approach. An artist requested an official ruling by the Italian tax authorities, to apply the reduced VAT rate reserved to artworks directly sold by their creator (10 per cent), rather than the ordinary VAT rate (22 per cent). He reported that he digitally created some sculptures on his computer, printed them with a 3D printer and then finalised them by hand. The Italian law, for the application of such reduced tax rate, defines artworks, as far as sculptures are concerned, as 'original works of statuary art or sculptural art, of any material, provided that they are made entirely by the artist; castings of sculptures with a limited edition of eight copies, controlled by the artist or by those entitled . . . '[23] The tax authorities replied that, for tax purposes, these sculptures cannot be considered artworks as they were neither 'made entirely by the artist' (because the personal intervention of the artist was residual and limited to the final

20 https://aiartists.org/generative-art-design.

21 *Brancusi v. United States*, 54 Treas. Dec. 428, 429 (Cust. Ct. 1928).

22 See www.thelegalpalette.com/home/2018/3/20/brancusis-bird-in-space-is-it-a-bird-or-is-it-art#:~:text=In%20the%201928%20case%20Brancusi,for%20the%20free%20import%20duty.&text=United%20States%20to%20transform%20the,into%20a%20more%20contemporary%20standard.

23 Decree Law No. 41/1995.

painting of the sculpture) nor were they part of an edition of less than eight cast sculptures.[24] This decision of the Italian tax authority could be criticised on several fronts, but mainly on the interpretation of the concept of 'made entirely by the artist': this concept, in fact, must be updated considering the technological tools (such as CAD design or 3D printing) now commonly available to artists. Therefore, while in the past artists used tools such as brushes or chisels, now they use software, algorithms and 3D printers, but this should not make any difference provided that the artists are in control of those tools (as in the case mentioned). Also, it cannot be ignored that the art market is validating these new forms of artistic expression, as, for example, in the aforementioned sale of the *Portrait of Edmond de Belamy* at Christie's or with the organisation of the Contemporary and Digital Art Fair that took place in New York, and was focused on 'showcasing the diversity of digital artistic mediums, including immersive installation, video art, virtual reality, creative experiments Blockchain-based and more'.[25]

III POST-COVID ART MARKET

While the digital transition of the art market has been occurring for a few years, the lockdowns imposed by the coronavirus pandemic have dramatically accelerated it in 2020. A recent Art Basel survey concerning the first six months of 2020 reveals that the share of online sales of art galleries 'rose from 10% of total sales in 2019 to 37% in the first half of 2020'.[26]

Therefore, the presence of digital tools in the art market is no longer marginal, but absolutely central. The new technologies are in fact impacting fundamental aspects such as the assessment and guarantee of authenticity and provenance, the legal title of the seller, the opportunities of fractional ownership, and the way proceeds from art sales are shared among the various players involved.

i Evidencing authenticity and provenance

The basic issue involved in art sales is the authenticity of the work of art and this aspect has recently become quite problematic when many authentication committees (Warhol, Basquiat, Haring, to name a few), facing a growing number of disputes with disgruntled collectors, have ceased to issue certificates attesting the authenticity of the same, thus creating a confusing grey area in which collectors do not know who to turn to.[27]

One way to solve this problem is to create digital incorruptible evidence of the chain of title of an artwork, best of all from its creation.

24 See www.agenziaentrate.gov.it/portale/documents/20143/2665720/Risposta+all%27interpello+n.+303+del+2020.pdf/907a73a3-a850-4849-8907-4630065901b5.

25 See https://cadaf.art/. 'CADAF is a discovery and interaction platform dedicated to digital and new media art. It regularly hosts international art fairs, special events, art exhibitions and talks. Discover and connect with the world's most important artists, galleries, curators and collectors of the digital art market. CADAF is a product or New Art Group LLC, along with New Art Academy, dedicated to art + tech education.'

26 See www.artbasel.com/about/initiatives/the-art-market.

27 Inter alia, see, for example: (1) the Andy Warhol Foundation, which will no longer authenticate the works of the well-known pop art artist; (2) the Authentication Committee of the Estate of Jean-Michel Basquiat, which, after having attributed more than 2,000 authenticated works over the course of 18 years, completely ceased to authenticate the works of the US artist in September 2012; and (3) the Keith Haring Foundation, which has dismissed the authenticity committees and no longer examines works attributed to the artist.

One example of this is the activity of a US company named Verisart, which applies blockchain technology to combine transparency, anonymity and security to protect records of creation and ownership of artworks and collectibles. On the home page of the Verisart website, it is stated that:

> *Verisart is building evidentiary infrastructure for artworks and collectibles that is verifiable by anyone. . . . Records are encrypted and timestamped by the world's most-trusted decentralized ledger. Certificates are easy to manage and can be shared or transferred at any time.*[28]

The identification of the work is actually ensured by Verisart by uploading a high-definition photo of the artwork, which makes it easy to spot any potential forgery through image-recognition technology.

Needless to say, the effectiveness of the system depends on the accuracy of the data initially entered. To demonstrate and emphasise this, Terence Eden, a technology enthusiast and influencer, uploaded on Verisart, as his own work, Da Vinci's *Mona Lisa*, thus generating a blockchain provenance record that claims he is the true 'author and owner' of *Mona Lisa*; given the (almost) impossibility of erasing the 'blocks' of a blockchain, this information will remain recorded in the system forever, although obviously no one will realistically believe it to be true.

A different form of authentication is proposed by the San Francisco-based Chronicled company, which uses blockchain technology to address the issue of avoiding counterfeiting, in particular by placing microchips on or within any physical object (and therefore also on or within works of art)[29] and then monitoring each stage related to ownership changes. The process is the following: (1) a microchip is placed somewhere on or in a work of art; (2) there is a private key that is stored in the microchip, invisible to the human eye; (3) there is also a corresponding public key stored on a blockchain; and (4) when you scan the microchip, it goes through a cryptographic algorithm and affirms that this is the authentic work of art.

It is interesting to point out that the microchips may be used as self-authentication – the artists themselves can attach it when they produce a new work – and they can also be applied to older works as a certificate of authenticity by the entity in charge of authentications (e.g., an artist's estate).

ii Artwork recognition and stroke recognition

Technology provides the art market with a new powerful tool to verify the authenticity of artworks: AI, applied either to the artwork as a whole or to characterising elements thereof, such as the strokes in a drawing.

With regard to the recognition of the authenticity of an artwork as a whole, Art Recognition, a Swiss start-up, offers AI-powered authentication rulings on paintings within days, based on photographic reproductions.[30] The process involves three steps: (1) a photo of the artwork (taken with a smartphone) must be sent to Art Recognition;

28 See www.verisart.com/: 'Verisart is building evidentiary infrastructure for artworks and collectibles that is verifiable by anyone.'

29 See www.chronicled.com/: 'Automating business rule enforcement in the life sciences industry through the blockchain-powered MediLedger Network.'

30 See www.art-recognition.com/: 'The Art Recognition computer system assesses the authenticity of an artwork by analyzing its photographic reproduction with the help of AI.'

(2) the Art Recognition's algorithm learns an artist's main features from a set of photographic reproductions of original works by that artist; once the tool has been trained to recognise the characteristics of an artist, it checks whether the learned characteristics match those of the artwork being submitted for authentication; and (3) Art Recognition will get back with a report summarising the most important steps of the analysis and the conclusions reached about authenticity.

Another interesting project concerns the verification of the authenticity of drawings. Rutgers University, with a team led by Dr Ahmed Elgammal[31] (who separately created the above-mentioned CAN), and the Atelier for Restoration & Research of Paintings[32] have commenced a research project on several hundred drawings by a few famous artists, trying to show how each line drawn on a sheet of paper is practically comparable to a fingerprint of the artist. In particular, the algorithm they created broke down almost 300 line drawings by Picasso, Matisse, Modigliani, and other famous artists, into 80,000 individual strokes. Then, a recurrent neural network learned which features in the strokes were important to identify the artist and, at the same time, the researchers also trained a machine-learning algorithm to look for specific features, such as the shape of the line in a stroke. With both algorithms working in tandem, the researchers were able to correctly identify artists around 80 per cent of the time. The same technology is able to distinguish an original drawing from a certain artist from a forgery of the same.

IV ART MARKET SERVICES

The new technologies have also permitted the emergence of a number of new services directed towards the art market, a few examples of which are discussed below.

i Art appraisal

The soft spoken world of art appraisers is now facing competition from an AI-based appraisals system. An Italian startup, Kellify.com, has created an AI-powered methodology that, by processing art market big data, is able to provide automated appraisals of artworks, as well as forecasts of their future market trends. Being able to provide real-time detailed objective insights and forecasts, remotely, and 24/7, Kellify immediately attracted the attention of art insurers, art lending institutions and art funds.

ii Instant access to artworks data

Another innovation that has been considered very disruptive for the art market is the Magnus application, which could be considered the Shazam of the art world.[33] This application makes it possible, on the basis of a photographic reproduction of an artwork, to search within the databases of all the most important auctions and all the other available data on the art market and to instantly find data on the work and on its previous commercialisation (author, year of creation, sales history, or if and when it remained unsold). Therefore, Magnus allows anyone

31 See footnote 17.

32 See www.arrs.nl/arrs_en.html: the Atelier for Restoration & Research of Paintings, founded in 1991, 'has been consulted for professional restoration, authenticity research, expertise and condition reports by national museums, government agencies, institutions and auction houses. Our international client base includes leading art dealers and private collectors worldwide.'

33 See www.magnus.net/about/: 'Our mission is to make the art market transparent.'

to have instant access to such information and, as a consequence, leads to greater transparency in the art market. This application creates a real disintermediation of the relationship between collector and works of art: the collector no longer needs an expert to access this data.

iii Marketing intelligence

Thread Genius, established in 2015 and then acquired by Sotheby's in 2018, through a set of AI algorithms, carries out market intelligence activities, endeavouring to identify which works might be of interest to a collector on the basis of his or her previous acquisitions. Similar AI-based services are now offered by Artrendex through its ArtPI platform,[34] which enables museums, galleries and fairs to better engage with their visitors and clients by offering them images of artworks that have characteristics that correspond to other artworks they appeared to admire.

iv Client relationship management services

Arternal, established in 2015, 'was the first technology company to focus exclusively on bringing client relationship management technology to the art world'.[35] It builds workflow software to help galleries to better manage client relationships allowing: (1) client relationships to be nurtured with the kind of thoughtful, personal touch that leads to successful sales, within less time and with less staff engagement; (2) creation of an institutional memory, enabling the collection, maintenance and use of data that stays with the company even when employees move on; and (3) better allocation of staff and resources based on tracking sales and performance across the entire operation. According to information that appeared in the press, Arternal is now working on a platform that will recommend works to collectors based on similarities between buyers (age, place of residence, profession, income).[36]

v Shipping services

ARTA is a digital platform delivering global logistics and services for art shipments.[37] It offers automated quotes for packing, shipping and installing artworks in a few minutes, which is a significant improvement on the hours or days normally needed to get such an estimate from a traditional art shipper.

vi Art curation

After the Swiss collective fabric|ch created an artwork for the 2019 exhibition 'Entangled Realities: Living With Artificial Intelligence' at Basel's House of Electronic Arts, which was entitled *Atomized (curatorial) Functioning* and that 'leveraged algorithms to produce a steady stream of layout variations for the very show in which it appeared',[38] we now have the first biennale entirely curated by a robot: the chief curator of the 2022 Bucharest Biennial will be Jarvis, an AI program in development from the Vienna-based studio Spinnwerk that will 'use deep learning in order to learn by itself from databases from universities, galleries, or art

34 See www.artpi.co/.

35 See www.arternal.com/.

36 See https://news.artnet.com/market/ai-art-business-intelligence-report-2020-1812288.

37 See www.shiparta.com/.

38 See footnote 36.

centers' and select works that fit the chosen theme. As to the impact of digital technologies on art, it is also interesting to underline that this entire biennale will only be available in virtual reality, through a virtual reality headset.[39]

V SALES

New technologies are also creating new opportunities for how artworks can be traded.

Experiments in fractional ownership offered through online platforms may involve either traditional co-ownership contracts (see Art Share)[40] or create digital ownership certificates through the blockchain, creating digital tokens, which is known as 'tokenisation' of artworks.

This business model based on blockchain technology was first created in 2017 by Maecenas.co, a blockchain-based platform that allows anyone to buy, sell and trade fractional ownership in masterpieces on a liquid exchange.[41] Fractional ownership then permits even small collectors to invest their money in (fractions of) important works of well-known artists, rather than in works of lesser known artists, thus increasing their chance of having access to the most dynamic and liquid portion of the market. The Maecenas platform is based on the following principles:

a it creates a direct interaction between the owner and the investors, without the need for other intermediaries (apart the platform itself); and

b it is transparent, inclusive and available to anyone, not just to ultra-wealthy individuals.[42]

Its mechanism also permits collectors who owns important works to sell only a portion of their value (less than 40 per cent), cashing the revenues of the fraction sale and maintaining possession of the work, thus making the artwork 'fractionally liquid'.

On 6 September 2018, Maecenas sold, through tokenisation, more than 30 per cent of Andy Warhol's painting *4 Small Electric Chairs* (1980), for US$1.7 million: the tokens acquired can be traded through the Maecenas exchange.[43]

In this respect, Marcelo Garcia Casil (CEO of Maecenas) explained:

> *This is a historical moment, for us and for the blockchain community. We have achieved a significant milestone that marks the beginning of a new era. Tokenisation of assets is the most prominent and exciting use case of blockchain technology, and we're proud to be pioneers in this space. This Warhol painting is the first of many more to come and we are looking forward to seeing and leading the financial revolution for the art market.*[44]

39 See https://news.artnet.com/exhibitions/bucharest-biennial-curated-by-artificial-intelligence-1872342.

40 See www.artsharesales.com/.

41 See www.maecenas.co/: Maecenas, the art investment platform.

42 'Traditional auction houses charge up to 25% commission on sales. Galleries, up to 50%. Our fees are as low as 1% for buyers and 8% for sellers. Plus, with Maecenas, there are no storage fees and no lock-in periods. You have the freedom to trade your tokens anytime on a liquid exchange.' (www.maecenas.co/whats-maecenas/).

43 www.finivi.com/tokenized-art-alternative-investment/.

44 'This auction was unchartered territory; a new model in an age-old market. The unprecedented demand, and speed with which the first fraction has been sold, has gone a long way to validating our vision of a more democratic and open art investment market,' Eleesa Dadiani, www.realwire.com/releases/first-ever-multi-million-dollar-artwork-tokenised-and-sold-on-blockchain.

This new experience and the rapidity with which it spread among investors has pioneered the massive implementation of this technology in the art market, demonstrating the merits of developing and improving this market through technology.

Now other players are entering the same art tokenisation market: among the most original is Snark.art, which sold 2,304 tokens (called atoms) of a video work called *89 Moments Atomized* by Eve Sussman, the sale involving not only a digital token but also ownership of a fraction of the screenshot of the same video: namely, each atom is 400 pixels of the entire visual frame with an approximately 10-minute duration (that is the duration of the full video) and the mechanics of blockchain ensure that each atom is uniquely assigned to the owner, so that provenance and singularity cannot be pirated or faked.[45]

Tokenisation is proving particularly attractive to a young and digital generation of buyers and is now being applied to all sorts of collectibles (thus, not only fine art, but also sport memorabilia, racing cars, watches, comic books), there being at least 10 other companies offering tokenisation opportunities.[46]

A totally different experience is that of the online platform dada.nyc, which only trades in digital art. This website does not offer fractional ownership, but each sale of a digital work (normally offered in numbered editions) is actually recorded on a blockchain and this guarantees the 'digital scarcity' as only one work with a certain edition number will exist and be recorded on the Ethereum blockchain. Moreover, the platform has implemented a unique way of sharing the proceeds of each subsequent sale of a digital artwork traded through it, with only 60 per cent of the proceeds going to the seller, 30 per cent going to the artist and 10 per cent to the platform, with all payments being made automatically through smart contracts.[47]

VI CONCLUSION

Disruptive technologies (such as blockchain, AI, neural networks, smart contracts, virtual reality and augmented reality) are creating entirely new works of art and business models, which are revolutionising the quite steady art market.

As most of these innovations are sailing in unknown waters, entirely new legal issues are emerging as to authorship, authenticity, representation and warranties, financial regulation of art trade, cross-border sales, transactions' traceability and privacy, and use of smart contracts.

Therefore, the art law lawyer of the future must also, inevitably, be a technology lawyer.

45 See https://medium.com/@snarkdotart/snark-art-launches-new-art-and-blockchain-laboratory-with-acclaimed-artist-eve-sussman-press-6e7777b50142.

46 See www.bloomberg.com/news/articles/2020-02-07/you-can-own-a-fraction-of-a-warhol-but-should-you.

47 See www.artmarket.guru/le-journal/blockchain/yehudit-mam/.

Chapter 5

APPLICATION OF COPYRIGHT TO ART

Barry Werbin[1]

Copyright is the primary source of legal protection for all forms of original works of art. While such protections have been engrained in US copyright law since 1909, the advent of the digital age in the 1990s, expansion of social media, growth in appropriation art, and the recent surge in popularity and market value for street art, have created multiple challenges for artists, the art market and those who seek to exploit works of art.

This chapter serves as an introduction to the law of copyright in the United States as it applies to works of art, reproductions and other derivative uses.

I HISTORICAL CONTEXT

When enacted in 1787, the US Constitution empowered Congress '[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ' Thus was born the earliest US legal protections for copyright (authors) and patents (inventors).

Jumping ahead 233 years, the impact of copyright on art is ubiquitous. Copyright is the most significant means of protecting original works of art and incentivising others to create new art. But finding this balance has consistently been challenging, especially in the modern online, digital world. The intersection of art and copyright is now one of the most debated and controversial areas of intellectual property.

The US Copyright Act (the Act), which is the exclusive means of protecting and enforcing copyright under federal law, pre-empts all other laws and claims that implicate any of the exclusive rights granted to copyright owners under the Act. The first version of the Act, enacted in 1790, granted copyright protection only for 'any map, chart, book or books already printed within these United States'.[2] In the late eighteenth century, photography of course did not exist, and there was no technological means to create and distribute reproductions of art outside of images included in printed books. That changed 119 years later with the next complete revision of the Act in 1909. The 1909 Act defined copyright-protectable works as 'all the writings of an author',[3] which expressly included works of art, models or designs for works of art, art reproductions, photographs, and prints and pictorial illustrations.

Today's version of the Act was enacted in 1976 and extends protection to all forms of 'pictorial, graphic, and sculptural works'.[4] These broad categories, in turn, include

1 Barry Werbin is counsel at Herrick, Feinstein LLP.

2 Copyright Act of 1790, 1 Statutes At Large, 124.

3 Section 4.

4 17 U.S.C. § 102(a).

'two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans'.[5]

II SCOPE AND LIMITATIONS OF COPYRIGHT

To be protected by copyright, a work of authorship must be original; that is, it cannot be in the public domain or so lacking in originality that it does not rise to the level of protected content. In a seminal 1991 opinion, the Supreme Court held that 'originality' requires only minimal creativity, irrespective of how much physical effort and time might go into a work.[6]

Nevertheless, common geometric shapes, and familiar symbols and designs are not subject to copyright protection. The Copyright Office provides the following examples.[7]

a 'Gloria Grimwald paints a picture with a purple background and evenly spaced white circles.' This is not protectable because 'the combination of the purple rectangle and the standard symmetrical arrangement of the white circles does not contain a sufficient amount of creative expression to warrant registration'.

b 'Gemma Grayson creates a wrapping paper design that includes circles, triangles, and stars arranged in an unusual pattern with each element portrayed in a different color.' This is protectable because 'it combines multiple types of geometric shapes in a variety of sizes and colors, culminating in a creative design that goes beyond the mere display of a few geometric shapes in a preordained or obvious arrangement'.

Similarly, '[c]ommon patterns, such as standard chevron, polka dot, checkerboard, or houndstooth designs' are not protectable; however, '[a] work that includes familiar symbols or designs may be registered if the registration specialist determines that the author used these elements in a creative manner and that the work as a whole is eligible for copyright protection.'[8] For example, a sketch of the standard fleur-de-lys design used by the French monarchy would not be protected in and of itself; however, if an artist painted an original silhouette of Marie Antoinette with a backdrop featuring multiple fleur-de-lys designs, the work would be protected because it incorporates an original, artistic drawing in addition to the standard fleur-de-lys designs.

Mere colouration or mere variations in colouring alone are not eligible for copyright protection.[9] If an artist merely adds just a few colours to a pre-existing design or creates multiple colourised versions of the same basic existing design, the work will not be protected. However, a work consisting of a digital image of the *Mona Lisa* to which different hair colour, nail polish, stylised clothing and darkened skin are applied, would be entitled to protection because the changes in colour and other attributes are sufficient to constitute a new work of authorship.[10]

5 17 U.S.C. § 101.

6 See *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

7 Copyright Office Compendium 3rd §906.1.

8 37 C.F.R. §202.1; Compendium 3rd, §906.2 and also § 313.4(J).

9 37 C.F.R. § 202.1(a).

10 See Compendium 3rd, §906.3.

i Merger doctrine/scènes à faire

Two other important related principles limit copyright protectability. One is the idea/expression 'merger' doctrine and the other is scènes à faire.

Copyright does not protect any idea, procedure, process, system, method of operation, concept, principle or discovery.[11] Consistent with this premise, the merger doctrine bars copyrightability when an idea merges with the expression; that is, if an idea and the expression of the idea are so closely related that the idea and expression are one, such that there is only one way or an extremely limited number of ways to express and embody the idea in a work. For example, an infringement suit by a photographer, whose photograph captured a mother mountain lion holding a cub in her mouth perched on a cliff, against an artist who created a sculpture depicting a similar scene, was dismissed because the image of a mother mountain lion perched on a rock with a kitten in her mouth was a naturally occurring pose that was created and displayed by nature.[12]

The related principle of scènes à faire (or 'scenes that must be done'), applies where the expressive elements of a work are a product of the genre of the subject matter, which by its nature must include certain common elements. In a well-known case, a glass-in-glass sculpture depicting jellyfish swimming vertically was entitled only to a 'thin' copyright, which was protected only against virtually identical copying (combination of unprotected elements dictated by the glass-in-glass medium and by the jellyfish's natural physiology).[13]

ii Fixation

Another fundamental requirement for protection is that a work be 'fixed' in some tangible medium of expression, so that it is more than of transitory duration (such as a sandcastle on a beach). A leading case denied copyright protection to a wild flower garden in Chicago because the court found the garden too transitory as it kept changing throughout the seasons.[14]

Consider prominent but temporary art installations, such as those by Christo, and whether they are too transitory to warrant protection, an issue that has not been addressed directly by US courts.[15] Christo, however, documented and preserved all of his projects with photographs and video, which thereby fixed the art itself in a tangible medium.

iii Functionality

Copyright precludes protection for 'useful articles' unless their incorporated artistic designs can be perceived separately from their functional elements and are independently copyrightable.[16] As an example, sculptured artistic belt buckles by the designer Barry Kieselstein-Cord were found to be separable and thus protectable apart from the utilitarian belts to which they were affixed.[17] In 2017, the Supreme Court held that two-dimensional designs (consisting of

11 17 U.S.C. §102(b).

12 *Dyer v. Napier*, 2006 WL 2730747 (D. Ariz. 2006).

13 *Satava v. Lowry*, 323 F. 3d 805 (9th Cir. 2003).

14 *Kelley v. Chicago Park Dist.*, 635 F. 3d 290 (7th Cir. 2011).

15 In 1985, Christo sued media companies in France after they attempted to reproduce and distribute photos of his *Pont Neuf* fabric wrap installation. In 1986, a Parisian court ruled for Christo, finding the installation was an original work of authorship that was entitled to copyright protection under French law; Paris Court of Appeal, 13 March 1986, Gaz. Pal. JP, p. 239.

16 *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017).

17 *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F. 2d 989 (2d Cir. 1980).

various lines, chevrons and colourful shapes) placed on cheerleader uniforms could be subject to copyright protection notwithstanding the utilitarian nature of the uniforms themselves, which are not otherwise subject to protection under the 1976 Act.[18]

iv Human authorship

Works that are not created by human beings are not protected by copyright.[19] But with the advent of more sophisticated artificial intelligence, this fundamental principal is being challenged. In 2016, Dutch computer scientists, together with Microsoft and others, created a 'new' Rembrandt portrait painting, using complex algorithms and extensive data from numerous real Rembrandt portraits, and a 3D printer for texture and depth. The resulting portrait was startling in its authenticity.[20]

An *Edmond de Belamy* AI-created portrait, programmed by the Parisian group Obvious, sold at Christie's in October 2018 for US$432,500. It was signed with a section of the algorithm's code: 'min G max D x [log (D(x))] + z [log(1 – D (G(z)))]'. To 'learn', the algorithm was fed 15,000 images of portraits from different time periods.

III COPYRIGHT EXCLUSIVE RIGHTS/FIRST SALE DOCTRINE AND DISPLAY RIGHT EXCEPTIONS

The Act provides copyright owners with a bundle of 'exclusive' rights, including reproduction, preparation of derivative works, adaptation, public distribution, public performance and public display.[21]

These exclusive rights, however, do not prevent the owner of a work of art from reselling it or transferring title under the 'first sale doctrine', which provides that anyone who lawfully owns a particular copy of a work 'is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy'.[22] The owner of an original work of art, however, cannot grant to a gallery or auction house to which such work is consigned for sale any rights greater than the bare legal title that owner has, with no right to exercise any of the exclusive rights reserved to the copyright owner.

This also highlights the important distinction between the copyright in a work of art and legal title in the same work that is purchased or otherwise acquired. An artist (or any other author) who creates an original work and sells it does not transfer his or her copyright in the work absent a written agreement to do so.

There is another important statutory exception to the exclusive display right that permits owners of works of art, or anyone authorised by such owners, to display those works

18 *Star Athletica, LLC* (footnote 16).

19 See Copyright Office Compendium (III) §306: 'Because copyright law is limited to "original intellectual conceptions of the author," the Office will refuse to register a claim if it determines that a human being did not create the work.' *Naruto v. Slater*, 888 F. 3d 418 (9th Cir. 2018) (self-portrait photograph taken by a monkey (represented by PETA as its surrogate) was not entitled to copyright protection and the monkey lacked standing to sue for infringement).

20 www.nextrembrandt.com.

21 17 U.S.C. §106.

22 17 U.S.C. §109.

publicly, 'either directly or by the projection of no more than one image at a time, to viewers present at the place where the [work] is located'.[23] This provision is responsible for lawfully permitting all displays of copyright-protected art by galleries, auction houses and museums.

IV TERM OF COPYRIGHT

The term of copyright for an individual artist who created a work on or after 1 January 1978 is the life of that author plus another 70 years. Works created prior to that date are subject to a different term under the 1909 Act, which was an initial term of 28 years and a second renewal term of 28 years, but there are certain exceptions that are beyond the scope of this chapter.

Where an artist is commissioned to create a work to be used in conjunction with other original content in another work, such as a compilation or collective work, the artist's work will be deemed a 'work made for hire', which automatically places copyright ownership in the party that commissions the work, provided a written agreement with the author specifies it is a 'work made for hire'. The copyright term for a work made for hire under the 1976 Act is 95 years from the date of first publication or 120 years from the year of creation, whichever expires first.[24]

V REGISTRATION AND INFRINGEMENT

Under US copyright law, registration for an original work is optional, but provides significant benefits in connection with any claim for infringement. First, registration is a precondition to filing a copyright infringement action in the US, unless the work is a foreign work that was created by a non-US author.[25] This is required by the Berne Convention, a treaty to which the US and 178 other countries are parties.[26]

Second, a work that is registered is presumed to be valid as to its ownership and copyrightability. Third, the copyright owner of a work that is registered prior to commencement of an act of infringement is entitled to seek alternative economic relief in the form of statutory damages, which generally range from US$750 to US$30,000 per work infringed, but can be as high as US$150,000 for a wilful infringement and as low as US$250 for an innocent infringement.

Fourth, the copyright owner of a work that is registered before an infringement begins may, if successful in proving infringement, also seek an award of legal fees in the court's discretion.[27]

Although a foreign work under the Berne Convention need not be registered before an infringement action can be brought, it must still be timely registered for statutory damages and legal fees to be sought. The absence of registration also places the initial burden of proof on a foreign copyright owner to establish ownership and validity of the copyright.

While a detailed discussion on copyright infringement is beyond the scope of this chapter, in general, to establish infringement, a copyright owner must prove that (1) his or

23 17 U.S.C. §109(c).

24 17 U.S.C. § 302(c).

25 *Fourth Estate Public Benefit v. Wall-Street.com, LLC*, 139 S. Ct. 881 (S. Ct. 4 March 2019).

26 www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15.

27 The US follows the 'American rule', under which legal fees can only be awarded if authorised by statute or contract.

her work is original and protectable by copyright (which is presumed if a registration has been issued), and (2) an alleged infringing work is substantially similar to the protected work, as to those elements of the protected work that are entitled to protection. Some cases also examine whether an alleged infringing work has copied the overall 'look and feel' of a protected work.[28] In the case of art works, substantial similarity is assessed from the perspective of a hypothetical 'ordinary observer'.[29]

VI IMPACT OF FAIR USE ON THE ARTS

Perhaps the most controversial issue impacting copyright and art today is the statutory defence of 'fair use', particularly as it applies to appropriation art.

Over 117 years ago, Supreme Court Justice Oliver Wendell Holmes Jr cautioned: 'It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.'[30] That caution still impacts fair use art decisions today.

Fair use is a defence to copyright infringement that was originally intended to protect certain types of uses of a copyright-protected work as 'fair'. Among the statutory uses that are generally permitted are news reporting, research, and criticism and commentary on an original work, including parody, where reproduction of the work is necessary for such purposes. Courts must consider four statutory factors in assessing a fair use:

a the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;

b the nature of the copyrighted work;

c the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

d the effect of the use upon the potential market for or value of the copyrighted work.

In an important 1992 appellate case, Jeff Koons's sculpture of a couple holding a litter of puppies was held to have deliberately infringed photographer Art Rogers's copyright in a photo depicting the same scene, and was not a 'fair use' parody because Koons's sculpture was commercial and not a critique of the original, but merely a distortion of it.[31]

Subsequent to 1994, however, most federal courts have also assessed whether the challenged use is 'transformative' under the first fair use factor. Transformative use was first mentioned by the Supreme Court in a seminal 1994 fair use case involving a music parody.[32] The Court suggested that the transformative nature of a challenged work – 'whether the new work merely "supersede[s] the objects" of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message' – was a useful construct in assessing the first fair use factor, and that 'the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use'.[33]

28 *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F. 3d 57, 66 (2d Cir. 2010).

29 See *Yurman Design, Inc. v. PAJ, Inc.*, 262 F. 3d 101, 111 (2d Cir. 2001).

30 *Bleistein v. Donaldson Lithographing Company*, 188 U.S. 239, 251 (1903).

31 *Rogers v. Koons*, 960 F. 2d 301 (2d Cir. 1992).

32 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

33 id., at 579.

The impact of transformative use on appropriation art was highlighted in a subsequent case where Koons was sued for adapting part of a photograph (depicting a woman's legs, feet and shoes with ornate sandals) for use in a parodic collage that included three other sets of women's legs and disparate elements. This time Koons won a fair use decision in his favour because the copying was deemed reasonably limited to conveying the fact of the photograph in a parody and was therefore found to be transformative.[34]

Application of transformative use has since expanded greatly and become a litmus test for fair use, particularly in addressing appropriation art. Nowhere is this expansion more prominent than in the Second Circuit's controversial 2013 fair use decision in *Cariou v. Prince*.[35] There, the court found that 25 of 30 works created by the famous appropriation artist Richard Prince were entitled to a fair use defence as a matter of law because they were transformative, despite there being no commentary on the original photographs he copied. Commercialism was also relegated to a minor fair use factor because any work that is sold has a commercial element to it.

Prince altered photographer Cariou's *Yes Rasta* photographs and incorporated them into a series of paintings and collages. Five of them displayed only minimal alterations or additions, and the rest were so 'heavily obscured and altered to the point that Cariou's original [was] barely recognizable'.[36] With respect to the latter group, the court found they were transformative and entitled to a fair use defence, but that the other five were a closer case where the court could not decide the fair use issue without further lower court proceedings. The case then settled confidentially.

Significantly, *Cariou* held that a work need not comment on the original copyrighted work to be entitled to a fair use defence. The 25 images found to be transformative, said the court, 'have a different character, give Cariou's photographs a new expression, and employ new aesthetics with creative and communicative results distinct from Cariou's. Our conclusion should not be taken to suggest, however, that any cosmetic changes to the photographs would necessarily constitute fair use.'[37]

Most recently, a federal district court found that reproductions of Andy Warhol's silk screen paintings and drawings based upon a famous photographer's portrait of the musician Prince constituted fair use because they were transformative, despite arguably minimal modifications to the original photograph.[38] At the time of writing, the case is on appeal.

VII MORAL RIGHTS

Historically, moral rights, which protect the integrity and attribution of artists and authors, did not exist in the US. Currently, artists possess two limited forms of moral rights that have been codified under the Visual Artists Rights Act (VARA) and certain provisions of the Digital Millennium Copyright Act (DMCA), both part of the Act.

34 *Blanch v. Koons*, 467 F. 3d 244 (2d Cir. 2006).

35 *Cariou v. Prince*, 714 F. 3d 694 (2d Cir. 2013).

36 id., at 710.

37 id., at 708.

38 *The Andy Warhol Foundation v. Goldsmith*, 382 F. Supp. 3d 312 (S.D.N.Y. 2019). The author was counsel to the photographer, Lynn Goldsmith.

i VARA

VARA, which was enacted in 1990, grants to authors of 'visual art' the rights of attribution and integrity.[39] 'Visual art', for purposes of VARA, includes only paintings, drawings, prints and sculptures that exist in a single copy or limited edition. VARA excludes 'works made for hire' and works of 'applied art'. A recent example of applied art denied protection was the design of a sixteenth-century galleon ship constructed over the body of an old bus that was displayed at the Burning Man festival. When the sculptural work was destroyed, the artists sued under VARA, but the court held that because the work was 'applied art' affixed to a functional bus, it was not entitled to VARA protection.[40]

VARA also prevents the use of an artist's name as the author of a work of visual art in the event of a distortion, mutilation or other modification of the work that would be prejudicial to his or her honour or reputation. Related to this right, VARA empowers an artist to (1) prevent any intentional distortion, mutilation or other modification of a work that would be prejudicial to his or her honour or reputation, and any intentional distortion, mutilation or modification of that work is a violation of that right, and (2) prevent any destruction of a work of 'recognized stature', and any intentional or grossly negligent destruction of that work is a violation of that right. VARA permits a property owner to remove a work of art affixed to a building without its destruction, distortion, mutilation or other modification, provided 90 days' notice is first given to the artist, who is then given the right to either remove the art or pay for its removal.

Until recently, few courts had grappled with the VARA concept of 'recognized stature' and no case had applied VARA to street art. This all changed dramatically in 2018 when a court awarded a group of street aerosol artists US$6.75 million after their high-profile 5Pointz curated murals and exterior building wall art were intentionally whitewashed over and then destroyed by a developer.[41] Based on expert witness art market testimony, the court found that most of the aerosol artworks had achieved 'recognized stature'. The decision was recently upheld on appeal and the Supreme Court declined to hear it.[42]

ii Digital Millennium Copyright Act

The DMCA was added to the Act in 1998 to address various issues tied to digital technology and online use of copyright-protected works. One part of the DMCA addresses the integrity and removal of 'copyright management information', which is defined to include a copyright-protected work's title, the name of its author and other identifying information about the copyright owner, including a notice of copyright.[43] The intentional removal or alternation of such information is a DMCA violation, with statutory damages ranging from US$2,500 to US$25,000 per violation.

The statute has been applied in recent years to find liability where someone copies and uses without permission a photograph or other image found on the internet, and in doing so strips out all attribution credits identifying the creator of the original work. Courts have held

39 17 U.S.C. § 106A, generally.

40 *Cheffins v. Stewart*, 825 F. 3d 588 (9th Cir. 2016).

41 *Cohen v. G&M Realty*, 320 F. Supp. 3d 421 (E.D.N.Y. 2018).

42 *Castillo v. G&M Realty*, 950 F. 3d 155 (2d Cir. 2020), cert. denied No. 20-66, ___ S. Ct. ___ (5 October 2020).

43 17 U.S.C. § 1202.

that removal of a copyright owner's attribution credit in a gutter credit is a DMCA violation. This provides another remedy for artists and, particularly, photographers, to protect their moral right of attribution.

VIII STREET ART

In the past couple of years, street artists have started suing companies that use their art for commercial marketing purposes. A high-profile case was filed in California in 2018 by a graffiti muralist (Smash 137) against General Motors for using his mural in an unauthorised photo as part of an advertisement. The mural had been painted on the outdoor level of a parking garage. The case arises under another unique portion of the Act called the Architectural Works Copyright Protection Act of 1990 (AWCPA), which provides that anyone can reproduce an image of a building that is habitable by humans and viewable from public places.[44] The court refused to dismiss the case, finding there was a 'lack of a relevant connection between the mural and the parking garage'.[45] The case then settled.

A similar case was filed in Detroit by four street artists against Mercedes Benz, which posted images of its vehicles on social media with buildings visible in the background that included murals painted by the artists. After the artists demanded that Mercedes cease using the images, Mercedes filed suit to declare that its conduct was protected by AWCPA. The artists moved to dismiss the case but, contrary to the *GM* case, this court found that Mercedes had a plausible claim and allowed the case to proceed.[46]

A claim filed in New York by a street artist against H&M for using his street art in an advertisement was quickly resolved when H&M agreed to cease using the advert and issued an apologetic press release.[47] Several other similar claims have been filed by prominent street artists in recent years, but until appellate courts start ruling on these issues, street art will remain a burgeoning area of copyright law impacting artists.

44 17 U.S.C. §102(8); 37 C.F.R § 202.11.

45 *Falkner v. General Motors LLC*, 393 F. Supp. 3d 927 (C.D. Cal. 2018).

46 *Mercedes Benz, USA, LLC v. Lewis*, 2019 WL 4302769 (E.D. Mich. 11 September 2019).

47 *H&M v. Jason 'Revok' Williams*, No. 1:18-cv-01490 (E.D.N.Y., filed 9 March 2018).

Chapter 6

MORAL RIGHTS OF THE ARTIST: A US PERSPECTIVE

Irina Tarsis[1]

Morality and all the incidents of morality are essential; as justice to the citizens, and personal liberty.[2]

On 5 October 2020, the United States Supreme Court declined to review a landmark decision from the Second Circuit awarding US$6.75 million, maximum statutory damages, to street artists whose artworks were mutilated and destroyed at an abandoned industrial complex in Long Island, New York, better known as 5Pointz or the Graffiti Mecca.[3] The dispute over 5Pointz was first heard by the Eastern District of New York on a temporary restraining order (TRO) application, when almost two dozen street artists tried to protect their legal graffiti site from demolition. After the TRO was lifted, frustrated by the 5Pointz artists' failed attempt to enjoin demolition of their Graffiti Mecca and his property, the real estate owner, Gerald Wolkoff, hired a painting crew to whitewash the buildings, destroying dozens of installations and murals, and triggering allegations of violating artists' moral rights to the integrity of their works. On appeal, the Second Circuit agreed that art at 5Pointz gained recognised stature and the actions of the real estate developer were in violation of the Visual Artists Rights Act (VARA).[4] In the US, moral rights of artists are usually narrowly enforced, especially in the context of disputes concerning real estates. While the question of legal fees may still be open, the holding that whitewashing ephemeral aerosol art on the walls of a derelict factory slated for demolition constitutes a violation of federal law is now *res judicata*.

The 5Pointz outcome, a staggering award for the wilful destruction of 45 artworks in violation of moral rights, is a rare win for the members of the creative community.[5] It certainly serves as a cautionary tale to other real property owners to think carefully before allowing artists to create on their walls without clearly defined parameters of engagement. Similarly, museum administrators, art collectors and conservators who engage with artists in

1 Irina Tarsis is the founder and managing director of the Center for Art Law.

2 Ralph Waldo Emerson, *The Collected Works of Ralph Waldo Emerson: Society and Solitude*, Vol. VII (Cambridge, MA: The Belknap Press of Harvard University Press, 2008), 17.

3 *Castillo v. G&M Realty L.P.*, 950 F.3d 155 (2d Cir. 2020), as amended (21 February 2020), aff'g 988 F. Supp. 2d 212 (E.D.N.Y. 2013), cert. denied (5 October 2020).

4 Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5128 (1990). 17 U.S.C. § 106A.

5 Eileen Kinsella, 'A Stunning Legal Decision Just Upheld a $6.75 Million Victory for the Street Artists Whose Works Were Destroyed at the 5Pointz Graffiti Mecca', *ArtNet News* (20 February 2020), available at https://news.artnet.com/art-world/5pointz-ruling-upheld-1782396; Sara Cascone, 'It "Makes No Sense": 5Pointz Developer Vows to Appeal Landmark Ruling That Favored Graffiti Artists', *ArtNet News* (21 February 2018), available at https://news.artnet.com/art-world/5pointz-developer-appeal-1228928.

arm's-length dealings for exhibitions, commissions or collecting purposes need to recognise the possible conflicts of interest and the legal mechanisms that exist to protect artists and their creations.

I DEFINING AND CODIFYING MORAL RIGHTS

Moral rights, or *droit moral* (having originated in France), describe rights of creators in their artistic work that are not necessarily pecuniary, yet still integral to and arise from the idea that an artist's very being is included in the work that he or she creates. Recognition and evolution of visual artists' rights in the United States have been slow to develop, and the scope of moral rights enacted in the United States is limited.

Typically, moral rights are neither alienable or waivable; they last for the duration of an artist's lifetime and can survive for the benefit and discretion of an artist's estate even after the original work is finished or changes ownership through the stream of public commerce.[6] The basic moral rights are as follows:

a right of attribution or authorship entitles the artist to:
- be recognised by name for his or her work or permit the work to be published anonymously;
- prevent a wrong person being named as the author of his or her work;
- prevent having his or her name be associated with a work he or she did not create;
- decline having his or her name be associated with a work that has been modified or distorted in such a way as having the authorship remain with the work is prejudicial to the artist; and
- remove his or her name from the work in cases of mutilation or the artist's belief that the work is no longer true to its original creation;

b right of integrity prevents tampering or modifying the artwork without the artist's consent even after ownership in the artwork transfers;

c right of disclosure concerns the artist's reputation and provides that the artist has discretion to decide when and how his or her work can be made public; and

d resale royalty rights, a semi-economic right assuring that an artist may continue to benefit financially from commercial appreciation of his or her work in the secondary market by receiving a percentage of the sale proceeds.

6 See Ralph E Lerner and Judith Bresler, *Art Law: The Guide for Collectors, Investors,Dealers & Artists* (4th Edition, 2012), Chapter 12: Moral Rights, 1071–1165.

These rights are enumerated in the Berne Convention for the Protection of Literary and Artistic Works (the Convention), as Article 6 *bis*[7] and Article 14 *ter*.[8] While the US is a signatory to the Convention,[9] according to the US Berne Convention Implementation Act of 1988, the Convention's acts and protocols are not self-executing under the US Constitution, and must be implemented through US legislation.

In 1990, parts of Article 6 *bis* were implemented in the US when Congress amended the Copyright Law and enacted VARA. VARA recognises some of the moral rights, namely the right of attribution,[10] the right of integrity[11] and, in the case of works of visual art of 'recognized stature',[12] the right to prevent destruction.[13]

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7 '1. To claim authorship; to object to certain modifications and other derogatory actions; 2. After the author's death; 3. Means of redress: (1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation. (2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained. (3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.' The Berne Convention, Article 6 *bis* (Paris Act 1971), 828 U.N.T.S. 221.

8 '(1) The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work. (2) The protection provided by the preceding paragraph may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed. (3) The procedure for collection and the amounts shall be matters for determination by national legislation.' The Berne Convention, Article 14 *ter* (Paris Act 1971), 828 U.N.T.S. 221.

9 'International Copyright relations of the United States: Circular 38A', p. 2, available at https://copyright.gov/circs/circ38a.pdf; also see 31 October 1988. H.R. 4262 (100th Congress), Public Law No: 100-568 (1988).

10 *Joncou v. Sotheby's and Nolan*, 988 F Supp 2d 212 (E.D.N.Y. 2013) (the artist asked an auction house not to sell a work attributed to her because the artwork *Cowboys Milking*, a silkscreen print, was damaged and selling it in this condition would prejudice 'her honor and reputation').

11 *Mass. MOCA Found., Inc. v. Büchel*, 593 F3d 38 (1st Cir. 2010) (VARA claim succeeded because the artist did not authorise the museum to use his name in connection to an unfinished and contested installation).

12 Christopher J Robinson, 'The "Recognized Stature" Standard in the Visual Artists Rights Act', 68 *Fordham L. Rev.* 1935 (2000).

13 Rights of Certain Authors to Attribution and Integrity: '(a)Rights of Attribution and Integrity. [S]ubject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art . . . (1) shall have the right . . . (A) to claim authorship of that work, and (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create; (2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and (3) subject to the limitations set forth in section 113(d), shall have the right . . . (A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and (B)to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.' 17 U.S.C. § 106A(a).

Limitations of VARA

VARA differs from Article 6 *bis* of the Convention by offering a limited coverage that expires on the year of the artist's death.[14] Additionally, while artists' rights cannot be transferred under VARA, they may be waived through a written form signed by the author.[15] Further, VARA does not offer economic benefits suggested under Article 14 *ter* of the Convention concerning resale royalty right for fine artists when their works are sold in the secondary market.[16] Under VARA, moral rights protection, if any, only applies to 'works of visual art', such as 'a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author'.[17] Books, photographs and other copyrightable content are not included in the working definition of 'a work of visual art'.[18]

II VARA AS APPLIED THROUGH CASE LAW

The following selection of notable cases surveys the treatment of artists' rights in the US legal system and demonstrates courts' hesitance to find in favour of artists whose works were under threat. Too frequently courts ruled that VARA did not protects site-specific works,[19]

Other moral rights that are not codified by VARA include inalienability of moral rights, rights surviving and vesting with artists' heirs, resale royalty right and right of divulgation (if, when and how to make an artist's work available to the public and under what name). Some cases that postdate VARA may have turned out differently had the US Congress included additional moral rights. See, for example, *Herstand & Co. v. Gallery*, 211 A.D.2d 77, 626 N.Y.S.2d 74 (App. Div. 1995) (noting possible personal animus expressed by the artist when disavowing his works); see *TriStar Pictures v. Director's Guild of America*, 160 F.3d 537 (9th Cir. 1998) (affirming the arbitration finding that either the name of the director has to be removed or a film with severe edits has to appear with a disclaimer that the film was butchered).

14 VARA does not allow the moral rights to last as long as other copyrights last. They expire with the death of the artist. Thus the right to (dis)claim ownership is not vested in the heirs or other copyright holders.

15 17 U.S.C. 106A(e).

16 To learn more about the debate of introducing resale rights in the United States, see US Copyright Office, Office of the Register of Copyrights Report, 'Resale Royalties: An Updated Analysis' (December 2013), available at www.copyright.gov/docs/resaleroyalty/usco-resaleroyalty.pdf; also see *Sam Francis Foundation v. Christie's, Inc.*, 784 F.3d 1320 (9th Cir. 2015), aff'ing *Estate of Graham v. Sotheby's Inc.*, 860 F. Supp. 2d 1117 (C.D. Cal. 2012). Also see, Tiernan Morgan and Lauren Purje, 'An Illustrated Guide to Artist Resale Royalties', *Hyperallergic* (24 October 2014) https://hyperallergic.com/153681/an-illustrated-guide-to-artist-resale-royalties-aka-droit-de-suite/.

17 17 U.S.C. § 101.

18 See, for example, *Purohit v. Legend Pictures, LLC*, 448 F. Supp. 3d 382 (D. Del. 2020) (holding a book sold from an edition of more than 500 copies was not eligible for moral rights protection under § 106A).

19 *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128 (1st Cir. 2006) (the VARA claim failed because the works were deemed site-specific and thus not protected).

thus favouring the interest of real estate owners,[20] municipal administrations[21] and other commercial interests.[22] Inherent throughout the sequence is the tension between the rights VARA creates and the 'conventional notions of property rights'.[23]

i Ushering in VARA with Serra v. US General Services Administration

In 1986, renowned US sculptor Richard Serra sought legal protection to prevent his artwork, *Tilted Arc* (1981), a large public sculpture that was owned by the US General Services Administration (GSA), from removal and relocation from the Federal Plaza in Manhattan, New York.[24] Serra created the sculpture on commission and sold it to GSA. Subsequently, GSA received hundreds of complaints from members of the general public, who claimed that the sculpture was an eyesore, hindered pedestrian traffic and was susceptible to vandalism.[25]

In 1988, just two years before VARA was enacted, the Second Circuit ruled against Serra's arguments for preservation of his site-specific art on the basis that he 'relinquished his own speech rights in the sculpture when he voluntarily sold it to GSA; if he wished to retain some degree of control as to the duration and location of the display of his work, he had the opportunity to bargain for such rights in making the contract for sale of his work'.[26] In deciding against the artist, the court concluded that the artist was seeking a new rule from the judiciary, something reserved for Congress to regulate. The court opined:

> *We recognize that Courts considering . . . challenges by artists to governmental decisions to remove purchased works of art must proceed with some caution, lest a removal ostensibly based on unsuitable physical characteristics of the work or an unfavorable assessment of its aesthetic appeal camouflage an impermissible condemnation of political viewpoint . . . Government can be a significant patron of the arts. Its incentive to fulfill that role must not be dampened by unwarranted restrictions on its freedom to decide what to do with art it has purchased.*[27]

20 *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77 (2d Cir. 1995) (the VARA claim failed because the works were found to have been made for hire).

21 *Kelley v. Chicago Park Dist.*, 635 F.3d 290 (7th Cir. 2011) (the VARA claim failed because the artist's garden could not qualify for moral rights protection under VARA since the garden was neither 'authored' nor 'fixed' in senses required for basic copyright).

22 See, for example, *Tobin v. The Rector, Church-Wardens, and Vestrymen of Trinity Church*, 17-cv-02622 (S.D.N.Y. Nov. 2017) (affirmed 13 September 2018); *Cheffins v. Stewart*, 825 F3d 588 (9th Cir 2016) (the VARA claim failed because the court found that the underlying object (a used school bus transformed into a mobile replica of a sixteenth-century Spanish galleon) was utilitarian in nature, an applied art, and thus not protected under the Copyright Act); *Kleinman v. City of San Marcos* (2010, CA5 Tex.) 597 F3d 323, cert. den. (2010, US) (holding that the VARA claims failed because the objects thought to be protected did not qualify as 'works of art' but rather as 'promotional' material outside of VARA protection).

23 Morton J Horwitz, *The Transformation of American Law*, Cambridge, Mass: Harvard University Press (1977).

24 *Serra v. U.S. General Services Admin.*, 847 F.2d 1045 (2d Cir. 1988).

25 id., at 1048.

26 id., at 1047.

27 id., at 1051.

Arriving in the wake of the *Serra* decision and in response to advocacy efforts for extending artists' rights, Congress created the very rule Serra would have needed to keep *Tilted Arc* in place: it added VARA as an amendment to the Copyright Act.[28]

ii Surveying VARA application in Carter v. Helmsley-Spear, Inc

The first important case to test how VARA could protect artists was brought by three professional sculptors: John Carter, John Swing and John Veronis (collectively, 'Jx3'),[29] who, as plaintiffs, claimed that defendants (and later, appellees and cross appellants) tried to assert their rights of integrity against a real estate owner and managing agent (the 'defendants') of a commercial building in Queens, New York. Here, the artwork in question was commissioned by the former tenants of the building but it was not sold and all agreed that Jx3 retained copyright in their works. However, when the defendants resumed control of the premises, they forbade the artists from creating further artwork on the premises and informed Jx3 of plans to remove all existing art from the building. At trial, Jx3 obtained a permanent injunction preventing the defendants from removing, modifying or destroying a work of visual art from the building. However, the decision was reversed on appeal.

Despite quoting US poet Ralph Waldo Emerson's praise of indigenous arts in its 1995 opinion ('a country is not truly civilized where the arts, such as they have, are all imported, having no indigenous life'), the court sided with the defendants and allowed for Jx3's 'indigenous art' to be removed. This was either because VARA was 'relatively new'[30] or because it 'did not mandate the preservation of art at all costs and without due regards for the rights of others',[31] but the *Carter* court concluded that the piece commissioned from Jx3 was 'made for hire' and thus exempt from protections offered under VARA.[32]

iii Training ground for VARA in Massachusetts Museum of Contemporary Art Foundation v. Büchel

The bitter dispute between Christoph Büchel, a Swiss visual artist, and the Massachusetts Museum of Contemporary Art (Mass MoCA or the Museum)[33] offered a new test and an expanded application of VARA.[34] Characterised by the *Boston Globe* as 'the ultimate how-not-

28 See *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128 (1st Cir. 2006) (containing arguments by a sculptor for protection of site-specific art); *Kelley v. Chicago Park District*, No. 04-C-07715, 2008 WL 4449886, at *1 (N.D. Ill. 29 September 2008) (concerning non-traditional works of art that should be granted moral rights protection from destruction or removal).

29 71 F.3d 77 (2d Cir. 1995), reversing and vacating the grant of injunctive relief in *Carter v. Helmsely-Spear, Inc.*, 861 F. Supp. 303 (S.D.N.Y. 1994).

30 id., at 84.

31 id., at 80.

32 It is instructive to note that the court in *Carter* was aware that 'the issue of federal protection of moral rights was a prominent hurdle in the debate of whether the United States should join the Berne Convention . . . [because its] protection of moral rights posed a significant difficulty to U.S. adherence' and cognisant of the fact that 'artists fared better in state legislatures than they generally had in Courts'. id., at 81 and 82.

33 593 F.3d 38 (1st Cir. 2010).

34 K E Gover, 'Christoph Büchel v. Mass MoCA: a tilted arc for the twenty-first century', *Journal of Aesthetic Education* 46, No. 1 (2012), 46–58.

to guide in the complicated world of installation art',[35] it concerned an immense installation, with the working title *Training Ground for Democracy*, which would display a cinema, a jail, voting booths, a shooting range and other true-to-scale references to visual markers of democracy in everyday life.[36] The project was not memorialised in writing and, following budgetary and creative disputes, abandoned.[37] Mass MoCA's continued use of the artist's name in association with the modified work and the treatment and display of the unfinished installation were categorised as infringing on Büchel's moral rights; two court rulings followed.

The lower court sided with the museum and found that as a matter of law, Büchel's moral rights in an unfinished work and his exclusive rights to display it were not violated. On appeal, the First Circuit found that even though the artist did not complete the work, an unfinished installation nevertheless classified as a 'work of art' and the author had the right to integrity in his work.[38] Hence, the Museum potentially infringed on the artist's rights.

In this decision, the court also addressed damages available to artists whose works were destroyed or whose reputations may have been injured as a result of a VARA violation. The *Büchel* court ultimately determined that a financial remedy did not arise automatically from the right to prevent offensive conduct. The artists would need to obtain adequate relief for the harms of false attribution by resorting to the damages contemplated under the Copyright Act and other traditional claims.[39] Büchel's moral rights arguments regarding distortion of his work were rejected because '[a] separate moral right of disclosure (also known as the right of divulgation) . . . is not covered under VARA'.[40] However, the exclusive right to publicly display his copyright-protected work under Section 106 of the Copyright Act survived. The case was remanded and then settled.[41]

iv Observing the Noland effect

Marc Jancou Fine Art Ltd v. Sotheby's, Inc

Moral rights codified by VARA could serve as a weapon (whether intentionally or not) to jeopardise the economic value of art by a living artist who decides to disavow authorship in his or her work. Artist Cady Noland, for example, on multiple occasions withdrew her authorship from the art she made. In 2013, the First Circuit affirmed a holding that an auction house (which had accepted a work on consignment from the defendant-collector) could lawfully withdraw an aluminium print attributed to Noland, *Cowboys Milking* (1990), with a high estimated value of US$300,000 from its auction after the artist disclaimed authorship in the work and demanded the lot be withdrawn. Noland believed the conservation work done to *Cowboys Milking* constituted detrimental changes that prejudiced her honour and reputation

35 *Massachusetts Museum, Contemp. Art Foun. v. Büchel*, 593 F.3d 38, 41 (1st Cir. 2010), citing Geoff Edgers, 'Dismantled', *Boston Globe* (21 October 2007), http://archive.boston.com/ae/theater_arts/articles/2007/10/21/dismantled/.

36 Mass MoCA, 'Press Release: Training Ground for Democracy' (7 December 2010) (summarising the Museum's position and acknowledging that the parties settled), https://massmoca.org/event/training-ground-democracy/.

37 K E Gover, 'Artistic Freedom and Moral Rights in Contemporary Art: The Mass MoCA Controversy,' *Journal of Aesthetics and Art Criticism* 69, No. 4 (2011), 355–365.

38 593 F.3d 38, 57.

39 id., at 56.

40 593 F.3d 38, 62; citing Cyrill P Rigamonti, 'Deconstructing moral rights,' *Harv. Int'l LJ* 47 (2006), 353, 405.

41 593 F.3d 38, 65.

as an artist; she sought to assert 'her right to prevent the use of her name as its author'.[42] Sotheby's consignment agreement with the defendant-collector allowed the auction house to unilaterally withdraw lots from sale, and, when faced with possible VARA claims, Sotheby's exercised its discretion to withdraw the lot.

The collector appealed the court's summary judgment ruling in favour of co-defendants Sotheby's and the artist. On appeal, the court affirmed the lower court's holding, explaining:

> *[i]n light of Noland's assertion and a report showing that the work had been damaged and restoration had been performed on it, Sotheby's did not breach the contract or its fiduciary duty to the plaintiff by withdrawing the work from auction.*[43]

Noland v. Janssen

Ten years later, Noland commenced a moral rights case against a collector and his art dealers, trying to distance herself from yet another refurbished artwork.[44] The case concerned a wooden sculpture, *Log Cabin Façade* (1990), which one of the defendants, a German art collector, purchased directly from the artist. In 1995, the collector received the artist's permission to weatherproof the sculpture, to display it outdoors. The sculpture, having been displayed outdoors on the bare ground, began to rot in some areas and the collector replaced the deteriorated portions in 2010.

In June 2020, district judge Paul Oetken ruled that, even after Noland filed a third amended complaint, her allegations that conservation work on *Log Cabin Façade* violated her moral rights were unconvincing. Noland conceded that her express authorisation to stain the sculpture created a derivative work that fell under the umbrella of VARA. The court found that artist's permission shifted copyright from the artist to the collector, thus empowering the collector to create the derivative that later underwent conservation.

As Judge Oetken explained, Noland's mere displeasure with the collector's conservation efforts did not afford her protection under VARA:

> *Noland does not contest that the sculpture did not initially qualify for protection under VARA. Rather, she argues that she authored a derivative work when she permitted Schürmann to stain the sculpture sometime after the effective date of the statute, and that derivative work is entitled to VARA protection. (Dkt. No. 96 at 16-20.) Even if the Court were to make many of the leaps required by Noland's line of reasoning – that the staining created a copyrightable derivative work, that the derivative work qualifies for protection under VARA, and that the marketing of the refurbished stained work violated those rights – Noland still would not prevail on her claim. That is because the author of the derivative work – and therefore the holder of any VARA rights vis-à-vis the staining – would be Schürmann, not Noland.*[45]

v Missing resale royalty in Estate of Graham v. Sotheby's Inc

Unlike dozens of other nations, the US does not recognise the right of visual artists to receive a royalty when their original, tangible work of arts are resold. The dissimilar nature of copyright-protected materials (published books, music and visual arts) has created a disparity

42 *Marc Jancou Fine Art Ltd., v. Sotheby's, Inc.,* 2012 N.Y. Slip Op 33163 (Sup. Ct. 2012).

43 *Marc Jancou Fine Art Ltd. v. Sotheby's, Inc.*, 107 A.D.3d 637, 967 N.Y.S.2d 649 (App. Div. 2013).

44 No. 17-CV-5452 (JPO) (S.D.N.Y. 1 June 2020).

45 *Noland v. Janssen*, No. 17-CV-5452 (JPO) (S.D.N.Y. June 1, 2020).

in the benefits afforded to authors of literary and audio works and visual artists. Whereas writers and musicians are able to capitalise on the volume of copies of their works sold, visual artists typically depend on the sale of the unique work of art at the primary market stage. A copy, or a derivative work, from the original work of art is valued significantly below the value of the original, which can only be legally sold once. Listed as Article 14 *bis* in the Berne Convention, a version of the model clause concerning resale rights has been incorporated into the legislation of over 70 countries worldwide, thus allowing their visual artists to collect a percentage from each subsequent sale of their works.

Despite multiple efforts to promulgate a national resale royalty right in the United States, the US Congress stopped short of including resale rights in the VARA amendment. The history of efforts to codify a federal resale royalty scheme in the United States is well-documented.[46] The lack of a federal resale royalty scheme effectively excludes US artists and their estates from participating in the financial appreciation of the artist's creative work that has been alienated through sales.[47]

Only one of the US states, California, has successfully passed a law allowing visual artists to partake in the economic appreciation of their works. However, in 2012, the Ninth Circuit found that the California Resale Royalties Act (CRRA)[48] was unconstitutional, as it violated the dormant Commerce Clause of the US Constitution,[49] conflicted with and thus violated the first sale doctrine of the Copyright Law[50] and, where any protections survived for California-based transactions, the entire law was pre-empted by Section 301(a) of the later adapted 1976 Copyright Act.[51]

The underlying consolidated case, *Estate of Graham v. Sotheby's*,[52] was initiated by artists and estates who brought a class action complaint against the leading auctioneers (including eBay, Christie's and Sotheby's) for failure to comply with CRRA, with regard to their own rights and the rights of similarly situated artists, including New York-based artist Chuck Close (born 1940), LA-based artist Laddie John Dill (born 1943), the California-based

46 See, generally, US Copyright Office, 'Droit de Suite: The Artist's Resale Royalty' (December 1992) (the 1992 Copyright Report); Office of the Register of Copyrights, 'Report on Resale Royalties: An Updated Analysis' (December 2013), available at www.copyright.gov/docs/resaleroyalty/usco-resaleroyalty.pdf; see also Responses to Copyright Office's Notice of Inquiry re Resale Royalty Right, Docket No. 2012-10, 77 Fed. Reg. 58175 (19 September 2012), containing comments in support and in opposition of passing a federal resale royalty right, such as the comments of the Center for Art Law, available at www.copyright.gov/docs/resaleroyalty/comments/77fr58175/Center_for_Art_Law.pdf; and comments of Sotheby's, Inc and Christie's Inc, available at www.copyright.gov/docs/resaleroyalty/comments/77fr58175/Sothebys_Inc._and_Christies_Inc_Simon_J_Frankel.pdf.

47 Artists may collect licensing fees for the right to reproduce their works but may not receive commission from the sale proceeds of the pieces. See US Copyright Office 1992 and 2012 reports.

48 Cal. Civ. Code § 986.

49 *Estate of Graham v. Sotheby's Inc.*, 860 F. Supp. 2d 1117 (C.D. Cal. 2012).

50 17 U.S.C. §109(a). *Estate of Graham v. Sotheby's, Inc.*, 178 F. Supp. 3d 974 (C.D. Cal. 2016). (finding that the Copyright Law 'prohibits copyright holders from exercising downstream distribution control of their products').

51 *Estate of Graham v. Sotheby's, Inc.*, 894 F.3d 1061 (2018) (holding the California Resale Royalties Act (CRRA) to be 'short lived' whereby artists could 'only state claims for the period between the CRRA's effective date of January 1, 1977, and the 1976 Act's effective date of January 1, 1978').

52 860 F. Supp. 2d 1117 (C.D. Cal. 2012); *Estate of Robert Graham v. Sotheby's Inc.*, C.D. Cal. No. 2:11-cv-08604-JHN-FFM, complaint filed 18 October 2011; *Sam Francis Foundation v. Christie's Inc.*, C.D. Cal. No. 2:11-cv-08605-SVW-PJW, complaint filed 18 October 2011.

artist-endowed charitable foundation Sam Francis Foundation (established 1995) and the estate[53] of the US-born Mexican sculptor Robert Graham (1938–2008). Typically severe competitors, the defendants objected vehemently to the validity and constitutionality of CRRA, arguing that it was pre-empted by the first-sale doctrine.[54] Ironically, the two auction houses that have been the most vocal critics of US efforts to impose a resale royalty scheme[55] have successfully modified their business practices in the United Kingdom, following the passing of the EU Directive requesting all EU Member States, including the UK, to collect artist resale royalty following public auctions. It is important to note that the concerns over potential market losses by US dealers who feared or predicted that UK art sales would drop following its adoption of the royalty scheme were ultimately unfounded.[56]

In light of the fact that the US does not have a resale royalty right scheme, there is no reciprocity and US artists are not eligible to collect royalties even in the jurisdictions where this practice is a norm, such as France and the UK, where both Sotheby's and Christie's have auction rooms and conduct sales. Artists and estates of deceased artists who qualify to collect resale royalties include nationals of any European Economic Area countries, such as Belgium. Even during 2020, comparable sales of artworks by the famous Belgian artist Rene Magritte (1898–1967), which took place in quick succession, one in London[57] and one in the US,[58] both generated substantial interest and sold in excess of their low estimates, with the main

53 *Estate of Graham v. Sotheby's, Inc.*, 178 F. Supp. 3d 974, 996 (C.D. Cal. 2016) (dismissing a claim from the Graham estate on the grounds that it had no standing, lacked the status of legal entity and suggesting that 'an individual, such as an executor, . . . appear on behalf of the Estate of Robert Graham to prosecute its claims'.)

54 17 U.S.C. § 109 – Limitations on exclusive rights.

55 See public comments submitted to the Copyright Office in 2012 by the auction houses arguing against the recognition and enforcement of federal resale royalty rights in the US, available at copyright.gov, 'Policy Studies: Resale Royalty Rights', www.copyright.gov/docs/resaleroyalty/. Also see, for example, Sotheby's glossary explain that the artist resale right (or droit de suite) denotes a requirement imposed by the European Union's Artist's Resale Right Directive, 'which has been adopted by the United Kingdom, living artists and artists who died within 70 years prior to the date of the sale are entitled to receive a resale royalty each time their art work is sold by an art market professional in the European Union or United Kingdom, subject to certain conditions. Sotheby's will collect the resale royalty due to the artists or their estates from buyers of lots with a hammer price (excluding buyer's premium and excluding VAT) in excess of €1000. Any purchaser of a lot to which Artist's Resale Right applies will be charged the amount of the resale royalty, which will be added to the invoice. For more information on rates, view the Artist Resale Right Chart,' available at www.sothebys.com/content/dam/sothebys/PDFs/droitdesuite/ARR-EN.pdf?locale=en; Christie's, 'FQAs: Droit de Suite', available at www.christies.com/features/guides/buying-guide/related-information/droit-de-suite/faq/?sc_lang=en#question4.

56 See 'UK's Artist Resale Royalty Law Didn't Damage the Art Market (Despite All the Claims)', *Huffington Post*, 14 September 2012.

57 Christie's sold *A la rencontre du plaisir* (1962): hammer price: £16.5 million; buyer's premium: £2,433,750; artist's royalty: €12,500; Christie's, 'London SALE 18340: The Art Of The Surreal Evening Sale (5 February 2020): Lot 32', www.christies.com/lotfinder/paintings/rene-magritte-a-la-rencontre-du-plaisir-6252203-details.aspx?from=salesummary&intObjectID=6252203&lid=1.

58 Sotheby's sold *Rêverie de Monsieur James* (1943): hammer price: US$4.2 million; buyer's premium: US$889,800; artist's royalty: $0; Sotheby's, 'New York Sale, Impressionist & Modern Art Evening Sale (28 October 2020): Lot 104'.

difference being the US sale collected no resale royalty, while the London sale, subject to artist resale rights provisions, had to account for and deliver funds to the Magritte Estate in Belgium.[59]

vi Opportunity for private law

Lack of a federal resale royalty right in the US should not necessarily prevent artists from asking for and negotiating resale royalty provisions in their sales contracts before 'first sale doctrine' takes root. As early as 1971, US-based artist Seth Siegelaub and attorney Robert Projansky put together a model agreement entitled 'Artist's Reserved Rights Transfer and Sale Agreement', designed to empower artists to negotiate their resale rights individually. More recently, in summer 2020, a non-profit organisation called Kadist made public its own model agreement to encourage artists and collectors to agree on setting aside some of the proceeds from the resale of art to be donated to charitable causes. Whether using a model agreement or negotiating independently, US artists may be incorporating resale royalty requirements into the private contracts they enter into with collectors to retain some economic interest in their creations.[60]

III MORAL RIGHTS OUTSIDE OF VARA

A survey of the limited moral rights of visual artists in the United States shows that artists have endured an uphill battle to protect the integrity of their work. Prior to the passing of VARA, artists had to rely on limited state regulations, private contracts, unfair competition doctrine, public interest and general copyright protections to preserve the integrity of their works.[61] Even now, New York and other state laws offer additional protections to artists and art collectors.[62]

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59 WIPO, Standing Committee on Copyright and Related Rights Thirty-Fifth Session, Geneva, 13–17 November 2017, 'The Economic Implications of the Artist's Resale Right', available at www.wipo.int/edocs/mdocs/copyright/en/sccr_35/sccr_35_7.pdf.

60 See, for example, Louise Carron, 'A Charitable Spin on Sale Agreements of Art', Center for Art Law (21 October 2020), https://itsartlaw.org/2020/10/21/charitable-spin-on-sales-agreement-of-art/; Laurel Wickersham Salisbury, 'It's Not That Easy: Artist Resale Royalty Rights and The ART Act', Center for Art Law (1 July 2019), https://itsartlaw.org/2019/07/01/its-not-that-easy-artist-resale-royalty-rights-and-the-art-act/.

61 See, for example, *Vargas v. Esquire, Inc.*, 164 F.2d 522, 527 (7th Cir. 1947) (a request for attribution by an artist against a magazine was rejected based on the terms of contract and because 'the concept of "moral rights" . . . so fully recognized and developed in the civil law countries has not yet received acceptance in the law of the United States') and *Crimi v. Rutgers Presbyterian Church in the City of New York*, 89 N.Y.S.2d 813 (N.Y. Sup. Ct. 1949) (a claim that removal of a mural from a wall was a violation of the artist's right of integrity was denied by a court that found destruction of an artwork does not injure the artist's reputation, unlike its display in an altered state). Other protections available under Federal law include the First Amendment that may offer relief to artists who wish to protect their right from destruction or censorship. See Cara L Newman, 'Eyes Wide Open, Minds Wide Shut: Art, Obscenity, and the First Amendment in Contemporary America', 53 *DePaul L. Rev.* 121 (2003); see also Amy M Adler, 'Post-Modern Art and the Death of Obscenity Law', 99.6 *Yale L.J.* 1359 (1990).

62 See N.Y. Arts and Cultural Affairs Law § 12.01 (Consol. 2012) and *Lipsky v. Spanierman Gallery, LLC et al.*, No. 154805/2020 (N.Y. Sup. Ct., filed on 29 June 2020) (the artist is seeking to stop the damage being done to her reputation by an art dealer).

Typically, claims of violations of artists' rights are examined in the context of copyright law and its exceptions. However, notes of moral rights echo in many textbook disputes, even when VARA is not at issue. For example, in the case concerning the US-artist Richard Prince's blatant appropriation of artistic photographs created by the French artist Patrick Cariou, the district court found copyright infringement and ordered that the defendants:

> *shall within ten days of the date of this Order deliver up for impounding, destruction, or other disposition, as plaintiff determines, all infringing copies of the Photographs, including the Paintings and unsold copies of the Canal Zone exhibition book, in their possession, custody, or control and all transparencies, plates, masters, tapes, film negatives, discs, and other articles for making such infringing copies.*[63]

On appeal, the decision was reversed and no artworks were destroyed (an act that itself could have triggered a VARA discussion). Still, the lower court's temporary holding with its draconian disposition was reminiscent of the European traditions of destroying infringing and offensive works, such as those deemed forgeries of works protected by moral rights.[64]

Similarly, it is not easy to force an artist to create a work of art or 'deliver on the contract', even when avid collectors are armed with a consignment agreement and are paying to have the works created and delivered in time. Unlike a case decided in the Netherlands, where a court ordered specific performance and threatened a US$10,000/day penalty for an artist's non-performance under a contract with a collector,[65] courts in the US are reluctant to force artists' creation. Consider, for example, the circumstances when collectors Joel Silver and Steven Tananbaum sued Jeff Koons and the Gagosian Gallery after Koons and the gallery failed to produce sculptures in accordance with the parties' contract. After the court did not readily grant damages or order specific performance, the Tananbaum claim was settled in 2020[66] and Silver's claim was discontinued in 2019.[67]

Eyeing the implications of VARA

Whereas most VARA claims have been resolved on grounds unrelated to moral rights (*Carter*) and settled prior to a final disposition on the facts (*Büchel*), the *5Pointz* case resulted in a clear deference to protecting moral rights.[68] The most impressive part of this case for this author was the breadth of art historical material submitted to support the plaintiffs' position that aerosol art merited recognition and protection. During the trial, artist after artist took the stand to discuss his or her training and technique, professional trajectory, exhibition history and commercial success.

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63 *Cariou v. Prince*, 784 F. Supp. 2d 337 (S.D.N.Y. 2011), rev'ed in 714 F.3d 694 (2d Cir. 2013).

64 See, for example, Italian and French laws regarding destruction of works of art, Cyrill P Rigamonti, 'Deconstructing moral rights'. *Harv. Int'l L.J.* 47 (2006), 353. Sofia Komarova, 'Why not destroy this fake? A defence of the Chagall Committee', *Apollo* (6 March 2014), available at www.apollo-magazine.com/destroy-fake-chagall-committee/.

65 *[Bert Kreuk] v. [Danh Võ]* C/10/442131 / HA ZA 14-57 Rechtbank Rotterdam ECL:NL:RBROT:2014:6962 (24 June 2015), available at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBROT:2014:6962.

66 *Steven Tananbaum v. Gagosian Gallery, Inc. and Jeff Koons LLC*, Index No. 651889/2018.

67 *Joel Silver v. Gagosian Gallery, Inc.*, No. 652090/2018.

68 *Cohen et al., v. G&M Realty L.P, Wolkoff et al.*, 13-cv-05612(FB)(RLM) (E.D.N.Y. 12 February 2018) available at https://casetext.com/case/cohen-v-gm-realty-lp-3#p2.

On 12 February 2018, in a 100-page decision, Judge Block awarded US$150,000 for each mural, collage and installation that was wrongfully and wilfully destroyed because the real estate developer's actions were the 'epitome of wilfulness' and he acted out of 'pure pique and revenge for the nerve of the plaintiffs to sue to attempt to prevent the destruction of their art'.[69] Forty-nine pages in the decision were its Appendix, almost an exhibition catalogue of street art, listing each plaintiff by name and reproducing at least one of his or her works of art from the former 'repository of the largest collection of exterior aerosol art . . . in the United States'.[70]

Looking at the *5Pointz* ruling in isolation, the US street artists and fine artists alike might feel empowered. However, going forward, owners or real estate operators will be more careful when dealing with artists, and are likely to insist on artists' waiving their VARA rights before ever allowing them to install their works. The conflict between protection of artists' rights and property rights is ongoing.[71]

In hindsight, moral rights of artists in the United States are poorly protected and narrowly enforced. As soon as US artists die, their moral rights evaporate all together. The cavalier rather than chivalrous attitude towards the vision and the will of the artist persists as tastes and emphasis change. Consider, for example, museums deaccessioning art that was once donated directly by an artist.[72] Similarly, consider the trend of covering up or removing the *New Deal-Era* murals from schools and court houses,[73] which is evocative of the problem posed by Serra's *Tilted Arc* in the 1980s. Even after the *5Pointz* ruling, is the *Büchel* court's observation that VARA 'acquired the attribution of a false talisman' still true?[74] Until the US Supreme Court reviews a VARA case, or Congress amends the Copyright Law to include a resale royalty provision, artists and their advocates remain limited by the available moral rights protections, and have to be creative in using public and private law to protect artists' rights.

69 For the analysis on how to assess the damages, J Block relied on the *Bryant* factors and reviewed the infringer's state of mind, expenses saved and profits earned by the infringer, revenue lost by the copyright holders, the deterrent effect on the infringer and third parties, the infringer's cooperation in providing evidence and the conduct of the parties. *Bryant v. Media Right Prods.*, 603 F.3d 135 (2d Cir. 2010).

70 *Cohen v. G & M Realty L.P.*, 988 F. Supp. 2d 212, 214 (E.D.N.Y. 2013).

71 Amy M Adler, 'Against moral rights', *Calif. L. Rev.* 97 (2009), 263.

72 In 2018, Sotheyb's auctioned off a number of artworks to benefit the Berkshire Museum, MA. Sotheby's, American Art, 23 May 2018 Sale, Lot: 43 Norman Rockwell, *Blacksmith's Boy* (1940), www.sothebys.com/en/auctions/ecatalogue/2018/american-art-n09867/lot.43.html?locale=en.

73 See, for example, Olivia Taylor, 'Art in the Courtroom: Dealing with New Deal-era Murals – Part I', Center for Art Law (15 November 2018), https://itsartlaw.org/2018/11/15/art-in-the-courtroom-dealing-with-new-deal-era-murals-part-i/; Alexa Díaz, 'School to cover up George Washington mural that depicts violence and slavery', *LA Times* (28 June 2019), www.latimes.com/local/lanow/la-me-ln-george-washington-san-francisco-mural-20190628-story.html.

74 *MassMoca v. Büchel*, at 63, citing Laura Flahive Wu, 'Massachusetts Museum of Contemporary Art v. Büchel: Construing Artists' Rights in the Context of Institutional Commissions', *Colum. JL & Arts* 32 (2008), 151, 164.

Chapter 7

THE MEDIATION AND ARBITRATION OF INTERNATIONAL ART DISPUTES

Luke Nikas and Maaren A Shah[1]

I INTRODUCTION

'The art market is notoriously opaque – the cliché is that it is the largest unregulated industry in the world, besides guns and drugs. . . . There is little oversight, and players can get away with a lot of ethically dubious behavior.'[2] In such a fraught landscape, disputes can arise frequently. Yet, the administration of justice in art law disputes can be challenging. Traditional judicial forums often do not have the required expertise in art and the art market to resolve these disputes. As a result, the art market often does not accept the validity of legal judgments in art disputes – rendering the process inefficient and ineffective. Aiming to address these problems, on 7 June 2018, the Netherlands Arbitration Institute (NAI) and Authentication in Art ((AiA), based in The Hague) launched the Court of Arbitration for Art (CAfA), 'a specialized arbitration and mediation tribunal exclusively dedicated to resolving art law disputes'.[3] CAfA aims to 'increase the quality of the decision making and the market acceptability of the outcome[s]'[4] by relying on art law practitioners and experts, who are better positioned than traditional courts to evaluate evidence and to understand the intricacies of the art market.[5] CAfA was designed to address all art law issues, including fraud, stolen art, authenticity, copyright and contractual disputes,[6] and can conduct hearings anywhere in the world.[7]

To best understand how this new tribunal operates, it is important to understand why it was created in the first place. This chapter focuses on two significant problems that confront the effective resolution of art law disputes in traditional judicial forums, and how CAfA set out to fix them.

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1 Luke Nikas and Maaren A Shah are partners at Quinn Emanuel Urquhart & Sullivan, LLP. Their colleague Jeanine Zalduendo provided essential assistance with this chapter.

2 M H Miller, 'The Big Fake: Behind the Scenes of Knoedler Gallery's Downfall', *Art News* (25 April 2016), www.artnews.com/art-news/artists/the-big-fake-behind-the-scenes-of-knoedler-gallerys-downfall-6179/.

3 About Court of Arbitration for Art [CAfA], available at https://authenticationinart.org/cafa/.

4 CAfA, About Us, available at www.cafa.world/.

5 'New York Faculty Helps Create New Art Tribunal at The Hague', Sotheby's Institute of Art, www.sothebysinstitute.com/news-and-events/news/new-york-faculty-helps-create-new-art-tribunal-at-the-hague.

6 Laura Gilbert, 'New Tribunal Aims to Provide Expertise and Impartiality for Art Disputes', *The Art Newspaper* (7 May 2018), available at www.theartnewspaper.com/news/new-tribunal-aims-to-provide-expertise-and-impartiality-for-art-disputes.

7 id.

II PROBLEMS WITH ADJUDICATING ART LAW DISPUTES IN TRADITIONAL FORUMS

A significant problem facing the adjudication of art law disputes is the judicial system's lack of experience with the unusual customs of the art world and lack of expertise in specific issues, such as artistic merit and purpose, aesthetics and authenticity. As Justice Holmes famously stated, 'it would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of a work, outside of the narrowest and most obvious limits'.[8] This lack of expertise in the first instance not only leads to inconsistent and imprecise results, but also contributes to the second major problem in adjudicating art disputes in the mainstream judicial system: the perceived lack of legitimacy of the decisions rendered. The fact that a court issues an opinion about a work of art does not mean that the market will honour the result, which can make the judicial determination ineffective. For example, 'the market need not – and often does not – accept a court's finding that a work is, more likely than not, authentic or fake'.[9] CAfA was designed to confront these types of problems by establishing procedures that promote decisional accuracy and foster the legitimacy of decisions resolving art disputes in a way that the market can and will rely on.[10]

Certain types of art disputes are particularly susceptible to these problems. Among these are copyright cases that involve the defence of fair use, and warranty cases that address authenticity.

i Copyright and the fair use defence

The fair use doctrine is an affirmative defence to a claim of copyright infringement under which certain uses of a copyrighted work 'for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright'.[11] Courts assessing fair use must engage in a multi-part analysis that considers both objective and subjective factors regarding a defendant's use of a copyrighted work. The first factor – which is often the most determinative in the analysis – considers the purpose and character of the use, including whether it is transformative of the original work.[12] Despite being highly subjective, the United States Court of Appeals for the Second Circuit considers this factor,

8 *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251, 23 S.Ct. 298, 47 L.Ed. 460 (1903) (Holmes, J).

9 Brigit Katz, 'New Court at the Hague Will Deal Exclusively with Art Disputes', *Smithsonian Magazine* (11 May 2018), available at www.smithsonianmag.com/smart-news/new-court-hague-will-deal-exclusively-art-disputes-180969052/.

10 See footnote 5, above.

11 17 U.S.C. § 107. 'Copyright law [] must address the inevitable tension between the property rights it establishes in creative works, which must be protected up to a point, and the ability of authors, artists, and the rest of us to express them – or ourselves by reference to the works of others, which must be protected up to a point. The fair-use doctrine mediates between the two sets of interests, determining where each set of interests ceases to control.' *Blanch v. Koons*, 467 F.3d 244, 250 (2d Cir. 2006).

12 Under 17 U.S.C. § 107, fair-use factors are: (1) the purpose and character of the use, including whether the use is of a commercial nature or is for non-profit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use on the potential market for or value of the copyrighted work.

and in particular the 'transformativeness' inquiry, to be at '[t]he heart of the fair use inquiry'.[13] Generally, 'the more transformative the new work, the less will be the significance of other factors, like commercialism'.[14]

For instance, the Second Circuit focused almost entirely on the purpose and character analysis in the copyright infringement case *Blanch v. Koons*,[15] in which fashion photographer Andrea Blanch brought a copyright infringement action against visual artist Jeff Koons, after Koons incorporated an altered image from one of Blanch's copyrighted photographs into a collage painting titled *Niagara*.[16]

As the Court repeatedly stressed, it was not its job 'to judge the merits of *Niagara*, or of Koons's approach to art'.[17] Curiously, however, the Court spent considerable time comparing Koons's purported artistic purpose for creating *Niagara* to that of Blanch in creating the copyrighted photograph.[18] The Court also identified and assessed what it believed to be the stylistic elements that Koons incorporated from Blanch's photograph into *Niagara*. Based largely on what the Court thought were the 'sharply different objectives' that Koons expressed for creating his art compared to Blanch's reasons for creating her photo, as well as the aesthetic and stylistic changes Koons made to the colours, background, medium and size of the objects and object details, the Court found *Niagara* to be transformative, with Blanch's photograph serving merely as the 'raw material'.[19] The Court therefore concluded that Koons had made fair use of Blanch's photograph and had not infringed on her copyright.

The holding in *Blanch* – when contrasted with the holdings in similar cases – highlights the potential problems of a court untrained in art applying a subjective analysis concerning artistic merit and objectives. The subjectivity of this analysis, uninformed by artistic expertise, may lead to inconsistent results. For example, Koons had been sued for copyright infringement in prior cases involving others of his artworks, and was found to have infringed the copyrighted works each time.[20] Indeed, in one case, *Rodgers v. Koons*, the court 'was not very sympathetic to Koons' artistic goals and viewed him more as a profiteer on Rogers' work.[21] Although the works at issue in each case were different, the result in *Blanch* may be more a product of Koons's changing defence strategy rather than the Court 'getting it right'.[22]

13 *Davis v. The Gap, Inc.*, 246 F.3d 152, 174 (2d Cir. 2001) (relying on *Campbell v. Acuff–Rose Music, Inc.*, 510 U.S. 569, 579, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994)); Blanch, 467 F.3d at 251 (same).

14 *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312, 325 (S.D.N.Y. 2019) (quoting *Campbell*, 510 U.S. at 579).

15 467 F.3d 244 (2d Cir. 2006).

16 id., at 249.

17 id., at 255.

18 id., at 248, 252.

19 id., at 252 to 253 (quoting *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 142 (2d Cir. 1998)).

20 See *Rogers v. Koons*, 960 F.2d 301 (2d Cir.), cert. denied, 506 U.S. 934, 113 S.Ct. 365, 121 L.Ed.2d 278 (1992); *Campbell v. Koons*, No. 91 Civ. 6055, 1993 WL 97381, 1993 U.S. Dist. LEXIS 3957 (S.D.N.Y. 1 April 1993); *United Feature Syndicate v. Koons*, 817 F.Supp. 370 (S.D.N.Y. 1993).

21 L Donald Prutzman, 'Significant Copyright Issues – Treatment Of "Appropriation Art" Under United States Copyright Law', New York State Bar Association International Law and Practice Section (2016) at 7; *Rogers*, 960 F.2d at 304.

22 Peter Jaszi, 'Is There Such A Thing As Postmodern Copyright?', 12 *Tul. J. Tech. & Intell. Prop*. 105, 114 to 115 (2009).

In a later Second Circuit case, *Cariou v. Prince*, photographer Patrick Cariou brought a copyright infringement action against appropriation artist, Richard Prince,[23] based on Prince's use of Cariou's copyrighted photographs in Prince's painting series called Canal Zone.[24]

The Canal Zone series consisted of collages of Cariou's photographs upon which Prince painted images over the subjects' facial features.[25] In reversing the District Court's finding that Prince infringed Cariou's copyright, the Second Circuit focused almost entirely on what it believed to be the transformative nature of Canal Zone.[26]

The majority of the Court adopted an 'objective viewer' test to determine whether Prince's works were transformative, noting that '[w]hat is critical is how the work in question appears to the *reasonable observer*, not simply what an artist might say about a particular piece or body of work'.[27] After conducting a side-by-side comparison of Cariou's 'serene and deliberately composed' photographs and Prince's 'crude and jarring' artworks,[28] the majority concluded that a reasonable observer would find that 25 of Prince's works 'employ[ed] new aesthetics' and created 'a new expression'.[29] The majority stressed the significant aesthetic differences between the works, believing that Prince 'fundamentally' altered the original photographs' 'composition, presentation, scale, color palette, and media'.[30] These changes were sufficient to render 25 of the 30 Canal Zone works transformative as a matter of law.[31]

As for the remaining five works, the majority could not 'say with certainty . . . whether those artworks present a "new expression, meaning, or message"',[32] and believed that the district court was 'best situated' to determine whether Prince's alterations of Cariou's photos were sufficiently transformative so as to render it a fair use.[33]

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23 *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013). 'Prince's work, going back to the mid 1970s, has involved taking photographs and other images that others have produced and incorporating them into paintings and collages that he then presents, in a different context, as his own. . . . As Prince has described his work, he "completely tr[ies] to change [another artist's work] into something that's completely different".' id., at 699 (*citation omitted*).

24 id., at 698.

25 id., at 699.

26 id., at 698, 699, 707.

27 id., at 707 (*emphasis added*). 'The Second Circuit found that a transformative work need not refer to the original copyrighted work, and thus Prince's lack of justification for the copying was of little moment. The district court, however, found Prince's lack of artistic intent and justification for his use of Cariou's copyrighted photographs to be a strike against fair use.' Sergio Muñoz Sarmiento, Lauren van Haaften-Schick, 'Cariou v. Prince: Toward A Theory of Aesthetic-Judicial Judgments', 1 *Tex. A&M L. Rev*. 941, 947 (2014). The Second Circuit does not describe this 'reasonable observer'. Concern exists that the *Cariou* standard eviscerated the United States Supreme Court's ruling in *Bleistein v. Donaldson Lithographing Co*., 188 U.S. 239 (footnote 8, above) by mandating that trial and appellate judges under their jurisdiction approach visual-art copyright lawsuits as art critics and arbiters of taste, and not necessarily as judges in a court of law. Muñoz Sarmiento, van Haaften-Schick, at 947.

28 *Cariou*, 714 F.3d at 706 to 707.

29 id., at 707 to 708. 'Notably, although the Second Circuit describes Prince's artistic technique in detail, it does not address Cariou's at all. His method was, however, discussed by the district court opinion, where the court explained that Cariou's use of photography is specific and learned, executed using a medium format camera and requiring a mastery of darkroom technique.' Muñoz Sarmiento, van Haaften-Schick (footnote 27, above), at 946.

30 *Cariou*, 714 F.3d at 706.

31 id., at 707.

32 id. (quoting *Campbell*, 510 U.S. at 579).

33 *Cariou*, 714 F.3d at 711.

The ruling of the majority drew harsh criticism from Judge John Clifford Wallace, who dissented in part where the Court 'employ[ed] its own artistic judgment' to find that 25 of the Prince works constituted fair use as a matter of law.[34] He failed to see how the majority could draw artistic distinctions between some of Prince's works, but not others, constituting fair use, and remanded the case on the issue of fair use only as to five of the 30 works in question.[35] Judge Wallace further questioned the majority's ability to evaluate Prince's art:

> *If the district court is in the best position to determine fair use as to some paintings, why is the same not true as to all paintings? Certainly we are not merely to use our personal art views to make the new legal application to the facts of this case. . . . It would be extremely uncomfortable for me to do so in my appellate capacity, let alone my limited art experience.*[36]

The lack of agreement regarding the substantive issue of Prince's fair use of copyrighted material – as well as the process for deciding it – as between the District Court's opinion, the majority opinion of the Second Circuit and the dissenting opinion by Judge Wallace, demonstrates the complicated nature of the artistic analysis at issue. It also calls into question the perceived legitimacy of any resulting judicial determination – highlighting the problems with allowing a 'judge [to] make these decisions about *art*'.[37]

ii Warranty cases and authenticity issues

A major issue in warranty cases is whether art is counterfeit, which raises the question of how art is, or should be, authenticated. These cases often turn on a battle of expert opinions, requiring courts to select which expert is more persuasive. When courts and the art market disagree, the legitimacy of a court's decision is diminished.

This is precisely the circumstance that occurred in *Greenberg Gallery, Inc v. Bauman*,[38] in which the plaintiffs sued for breach of warranty, claiming that the piece they had purchased was not the hanging mobile called *Rio Nero* by artist Alexander Calder that they were led to believe.[39] At trial, the parties presented competing expert testimony regarding the work's authenticity.[40] Klaus Perls, the plaintiffs' expert and one of the foremost Calder experts in the

34 id., at 713 (Wallace, J (concurring in part, dissenting in part)).

35 id.

36 id., at 713 to 714.

37 Cat Weaver, 'Law vs. Art Criticism: Judging Appropriation Art' (5 May 2011), available at https://hyperallergic.com/23589/judging-appropriation-art/ (*emphasis in original*). Other commentators have also criticised the *Cariou* decisions. See, e.g., Muñoz Sarmiento, van Haaften-Schick (footnote 27, above), at 947, 957 (noting that the Second Circuit's holding in *Cariou* reduces the 'judicial evaluation of fair use . . . to a formalist analysis of pure image, merely considering what comprises the surface, rather than paying heed to the facts as they stand'); Barry Werbin, 'The "Transformation" of Fair Use After Prince v. Cariou', February 2014, available at www.herrick.com/publications/the-transformation-of-fair-use-after-prince-v-cariou/ ('Based on the Second Circuit's decision, it is presumably now up to courts to determine how a reasonable observer would assess the transformative nature of a secondary work in assessing a fair use defense. At least within courts in the Second Circuit, this determination may now be made in the absence of any statement of meaning or intent from the allegedly infringing artist himself. As newly minted arbiters of potentially "transformative" works of art, judges will be looking more to the subject works themselves on their face to determine fair use.').

38 817 F Supp 167 (D.D.C. 1993), aff'd 36 F3d 127 (D.C. Cir. 1994).

39 id., at 167.

40 id., at 170 to 1 72.

world, whose gallery at one time owned *Rio Nero*, believed that the piece was a forgery.[41] He based his conclusion on a comparison of photographs of the original work to the purported forgery, and noted that the suspected forgery did 'not fit into the feel of a real Calder'.[42] Notwithstanding Perls's conclusion, the court was not persuaded by his analysis and held that the plaintiffs had not carried their burden of proving by a preponderance of the evidence that the work was a forgery rather than a piece that had been 'misassembled and abused' over time.[43]

Importantly, and as the defendant's expert warned, regardless of the court's conclusion, Perls's opinion that the piece was a forgery would 'destroy its value in the art market'.[44] That is exactly what followed: 'As a consequence of his opinion, the work's value has been assessed to be negligible.'[45] The *Greenberg Gallery* decision 'illustrates the inability of our legal system to provide a definitive determination of authenticity'[46] and the consequence of doing so when the art market is not in agreement.

The effect of the *Greenberg Gallery* decision influenced the court in a later case involving Calder works, *Thome v. Alexander & Louisa Calder Foundation*.[47] In *Thome*, plaintiff Joel Thome sought a judgment declaring that two theatrical stage sets were authentic works of Calder and a mandatory injunction compelling that the stage sets be included in Calder's catalogue raisonné.[48] As to authenticity, the court stated that it could not make such a declaration, and that doing so would be of no moment:

> *[D]eterminations of the authenticity of art work are complex and highly subjective assertions of fact. As such, disputes concerning authenticity are particularly ill-suited to resolution by declaratory judgment. The law cannot give an art owner a clear legal right to a declaration of authenticity when such a declaration by definition will not be definitive. . . . Moreover, because of the procedures and processes by which our civil litigation is decided, courts are not equipped to deliver a meaningful declaration of authenticity . . . courts have neither the education to appropriately weigh the experts' opinions nor the authority to independently gather all available appropriate information; we can only base our conclusions on the evidence the parties choose to present to us, and our findings as to a party's entitlement to relief are generally made according to a preponderance of the evidence standard. So, any declaratory judgment of authenticity a court issued would amount to a statement that the*

41 id., at 170. Though believing the work was a forgery, Perls nonetheless stated that the work in question was as 'exact a copy as can be produced', which the court could not comprehend, given the practical impossibility of anyone to do so. id., at 171, 175.

42 id., at 170 to 172.

43 id., at 174 to 176. 'This conclusion follows despite the great weight that must be accorded the opinion of Perls and his premier credentials in respect to Calder's work.' id., at 174.

44 id. Defendant's expert was Linda Silverman, owner of Linda R Silverman Fine Art, Inc and former director of the contemporary art department of Sotheby's auction house, who had examined and appraised hundreds of Calder works. id., at 172.

45 *Thome v. Alexander & Louisa Calder Found.*, 70 A.D.3d 88, 103, 890 N.Y.S.2d 16 (2009) (citing Ronald D Spencer, *The Expert versus the Object: Judging Fakes and False Attributions in the Visual Arts* (Oxford University Press, 2004), at 189).

46 *Thome*, 70 A.D.3d at 102.

47 id., at 103.

48 'A catalogue raisonné is regarded as a definitive catalogue of the works of a particular artist; inclusion of a painting in a catalogue raisonné serves to authenticate the work, while non-inclusion suggests that the work is not genuine', id., at 94 (quoting *Kirby v. Wildenstein*, 784 F Supp 1112, 1113 (S.D.N.Y. 1992)).

> *preponderance of the evidence submitted to it supported a finding that the work at issue was genuine. Even if we considered declaratory relief to be proper in this context, such a limited determination would, in any event, be of no value.*[49]

Conscious of *Greenberg Gallery*, the court noted that a court's declaration on 'authenticity would not resolve plaintiff's situation, because his inability to sell the sets is a function of the marketplace. . . . If it is immaterial to the art world that plaintiff has proof that the sets were built to Calder's specifications, and that Calder approved of their construction, then it will be immaterial to the art world that a court has pronounced the work "authentic"'.[50]

Despite the *Thome* court's more cautious nature, the result again highlights the limitations of the traditional justice system and its inability to provide meaningful relief in art disputes.

III CAFA ESTABLISHED TO ADDRESS LIMITATIONS OF COURTS

The US judicial system has a history of overcoming similar problems of expertise and legitimacy, with the establishment of certain specialty courts.[51] For example, the United States Bankruptcy Court, established in 1978, has jurisdiction over all cases arising under the United States Bankruptcy Code;[52] the Delaware Court of Chancery, established in 1792, was established to adjudicate disputes arising out of complex business transactions;[53] and similar specialist venues are emerging to address patent and trademark disputes.[54] However, the US legal system has not developed a specialist mechanism for addressing art disputes.

In light of the absence of a system dedicated to art disputes, and in light of the often international nature of art transactions, the AiA began formulating a tribunal to do so. In 2014, the AiA announced the formation the Authentication in Art Alternative Dispute Resolution Board (AiA ADR) for the purpose of resolving authenticity disputes outside the traditional court settings.[55]

In 2018, the focus of the AiA ADR was expanded to include all art disputes, in what became known as the CAfA.[56] The AiA and NAI formed a working group to develop the rules of procedure for CAfA.[57]

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49 *Thome*, 70 A.D.3d at 100 to 101.

50 id., at 103.

51 Justin Sevier, 'Redesigning the Science Court', 73 *Md. L. Rev*. 770, 786 to 787 (2014) (discussing Andrew W Jurs, 'Science Court: Past Proposals, Current Considerations, and a Suggested Structure', 15 *Va. J.L. & Tech*. 1, 24 (2010)).

52 id., at 786 to 787 (discussing Jurs at 26).

53 id. (discussing Jurs at 24 to 25; Anne Tucker Nees, 'Making a Case for Business Courts: A Survey of and Proposed Framework to Evaluate Business Courts', 24 *Ga. St. U. L. Rev*. 477, 480 to 482 (2007)).

54 Sevier (footnote 51, above), at 786 to 787 (discussing Matthew G Jacobs and Michael S Mireles, 'The Intersection of Intellectual Property and Antitrust Law: In re Independent Service Organizations Antitrust Litigation', 15 *Transnat'l Law*. 293, 297 (2002); Nancy Olson, 'Does Practice Make Perfect? An Examination of Congress's Proposed District Court Patent Pilot Program', 55 *UCLA L. Rev*. 745, 747 to 749 (2008)).

55 CAfA: A Brief History, available at https://authenticationinart.org/cafa/.

56 id.

57 AiA [Authentication in Art] Work Group Art & Law, available at https://authenticationinart.org/congress-2018/workgroup-art-law/. The working group comprised art law experts from around the world, including: William Charron (who chaired the group), lawyer at Pryor Cashman in New York

The CAfA procedures were designed to address two primary issues in the administration of justice relating to art disputes: decisional accuracy (i.e., the ability to correctly apply the appropriate law to the facts of a dispute) and procedural legitimacy (i.e., the ability of a decision-making system to provide citizens with a sense of voice and fairness in the proceedings).[58]

i Decisional accuracy

The process of making accurate decisions requires that a fact-finder (1) makes correct determinations about the facts, including which facts are the most relevant to resolving the dispute, and which are credible; (2) identifies the correct law that governs the dispute; and (3) correctly applies the law to the facts of the case to reach an appropriate verdict.[59] An error at any of these stages diminishes the factfinder's ability to make an accurate decision.[60]

CAfA was designed to '"flatten the learning curve" in [art disputes] by having experienced art lawyers be the deciders. Practitioners should be better equipped to understand and more properly weigh the evidence in a manner that the market will accept'.[61]

ii Legitimacy

Procedural legitimacy refers to the willingness of a litigant (and the market generally) to abide by a decision maker's judgment independent of the outcome of the dispute.[62] Several procedural factors influence people's perceptions of the legitimacy of a decision-making body:[63] the decision maker's neutrality (that is, that the decision is based on rules and facts instead of the decision maker's intuition),[64] the degree of respect and dignity that the decision maker confers on the parties,[65] the amount of voice and control that the parties have over the legal dispute,[66] and the degree to which parties can trust the decision maker's motive to be fair.[67]

Processes that are more adversarial in nature – for example, in jury trials, the use of cross-examination of witnesses and greater control over the flow of information to the

City; Dr Friederike Gräfin von Brühl of K&L Gates LLP, Berlin; Shawn Conway, managing partner of the international arbitration law firm Conway & Partner; Luke Nikas, co-chair of the art litigation and disputes practice of Quinn Emanuel Urquhart & Sullivan, LLP, in New York City; Megan Noh of Cahill Cossu Noh & Robinson; Judith Prowda, a senior faculty member of Sotheby's Institute of Art and founding member of Stropheus Art Law; and Nicole Wallace, a barrister in the United Kingdom and founder of Art ADR Global.

58 Sevier (footnote 51, above), at 776.

59 id., at 796 (discussing John R Allison, 'A Process Value Analysis of Decision-Maker Bias: The Case of Economic Conflicts of Interest', 32 *Am. Bus. L.J.* 481, 492 (1995) (defining decisional accuracy as 'when the decision maker's inferences are as close as possible to actual events').

60 Sevier (footnote 51, above), at 796 (discussing Allison, 32 *Am. Bus. L.J.* at 492).

61 Pryor Cashman, 'First-of-Its-Kind Global Arbitration Court for Art Disputes Launching June 2018' (7 May 2018), available at www.prnewswire.com/news-releases/first-of-its-kind-global-arbitration-court-for-art-disputes-launching-june-2018-300643034.html.

62 Sevier (footnote 51, above), at 774 to 775 (discussing David Marcus, 'From "Cases" to "Litigation" to "Contract": A Comment on Stability in Civil Procedure', 56 *St. Louis U. L.J.* 1231, 1231 (2012))

63 id. (discussing Tom R Tyler, 'Social Justice: Outcome and Procedure', 35 *Int'l J. Psychol.* 117, 121 (2000)).

64 id., at 800 to 801 (discussing Tyler, 35 *Int'l J. Psychol.* at 122).

65 id.

66 id. (discussing Tyler, 35 *Int'l J. Psychol.* at 121 to 122).

67 id. (discussing Tyler, 35 *Int'l J. Psychol.* at 122).

factfinder – are considered to be more procedurally legitimate than accurate.[68] On the other hand, procedures that are more inquisitorial in nature – such as bench trials, court-appointed expert witnesses, and an increased role for the factfinder – are considered more accurate than procedurally legitimate.[69]

Achieving legitimacy requires balancing the adversarial process with the inquisitive process towards an end goal of accuracy and fairness.[70] The rules of CAfA were drafted to specifically balance these considerations. As the CAfA working group explained: 'Everything we analyzed came back to the questions of whether this is something the market will likely accept, and whether this is something that best positions the tribunal to render the right results.'[71]

IV CAFA'S STRUCTURE AND PROCEDURE

CAfA's working group focused on creating a structure that implemented these dual aims, with the efficiencies often found only in arbitration:

> *the court's arbitrations will function like traditional alternative dispute resolution: while the parties are free to customize their rules to a large extent, the default rules provide for . . . more limited discovery than you would have in court, and with international enforcement through treaties such as the New York Convention . . . the hearings can be conducted anywhere in the world, based upon party and arbitrator agreement.*[72]

The default rules provide for the following.

i The arbitration panel

CAfA's rules provide that an arbitration panel composed of either one or three arbitrators[73] is appointed from a pool of international lawyers with expertise in art law.[74] The pool of potential arbitrators is composed of:

> *highly qualified international arbitration professionals coupled with a pool of leading experts in the fields of forensic science and provenance research regarding art objects qualified to resolve disputes in the wider art community, including matters involving international collectors, art historians, art market professionals, financial institutions, and other stakeholders in the international art market.*[75]

68 id., at 816.

69 id.

70 Justin Sevier, 'The Truth-Justice Tradeoff', 20 *Psychol. Pub. Pol'y & L.* 212 (2014).

71 Cashman (footnote 61, above).

72 Mike Fox, 'Alumnus Spearheads New Art Arbitration Court', University of Virginia School of Law (23 July 2018), available at www.law.virginia.edu/news/201807/alumnus-spearheads-new-art-arbitration-court (last accessed 10 November 2020).

73 CAfA Arbitration Rules, Article 12.2, in force as of 1 January 2019, available at www.cafa.world/docs/CAfA%20Arbitration%20Rules.1.pdf.

74 id., at Article 11.6, and Explanatory Notes AiA/NAI [Netherlands Arbitration Institute] Adjunct Arbitration Rules, 1.4, 2.1.

75 Explanatory Notes AiA/NAI Adjunct Arbitration Rules, 1.4.

The high calibre of the pool should add credibility to CAfA's decisions and provide comfort to parties that their dispute will be resolved by a panel with the specific expertise required in art disputes, which is not always found in the court system.[76]

ii Experts

The tribunal also employs various experts for particular circumstances where specific knowledge is required.[77] These experts are sourced from a pool of art historians, materials analysts, forensic scientists and provenance researchers; scholars of a particular artist may also be retained if needed.[78] The parties are able to appoint experts on other issues, but any such evidence must not compete with or supplement the tribunal-appointed expert's evidence on forensic science or provenance.[79] The purpose is 'to give the most comfort possible to the market that authenticity decisions are based on truly neutral expert analysis'.[80]

As with the pool of arbitrators, the parties' confidence in the process and whether decisions rendered under these rules will command the respect of the art market will depend on the quality and independence of the experts in the pool.[81]

iii Technical process adviser

If a case involves highly technical issues, for example in relation to an object's authenticity, with the parties' consent, the tribunal may appoint a technical process adviser from an expert pool to liaise between experts and the panel, and to facilitate the gathering and exchange of evidence.[82] The technical process adviser will act under the tribunal's direction but, if requested, may draft proposed procedural orders for adoption by the tribunal.[83] The assistance from the technical process adviser ensures that the panel is fully informed on and understands the issues of the case, bringing additional trust and legitimacy to the process.

iv Panel decisions

Another important aspect of CAfA's rules is that the final arbitration decisions will be published and will identify the art at issue, while the proceedings themselves will be confidential and will protect the parties' anonymity.[84] Publishing the result 'was deemed essential [by the working group] to ensure market understanding and acceptance of the results'.[85]

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76 Jane Parsons, Claire Morel de Westgaver, 'A New Arbitral Institution for the Art World: The Court of Arbitration for Art' (17 June 2018), available at http://arbitrationblog.kluwerarbitration.com/2018/06/17/a-new-arbitral-institution-for-the-art-world-the-court-of-arbitration-for-art/.

77 Marilyn Hayden, Dr Sharon Hecker, 'Cheers: A New Court for Resolving Art Disputes', Center for Art Law (29 March 2019), available at https://itsartlaw.org/2019/03/29/cheers-a-new-court-for-resolving-art-disputes/.

78 CAfA, Arbitration Rules, (footnote 73, above), at Article 29.1; Explanatory Notes AiA/NAI Adjunct Arbitration Rules, 2.2.

79 id., at Article 28.7.

80 Cashman (footnote 61, above).

81 Parsons, Morel de Westgaver (footnote 76, above).

82 CAfA, Arbitration Rules (footnote 73, above), at Article 29.1, 29.7 to 29.9; Explanatory Notes AiA/NAI Adjunct Arbitration Rules, 8.

83 id.

84 id., at Article 51.

85 Cashman (footnote 61, above).

V UPDATE ON CAFA SINCE LAUNCH

CAfA officially began accepting cases on 1 April 2019.[86] Currently, members of the art market are being encouraged to include CAfA's model arbitration clause in all art-related contracts.[87] Parties can either agree to CAfA jurisdiction over their dispute through a contractual clause in advance, or they can refer an existing dispute to CAfA through a submission agreement.[88]

86 Laura Gilbert, 'The Hague's art arbitration court to open in April', *The Art Newspaper* (21 March 2019), available at https://authenticationinart.org/pdf/artmarket/cafa-opens-april.pdf.

87 Constanza Trofaier, Young ICCA Skills Training Workshop on Art Law and International Arbitration, London, 20 September 2019, available at www.arbitration-icca.org/YoungICCA/EventPages/2019-youngicca-events/Youngicca_london20sep_2019.html.

88 Parsons, Morel de Westgaver (footnote 76, above).

Part II

Jurisdictions

Chapter 8

AUSTRALIA

Janine Lapworth[1]

I INTRODUCTION

Australia's visual arts market is relatively small, with annual auction sales over the past 10 years averaging around A$108 million.[2] Indigenous art is an important sector, accounting for on average around 8 per cent of annual auction sales,[3] and with numerous active art centres in regional and remote areas.

The coronavirus pandemic has had a negative impact on the Australian art market in 2020.

A number of recent developments relate to Indigenous art, including nationally recognised protocols, action against inauthentic Indigenous art, and preservation of cultural heritage.

II THE YEAR IN REVIEW

The Australian art market has been negatively impacted by the coronavirus pandemic. Auction sales to the end of October totalled around A$61 million,[4] tracking well below annual averages, despite strong online sales.[5] Although Indigenous art sales have remained strong at auction houses, with sales to October of A$11 million,[6] this has not been reflected at a local level, where travel restrictions have caused sales at Indigenous art centres to drop by approximately half.[7]

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1 Janine Lapworth is a senior consultant at Simpsons Solicitors. The author extends thanks to Adam Moxon Simpson, director, and Shane Simpson and Ian McDonald, special counsel, at Simpsons Solicitors for their review and suggestions.

2 Average calculated from figures provided at www.aasd.com.au/index.cfm/annual-auction-totals/, accessed 3 November 2020.

3 Average calculated from figures provided at www.aasd.com.au/index.cfm/annual-auction-totals/, accessed 4 November 2020.

4 See www.aasd.com.au/index.cfm/artist-nationality-totals/, accessed 3 November 2020.

5 Sutton, Malcolm, 'Art auctions rebound through online sales but blue-chip investments remain stymied by "draconian" legislation', 22 October 2020, at www.abc.net.au/news/2020-10-23/art-auctions-booming-but-sales-of-blue-chip-works-stymied/12801836, accessed 4 November 2020.

6 See www.aasd.com.au/index.cfm/artist-nationality-totals/, accessed 3 November 2020.

7 Morris, L, 'After years of growth, Indigenous art sales have been hit hard by COVID-19', 2 September 2020, at www.smh.com.au/culture/art-and-design/after-years-of-growth-indigenous-art-sales-have-been-hit-hard-by-covid-19-20200820-p55nma.html, accessed 4 November 2020.

The pandemic has also resulted in the postponement of numerous exhibitions and even the delay of major acquisitions: the National Gallery of Australia's A$6.8 million acquisition of Jordan Wolfson's animatronic sculpture *Cube* has been hampered by international travel bans, with the artist and his team unable to travel to Canberra to install and test the work.[8]

Many practising artists were not eligible for pandemic-specific government assistance packages and the industry is likely to take some years to recover.

There have been a number of developments in relation to Indigenous art over the past 12 to 24 months. The federal government's arts funding body, the Australia Council, released a new edition of Protocols for using First Nations Cultural and Intellectual Property in the Arts. The Australian Museums and Galleries Association released First Peoples: A Roadmap for Enhancing Indigenous Engagement in Museums and Galleries.

There has been ongoing controversy over the licensing arrangements applicable to the Aboriginal flag, resulting in an inquiry by a Senate Select Committee of the Federal Parliament. The Select Committee on the Aboriginal Flag released its report in October 2020, recommending that the copyright in the artistic work constituting the Aboriginal flag not be compulsorily acquired by the federal government but that negotiations continue with the copyright owner and the licensees over the creation of a body with custodial oversight of the flag.[9]

Also in the Federal Parliament, the Senate Environment and Communications Legislation Committee recommended in April 2020 that a bill designed to protect against the trade in fake Indigenous art should not be passed by the Senate.[10] Fraud remains an issue in this field.

In addition, the laws and processes permitting the damage or destruction of Aboriginal cultural heritage by mining and constructions companies are coming under increased scrutiny, following Rio Tinto's destruction in May 2020 of Aboriginal rock shelters in Junken Gorge that date back 46,000 years.[11] In a signal of changing values, public outcry and shareholder action resulted in the resignation of senior executives.

Women's representation in gallery collections is receiving attention through initiatives such as the National Gallery of Australia's national 'Know My Name' campaign during the 2020–2021 period.[12]

Climate change was also on the agenda over late 2019 and 2020, with bushfires threatening the estate of the late Arthur Boyd at Bundanon and the National Gallery of

8 Kembrey, Melanie, 'Controversial $6.8 million art acquisition delayed due to coronavirus', 24 April 2020, at www.smh.com.au/culture/art-and-design/controversial-6-8-million-art-acquisition-delayed-due-to-coronavirus-20200422-p54m0k.html, accessed 5 November 2020.

9 The Senate, Select Committee on the Aboriginal Flag, October 2020. Accessible at www.aph.gov.au/Parliamentary_Business/Committees/Senate/Aboriginal_Flag/AboriginalFlag/Report, accessed 4 November 2020.

10 The Senate, Environment and Communications Legislation Committee, Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019. Accessible at www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/IndigCulturalExpression/Report, accessed 4 November 2020.

11 Hepburn, Samantha, 'Rio Tinto just blasted away an ancient Aboriginal site. Here's why that was allowed', 27 May 2020, at https://theconversation.com/rio-tinto-just-blasted-away-an-ancient-aboriginal-site-heres-why-that-was-allowed-139466, accessed 4 November 2020.

12 See https://nga.gov.au/knowmyname/, accessed 6 November 2020.

Australia having to close because of smoke. Climate change is also affecting policy, accelerating trends in museum and gallery de-accessioning programmes because of the environmental costs of storage.

III ART DISPUTES

i Title in art

In Australia, there is no special process to be followed to transfer title in artwork. As with any other personal property, it is necessary to show that the parties involved in the transaction (vendor and purchaser in respect of a sale or donor and recipient in respect of a gift) clearly intended that title should pass and to what extent. Ideally this would be evidenced in writing to minimise the risk of a subsequent dispute. There is no difference if the acquisition is by auction or by private sale. Like many other jurisdictions, the copyright and physical ownership are considered separately – one does not necessarily pass with the other.

As a matter of law, the purchaser does not have a duty of inquiry into title. Rather, under the Australian Consumer Law, the vendor must guarantee clear title, unless the contract of sale or the surrounding circumstances indicate that limited title was intended to be transferred.[13] For further discussion of the application of the Australian Consumer Law consumer guarantees to artwork, see Section V.

Provenance practices in Australia continue to evolve in response to the Subhash Kapoor controversy. In 2008, the National Gallery of Australia acquired the *Dancing Shiva* statue from Kapoor. The provenance of the statue was called into question in 2014. The National Gallery of Australia sued Kapoor in the New York Supreme Court, one of the few galleries to take legal action in these circumstances. The Court issued a default judgment against Kapoor, ordering compensation of US$8.59 million.[14] The Australian gallery sector has since spent considerable time reviewing provenance policies and practices, while Kapoor faces multiple criminal proceedings in India and the United States.

ii Nazi-looted art and cultural property

There is no legislation in Australia specifically dealing with art misappropriated during the Nazi era, nor is there an independent body to review and assess claims of Nazi misappropriation. However, various museums and galleries have reviewed their collections for items with questionable provenance during the period from 1933 to 1945 and have made their research information publicly available online.[15]

13 Competition and Consumer Act 2010 (Cth), Schedule 2 – Australian Consumer Law, Section 51.

14 Barker, Anne, 'Dancing Shiva: National Gallery of Australia should get $11m compensation for stolen statue, court rules.' Accessible at www.abc.net.au/news/2016-09-26/nga-granted-11m-compensation-for-stolen-dancing-shiva/7878740, accessed 6 November 2020.

15 See, for example, https://nga.gov.au/collections/europeamerica/gallery.cfm?displaygal=prov; www.ngv.vic.gov.au/explore/collection/provenance; and www.qagoma.qld.gov.au/learn/research/provenance, each accessed 3 November 2020.

The first Australian restitution of Nazi-appropriated art of which we are aware dates back to 2014, when the National Gallery of Victoria accepted that a portrait, originally attributed to Van Gogh, belonged to heirs of Richard Semmel, a Jewish industrialist who was forced by the Nazis to sell the portrait in Amsterdam in 1933.[16]

Ten years earlier, the same gallery had received a demand to return a Gerard ter Borch painting, *Lady with a Fan*, which had belonged to Max Emden, a Jewish retailer who abandoned his art collection when fleeing Hamburg and later Switzerland.[17] However, this painting remains in the National Gallery of Victoria's collection.[18]

See Section V regarding the general regulation of cultural property.

iii Limitation periods

There are no limitation periods specific to claims for art misappropriated during the Nazi era.

More generally, the applicable limitation period for an art claim would depend on the cause of action and the jurisdiction in which it is brought. For example, contract claims and claims involving 'detinue'[19] or 'conversion'[20] in New South Wales must be commenced within six years of the date on which the cause of action accrues.[21]

The 2014 case of *McBride v. Christie's Australia Pty Limited*[22] involved a purchaser suing the auction house Christie's (among others) over the sale in 2000 of the painting *Faun and Parrot*, attributed to the Australian painter Albert Tucker. When the purchaser sought to sell the painting some 10 years later, it was discovered that the painting was a forgery. At the time of the auction, no one was aware that the painting was not genuine. However, soon after the auction, a group of eminent art experts raised doubts about the painting's authenticity with the auction house and Christie's did not contact the purchaser to advise her of this new information. Among other defences, Christie's argued that as the purchaser had suffered loss immediately upon purchasing the painting in 2000, the plaintiff's action had not been brought within the six-year limitation period. However, it was held that the purchaser had suffered the loss, not upon purchasing the artwork in 2000, but upon discovering that the artwork was a forgery in 2010. Accordingly, the applicable limitation period had not expired.

iv Alternative dispute resolution

Alternative dispute resolution remains popular in Australia and its private nature appeals to many involved in art disputes. Increasing delays in some Australian courts have meant arbitration, mediation and expert determination can offer swifter options.

16 'Portrait becomes Australia's first Nazi art restitution', dated 30 May 2014, at www.bbc.com/news/entertainment-arts-27634262, accessed 3 November 2020.

17 Blakeney, M 'Restitution of Art Looted During the Nazi Era, 1933–1945: Implications for Australia' [2016] UWALawRw 16; (2016) 41(1) *University of Western Australia Law Review* 251.

18 See www.ngv.vic.gov.au/explore/collection/work/4404/, accessed 3 November 2020.

19 The tort of detinue relates to the wrongful detention of property by a person, coupled with the person's unreasonable refusal of the owner's demand for the property to be returned.

20 The tort of conversion is available where a person who does not have legal title over goods deals with them in a way inconsistent with the owner's rights.

21 Limitation Act 1969 (NSW), Sections 14(1)(a) and 14A.

22 *McBride v. Christie's Australia Pty Limited* [2014] NSWSC 1729.

As it is often mandated by the courts, mediation is the most common form if one excludes usual *inter partes* negotiations. More costly private arbitration is less common, particularly where the dispute does not have an international dimension.

The National Association for the Visual Arts' Code of Practice for the Professional Australian Visual Arts, Craft and Design Sector recommends mediation for contractual disputes between artists and commercial galleries.[23] For disputes between artists and public institutions, it recommends mediation, followed by arbitration or litigation.[24] The choice of the method of dispute resolution is one that requires careful consideration of the particular circumstances as none are universally applicable. The best resolutions can involve a tiered and flexible approach tailored to the participants.

The Arts Law Centre of Australia, the national community legal centre for the arts, provides an alternative dispute resolution service, offering mediation, binding expert determination and non-binding expert evaluation. This is the only alternative dispute resolution service in Australia dealing specifically with art matters, although its remit extends to other art forms such as music, film, theatre and literature.

IV FAKES, FORGERIES AND AUTHENTICATION

In the event of an acquisition of fake, forged or inauthentic art, there are various causes of action available. In *McBride v. Christie's Australia Pty Limited*, mentioned in Section III, the plaintiff's claims against Christie's were of misleading or deceptive conduct,[25] unconscionable conduct[26] and deceit. The proceedings also involved a claim of misleading or deceptive conduct against the vendor, Holland Fine Arts & Cars Pty Limited, and against the director of that company for being knowingly involved in that conduct (although the claim against the director was subsequently dismissed). The plaintiff further brought claims of misleading or deceptive conduct, breach of contract, negligence and breach of fiduciary duty against her agent, Vivienne Sharpe (although the claims of breach of contract, negligence and breach of fiduciary position in respect of the painting were ultimately dismissed).

As mentioned further at Section V, the Australian Consumer Law provides certain guarantees in consumer transactions, such as the guarantee of clear title. The title guarantee applies to all such transactions, although other guarantees do not apply to sales by auction. The prohibitions in the Australian Consumer Law against misleading or deceptive conduct, unfair practices and unconscionable conduct generally apply.

Depending on the circumstances, criminal charges may also be brought against a dealer involved in the sale of forged paintings. A notorious case in Australia involved the creation and

23 See https://visualarts.net.au/code-of-practice/11-commercial-galleries/, accessed 4 November 2020.

24 See https://visualarts.net.au/code-of-practice/23-best-practice-standards-publicly-funded-exhibitions/, accessed 4 November 2020.

25 Trade Practices Act 1974 (Cth), s52. Since the proceedings, this legislation has been replaced by the Australian Consumer Law, in Schedule 2 of the Competition and Consumer Act 2010 (Cth), which contains an identical provision in Section 18.

26 Trade Practices Act 1974 (Cth), Sections 51AA, s51AB and S51AC, now see Australian Consumer Law, Part 2-2.

sale of paintings that were forgeries of the work of the late Australian painter Brett Whiteley. An art restorer and art dealer were convicted in 2016 of obtaining and attempting to obtain financial advantage by deception, although those convictions were later quashed.[27]

The recent publication of Whiteley's catalogue raisonné by Kathie Sutherland is anticipated to assist in future determinations of authenticity or otherwise of paintings attributed to Whiteley, although the publisher, Black Inc, has noted that Sutherland's research is ongoing.[28]

Authenticity is a particular issue for Indigenous artworks. Various organisations, including the Copyright Agency, Indigenous Art Code and the Arts Law Centre of Australia, have been campaigning over several years to raise awareness of the sale of 'Aboriginal-style' artworks made by non-Indigenous people. A bill was introduced into the Federal Parliament to ban the sale of such artworks, but the Senate Environment and Communications Legislation Committee, although supportive, recommended that the Senate not pass the bill.[29] More successful was the Australian Competition and Consumer Commission's action against Birubi Art Pty Ltd (in liquidation) for making false or misleading representations under the Australian Consumer Law about the authenticity of the Indigenous-style artworks it sold. The Federal Court found that Birubi had breached the Australian Consumer Law,[30] and ordered Birubi to pay penalties of A$2.3 million.[31]

V ART TRANSACTIONS

i Private sales and auctions

The Australian Consumer Law provides a set of guarantees relating to the supply of goods to a 'consumer'. A person is taken to have acquired goods 'as a consumer' if, relevantly, the amount paid for the goods was less than A$40,000 (increasing to A$100,000 from July 2021)[32] or the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption.[33] By this definition, a business acquiring goods of a certain value or character would be a consumer for the purposes of the legislation.[34] In terms of whether art 'is of a kind generally acquired for personal . . . use', there may be circumstances when a particular artwork, such as an oversized sculpture, does not have the requisite character. However, if

27 'Brett Whiteley art fraud conviction against Victorian pair quashed', 27 April 2017, at www.abc.net.au/news/2017-04-27/whiteley-art-fraud-convictions-quashed/8476216, accessed 5 November 2020.

28 'Brett Whiteley: Catalogue Raisonné: 1955–1992', at www.blackincbooks.com.au/books/brett-whiteley, accessed 5 November 2020.

29 The Senate, Environment and Communications Legislation Committee, Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019. Accessible at www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/IndigCulturalExpression/Report, accessed 4 November 2020.

30 *Australian Competition and Consumer Commission v. Birubi Art Pty Ltd (in liq)* [2018] FCA 1595.

31 *Australian Competition and Consumer Commission v. Birubi Art Pty Ltd (in liq) No. 3* [2019] FCA 996.

32 Treasury Laws Amendment (Acquisition as Consumer – Financial Thresholds) Regulations 2020 (Cth).

33 Aus Competition and Consumer Act 2010 (Cth), Schedule 2 – Australian Consumer Law, Section 3(1).

34 There are exceptions if a business acquires goods for re-supply or to use them up or transform them in the course of trade: see Competition and Consumer Act 2010 (Cth), Schedule 2 – Australian Consumer Law, Section 3(2).

artworks would otherwise be suitable for both domestic and other purposes (for example, for public display or corporate uses), they would be goods of a kind referred to in the definition of consumer and the guarantees should be taken to apply.

Where goods are sold at auction (including auctions conducted online), a limited set of consumer guarantees apply under the Australian Consumer Law, relating to title, clear title, undisturbed possession and freedom from securities or other encumbrances.[35]

However, if goods are sold other than at auction, the vendor also gives guarantees in respect of acceptable quality, fitness for a disclosed purpose, accuracy of description, availability of repairs and spare parts, and compliance with any manufacturer warranties.[36] These are implied by statute even if not stated expressly in the terms or conditions of sale.

The Australian Consumer Law also contains general prohibitions against misleading or deceptive conduct, unconscionable conduct and unfair practices. These would apply to all sales, whether private or by auction.[37]

Auctions are heavily regulated in some Australian states, such as Queensland,[38] but not in others, such as New South Wales and Victoria. Other than in Queensland, auction houses are not required by law to operate a trust account to keep sale proceeds separate from other funds. Several major art auction houses in Australia have called for mandatory trust accounts, after the auction house Mossgreen collapsed in December 2017. Mossgreen had mixed clients' sale proceeds with its own funds and used those proceeds to cover its own operating expenses. Although there has been no legislative change, the industry body, the Auctioneers and Valuers Association of Australia, has included a trust account requirement in its Code of Ethics.[39]

The usual considerations otherwise apply to the proper drafting of private sale agreements, including provisions relating to provenance, authenticity and condition, as well as appropriate transit and insurance arrangements.

ii Art loans

The Protection of Cultural Objects on Loan Act 2013 (Cth) deals with objects that have been imported into Australia for temporary public exhibition by approved institutions, which have to satisfy the government that they have appropriate provenance and due diligence policies and procedures in place before being approved.

With some minor exceptions, the legislation protects objects temporarily on loan from overseas from seizure as a result of legal proceedings, whether in Australia or overseas, or other actions taken under Australian laws. The protection generally ceases 24 months after import or when the object is exported from Australia.

There have been no recent cases or developments in Australia involving art loans.

35 Competition and Consumer Act 2010 (Cth), Schedule 2 – Australian Consumer Law, Sections 51–53. These sections are of general application, whereas the other consumer guarantees do not apply.

36 Competition and Consumer Act 2010 (Cth), Schedule 2 – Australian Consumer Law, Sections 54–59.

37 Competition and Consumer Act 2010 (Cth), Schedule 2 – Australian Consumer Law, Chapter 2 and Part 3-1.

38 See Motor Dealers and Chattel Auctioneers Act 2014 (Qld) and Motor Dealers and Chattel Auctioneers Regulation 2014 (Qld).

39 See www.avaa.com.au/avaa-code-of-ethics/, accessed 4 November 2020.

iii Cross-border transactions

The Protection of Movable Cultural Heritage Act 1986 (Cth) regulates the export from, and import into, Australia of cultural property, including objects of ethnographic art, objects of decorative art and objects of fine art.

The National Cultural Heritage Control List[40] sets out categories of protected objects in relation to export: Class A objects must not be exported from Australia (unless a certificate has been obtained from the relevant Minister in limited circumstances), while Class B objects may only be exported pursuant to an export permit. The latter category includes fine or decorative art that is at least 30 years old, has a value above a certain monetary threshold (variable depending on the nature of the work), is being exported by a person other than the creator and is an 'Australia-related object'.[41]

The Prohibited Exports Register lists cultural property in respect of which an export permit has been refused. The most recent entries in this register are from 2020 – two paintings by Charlie Numbulmore, *Wanjina on Coolamon* and *Two Wanjina on Slate*, each dating from around 1970.[42]

The Protection of Movable Cultural Heritage Act 1986 (Cth) also prohibits imports of protected objects of a foreign country if those protected objects were not permitted to be exported from the relevant country. The legislation contains an exception if the relevant object is being loaned for up to two years to certain government bodies or collecting institutions.

There are likely to be tax consequences for the ownership, and later sale, of art overseas.[43] If a taxpayer acquired an overseas artwork before that taxpayer became an Australian resident for tax purposes, they will be taken to have purchased the art at the same time as they became an Australian resident. If a taxpayer is no longer an Australian resident for tax purposes, they would be deemed to have disposed of the art when ceasing to be an Australian resident. Capital gains tax may be payable when the art is sold or otherwise disposed of. Capital gains tax applies to assets, no matter where in the world they are situated, that belong to Australian residents.

iv Art finance

In terms of jurisdiction-specific financing arrangements, the regime established by the Personal Property Securities Act 2009 (Cth) can be used to protect artists' interests, particularly in the context of consignment. When an artist consigns artworks to a commercial gallery and registers the artist's interest in those artworks on the Personal Property Securities Register, that interest is protected in the event of the gallery's insolvency. This registration gives the artist priority over other creditors. In particular, a commercial consignment arrangement is a 'purchase money security interest', giving the consignor super-priority against earlier registered security interests. Registration can also be used to protect assets that are leased or hired out for at least two years.

This regime also enables personal property assets to be used as security for a loan, opening up additional financing options to artists and investors.

40 Protection of Movable Cultural Heritage Regulations 2018 (Cth), Schedule 1.

41 Protection of Movable Cultural Heritage Regulations 2018 (Cth), Schedule 1 Part 5.

42 See www.arts.gov.au/what-we-do/cultural-heritage/movable-cultural-heritage/exporting-cultural-property-australia/movable, accessed 3 November 2020.

43 See www.ato.gov.au/individuals/income-and-deductions/income-you-must-declare/foreign-income, accessed 4 November 2020.

In terms of anti-money laundering laws, the Federal Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) does not currently regulate art dealers and auction houses. However, a statutory review of the legislation in 2016 recommended that options be developed for regulating high-value dealers, among other service providers.[44] The Department of Home Affairs conducted consultation on possible regulatory models over the period 2016–2017,[45] but legislative reform has not progressed further to date.

VI ARTIST RIGHTS

i Moral rights

Under the Copyright Act 1968 (Cth), an individual creator has the following moral rights: the right of attribution of authorship, the right not to have authorship falsely attributed and the right of integrity of authorship,[46] which is the right not to have the work subjected to derogatory treatment.

In the context of artistic works, derogatory treatment means the material distortion, destruction, mutilation or material alteration to the work that is prejudicial to the artist's honour or reputation, an exhibition in public of the work prejudicial to the artist's honour or reputation because of the manner or place in which the exhibition occurs, and anything else that is prejudicial to the artist's honour or reputation.[47] However, the right of integrity of authorship is not infringed by the destruction of a movable artistic work if the person who destroyed the work gave the creator a reasonable opportunity to remove it.[48]

Each of the moral rights in respect of an artistic work continues in force until copyright in the work expires.[49]

Unlike moral rights legislation in other jurisdictions, the Copyright Act 1968 (Cth) does not provide for creators being able to waive their moral rights. However, creators may consent in writing to an act or omission that would otherwise constitute an infringement of their moral rights. Outside the context of film, a consent must be specific as to the works it relates to and as to the acts or omissions being consented to.[50] This requires careful consideration and tailoring to the particular artwork and circumstances to be effective.

There are several cases in Australia relating to the infringement of the right of attribution and the right not to be falsely attributed in respect of photographs used in various publications.[51]

44 Attorney-General's Department, Report on the Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 and Associated Rules and Regulations, April 2016, accessible at www.austrac.gov.au/about-us/corporate-information-and-governance/reports-and-accountability/report-statutory-review-amlctf-act-and-associated-rules-and-regulations, accessed 4 November 2020.

45 See www.homeaffairs.gov.au/help-and-support/how-to-engage-us/consultations/australias-anti-money-laundering-and-counter-terrorism-financing-(aml-ctf)-regime, accessed 4 November 2020.

46 Copyright Act 1968 (Cth), Section 189.

47 Copyright Act 1968 (Cth), Section 195AK.

48 Copyright Act 1968 (Cth), Section 195AT.

49 Copyright Act 1968 (Cth), Section 195AM.

50 Copyright Act 1968 (Cth), Section 195AWA.

51 *Corby v. Allen & Unwin Pty Limited* [2013] FCA 370; *Tyler v. Sevin* [2014] FCCA 445; *Monte v. Fairfax Media Publications Pty Ltd* [2015] FCCA 1633.

The right of integrity of authorship has chiefly been the basis of complaints by architects when buildings they have designed are being renovated, with the most recent example being the proposed redevelopment of the Australian War Memorial.[52]

However, the right of integrity of authorship was referred to in defamation proceedings over an article published in *The Sunday Telegraph* newspaper.[53] The article alleged that the plaintiff had purchased a five-panel artwork by the Australian artist Del Kathryn Barton on the condition that the five panels not be sold separately. The plaintiff subsequently sold one of the panels, which was referred to as being an infringement of the right not to have the work subjected to derogatory treatment. That there had been an infringement of the artist's moral rights was one of the defamatory imputations alleged by the plaintiff. However, the court's decision dealt with procedural points rather than considering moral rights and we are not aware that the artist brought any separate action in relation to the matter.

ii Resale rights

A resale royalty scheme was introduced in 2010 through the Resale Royalty Right for Visual Artists Act 2009 (Cth). The scheme applies to commercial resales of artworks from 9 June 2010, where the sale price is more than A$1,000.[54] The transfer must be the second transfer of ownership since 9 June 2010 for the resale royalty to be payable, even if the work already existed as at that date.[55] Private transfers (that is, transfers from one individual to another that do not involve art market professionals) are excluded from the scheme.

The artist must satisfy the residency test of being an Australian citizen, an Australian permanent resident or a national or citizen of a country prescribed as a reciprocating country.[56] If the artist has died by the time of the commercial resale, the residency test applies as at the date of the artist's death, and the successor in title has to satisfy the residency test as well as a succession test.[57]

The resale royalty rate is 5 per cent of the sale price on the commercial resale of the artwork.[58] The liability for paying the resale royalty is shared on a joint and several basis between the sellers, the buyers and art market professionals acting as agent for either sellers or buyers.[59]

The resale royalty scheme is administered by the Copyright Agency.

In December 2019, the then Federal Department of Communication and the Arts released its review of the first three years of the scheme.[60] It was noted that the resale royalty scheme was viewed positively by artists and artist advocacy organisations and negatively by art investors and art market professionals. The scheme was regarded by many as having had a negative impact on the Australian art market, along with the global financial crisis

52 Williams, E, 'Fears Anzac Hall to be demolished in war memorial redevelopment.' 28 October 2018. See www.canberratimes.com.au/story/6001177/fears-anzac-hall-to-be-demolished-in-war-memorial-redevelopment/, accessed 4 November 2020.

53 *Vass v. Nationwide News Pty Ltd* [2016] NSWSC 1721.

54 Resale Royalty Right for Visual Artists Act 2009 (Cth), Sections 8 and 10.

55 Resale Royalty Right for Visual Artists Act 2009 (Cth), Section 11.

56 Resale Royalty Right for Visual Artists Act 2009 (Cth), Section 14.

57 Resale Royalty Right for Visual Artists Act 2009 (Cth), Sections 12 and 15.

58 Resale Royalty Right for Visual Artists Act 2009 (Cth), Section 18.

59 Resale Royalty Right for Visual Artists Act 2009 (Cth), Section 20.

60 Department of Communication and the Arts, Post-Implementation Review – Resale Royalty Right for Visual Artists Act 2009 and the Resale Royalty Scheme, 2019.

and the changing of the art ownership rules relating to self-managed superannuation funds (see Section VII).[61] Nevertheless, the review's conclusion was that the resale royalty scheme remained appropriate.[62] The review did not contain any recommendations to change the operation of the scheme.

The Resale Royalty Right for Visual Artists Act 2009 (Cth) has now been in effect for 10 years. As at 11 June 2020, the resale royalty scheme had generated approximately A$8.5 million in royalties for 1,975 artists and their estates.[63]

iii Economic rights

In addition to the usual exploitation of artist's copyright in their works, the Copyright Act 1968 (Cth) provides statutory licensing schemes for copying by educational institutions[64] and by government.[65] Both statutory licensing schemes are administered by the Copyright Agency.

In August 2020, the federal government proposed reforms to Australian copyright legislation, including the streamlining of the government statutory licensing scheme and the introduction of a limited liability scheme for use of orphan works. Draft legislation is expected to be released in late 2020.[66]

VII TRUSTS, FOUNDATIONS AND ESTATES

As a matter of law, philanthropic trusts and foundations may only fund charitable projects. Accordingly, organisations seeking funding from trusts and foundations need to be endorsed by the Australian Taxation Office as a deductible gift recipient (see further below) or endorsed for charity tax concessions.

Endorsement as a deductible gift recipient is available to public art galleries and public funds that are on the Register of Cultural Organisations. The benefit of such an endorsement is that donors receive a tax deduction for their donations, provided that there is a voluntary transfer of money or property (as opposed to a loan) and the donor does not receive any benefit from the donation.

For a gift of property (such as an artwork) to be deductible, the property must be valued by the Australian Taxation Office at over A$5,000. If the property was purchased less than 12 months prior to the gift, the tax deduction would be calculated as the lesser of the market value of the property on the day the gift is made and the amount paid by the donor for the property. If the property was purchased more than 12 months prior to the gift, the tax deduction will be the value of the property at the time of the gift, as determined by the Australian Taxation Office.

The Cultural Gifts Program is another means of using the tax system to encourage people to donate cultural property to public institutions. Public collecting institutions must

61 Department of Communication and the Arts, Post-Implementation Review – Resale Royalty Right for Visual Artists Act 2009 and the Resale Royalty Scheme, 2019 at 9.

62 Department of Communication and the Arts, Post-Implementation Review – Resale Royalty Right for Visual Artists Act 2009 and the Resale Royalty Scheme, 2019 at 52.

63 Copyright Agency, '10 years of Resale Royalty for Australian artists' at www.copyright.com.au/2020/06/10-years-resale-royalty/, accessed 4 November 2020.

64 Copyright Act 1968 (Cth), Part IVA, Division 4.

65 Copyright Act 1968 (Cth), Part VII, Division 2.

66 See www.communications.gov.au/departmental-news/copyright-access-reforms, accessed 3 November 2020.

apply to participate in the Cultural Gifts Program. Where a gift is made to a participating public collecting institution, the donor receives a tax deduction of the market value of the gift, which can be spread across five income years. The donation is also exempt from capital gains tax.[67]

Gifts donated under a will or by executors of deceased estates do not receive the tax benefits under the Cultural Gifts Program; such gifts are not tax deductible.[68] Nevertheless, large bequests have been made to public galleries; in October 2020 the Queensland Art Gallery received an A$35 million bequest.[69]

In addition to tax-deductible donations, individuals may also be interested in investing in art as part of their self-managed superannuation arrangements. However, an amendment to Australian superannuation laws in 2011 prohibits art bought through a self-managed superannuation fund to be displayed; this would be viewed as the fund members receiving a present-day benefit. Instead, the artworks would need to be leased to galleries or placed in storage. It has been claimed that the change in superannuation legislation has had an adverse effect on the market over the past decade, given that self-managed superannuation funds had been the purchasers for up to a quarter of Australian art sales and up to 40 per cent of indigenous art sales.[70]

VIII OUTLOOK AND CONCLUSIONS

While relatively small on a global scale, the Australian art market is mature and well regulated.

The ongoing effects of the coronavirus pandemic on the economy are likely to continue into 2021, with business insolvencies likely to result in disputes over payments and ownership.

Over the coming year, policy issues around Indigenous art, particularly representation in collections, restrictions on sale of fake Indigenous art, and the preservation of cultural heritage, will continue to be debated. It is also expected that the proposed amendments to copyright legislation will be passed.

67 See www.arts.gov.au/what-we-do/cultural-heritage/cultural-gifts-program, accessed 4 November 2020.

68 See www.arts.gov.au/what-we-do/cultural-heritage/cultural-gifts-program, accessed 4 November 2020.

69 'QAGOMA receives transformative bequest from Win Schubert', 10 October 2020, at https://blog.qagoma.qld.gov.au/qagoma-receives-transformative-bequest-from-win-schubert/, accessed 5 November 2020.

70 Plastow, K, 'How superannuation laws are strangling Australia's art scene', 29 September 2019. See https://thenewdaily.com.au/finance/superannuation/2019/09/29/superannuation-laws-hurt-art-scene, accessed 4 November 2020.

Chapter 9

AUSTRIA

C Dominik Niedersüß[1]

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, and 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

The coronavirus pandemic has had a significant impact on the art industry and society as a whole. In March 2019, Austria, being a neighbouring country with strong economic ties to Italy, decided to react to the pandemic situation in northern Italy with a very strict lockdown. This resulted in cultural life being shut down entirely, and public life being reduced solely to grocery shopping for almost three months.

While this seemingly had the desired effect, it strongly affected the art market and artists.

At the time of writing, the crisis is far from being over, and we are reluctant to jump to conclusions at this point. Data regarding the actual impact of covid-19 on the art market is not yet available. Traditionally, the Austrian art market has punched above its weight but the future will tell how it has been impacted by the pandemic in the long run.

Restitution of Nazi-looted art continues to be an issue. There seems to be a tendency to publicise these cases less, and give them a lower profile, than in the past.

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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/.

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*,[3] 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.[4] Further, good faith is presumed by law.[5] 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

3 See Section 442 of the Austrian Civil Code (ABGB).
4 id., Section 368.
5 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 restitute or not. In theory, the Minister is not bound by the board's findings. In practice, however, he or she has always followed any given recommendation 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 on the basis of the circumstances at the time the contract is concluded. A guarantee of authenticity can also be given tacitly, but in such case there must be no doubt on the part of the buyer about the authenticity and that the seller actually wishes 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.[6]

V ART TRANSACTIONS

i Private sales and auctions

With regard to the particularities of private sales, the definition of the term 'private sales' needs to be examined more closely. In a broader sense, this term 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. It is also noteworthy here that the exclusion of the statutory warranty law by the private seller is generally permissible. This possibility is also open to the seller with regard to hidden defects. The only limit here is immorality.

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.[7] 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.

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

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

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.[8]

The reason given for this is that in online auctions there is no curated selection of the winning bid but instead the highest bid becomes effective within the period set by the bidder. Online auctions are therefore reinterpreted as a binding offer to the person who submits the highest bid within the bidding period. Another, more sensible, distinction would be that the item in an online auction was not evaluated by an independent third party.[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 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.

Sales are usually made to the highest bidder, but the auction house is entitled to reject bids within the scope of the existing fiduciary duty; for example, if there are serious doubts about the financing of the purchase. In light of this, the highest bidder also has no legal claim to the acceptance of the bid.

If the work of art is not sold, it can be placed in the after-sale, which is usually covered by the commission contract. The auction house is then entitled to sell the work of art at the starting bid. Theoretically, the contractual agreement of sales prices below the starting bid is also permissible.

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. However, exceptions to such exclusion shall apply to consumer transactions. Here

8 OGH 4 Ob 204/12x.

9 See OGH 4 Ob 135/97t.

10 OGH 4 Ob 167/09a.

too, 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.

In-house and external experts regularly prepare expert reports for auction houses on the works of art consigned, in which the authorship and condition of the work of art are assessed. These expert opinions are often used as a basis for the purchase contract or, if necessary, also form the basis for the rejection of a work of art by the auction house.

Here the question arises of whether such expert opinions can also develop protective effects in favour of third parties, which would, for example, result in claims for damages against the auction house; for example, if an expert has granted faulty authentication of an artwork. According to the case law of the Austrian Supreme Court, this will be the case if the expertise is recognisably targeted at a third party.[11] If a work of art is offered for auction as authentic on the basis of a prepared expert opinion and the expert's opinion is disclosed to the successful bidder, who bases his or her bidding decision on this, the bidder is entitled to damages.[12]

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 Exhibition[13] 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.

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.

11 OGH 10 Ob 32/11w.

12 OGH 8 Ob 96/19d.

13 Austrian Federal Law Gazette 2003/133.

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.

In practice, the most important exception is the permit to re-exportation. Such permit must be applied for within three years of importation into Austria. Considering that the artwork was previously outside Austria, and that it was imported lawfully, the authorities are obliged to permit the re-exportation. Such permits are usually granted for 10 years but may be extended to up to 50 years. Further, objects that are classified as foreign cultural heritage, which are temporarily imported for exhibition, may be declared immune.

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. Austria is not one of these countries. The principle of a pledge applies here. To establish a loan, Austrian law requires the handover of the work of art in addition to the pledge agreement. 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.[14]

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.

14 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. For example, the two-dimensional reproduction of a three-dimensional work of art, the recording of a performance and of course the digitalisation of a music recording. Protection is limited by fair use exceptions on the one hand, and constitutionally guaranteed rights on the other.

The reproduction right ties in with the creation of a copy. In practice, this is more of a preparatory act than an act of economic exploitation. 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,[15] 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.

15 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 foundation deed.

Foundations are not companies under Austrian law, but nevertheless have legal personality. There are public foundations that must be oriented towards non-profit or charitable purposes. Private foundations are more flexible with regard to their purpose but must, in principle, have a purpose that at least goes beyond the preservation of the foundation assets.

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.

In practice, the strict prohibition of self-dealing representation[16] is often relevant. If, for example, a gallery owner belongs to the board of directors of an artist's estate organised as a private foundation, the gallery owner can only take works in the foundation into commission after prior judicial approval. If this approval is not obtained, a possible sale runs the risk of becoming null and void.

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

At the time of writing, it is hard to imagine any other issue as dominating as the coronavirus pandemic. The pandemic's impact on the art industry will be the defining question of the upcoming months and years.

16 Section 17(5) of the Private Trusts Act.

Chapter 10

BELGIUM

Lucie Lambrecht and Charlotte Sartori[1]

I INTRODUCTION

Belgium has always been a melting pot of different influences: Dutch, French, German, English and Spanish. In art terms, the country is primarily a trading country, rather than a country of origin. Belgium's importance in international art trade reaches far beyond what could be expected for such a small country.

In 2015, Belgium held sixth place in the market for contemporary art in Europe, after the UK, France, Germany, Italy and Austria, with a sales value totalling US$4.1 million; equivalent to 1 per cent of the world art auction market.[2]

Most international auction houses have representative offices in Brussels, and some occasionally organise local sales. Local auction houses are spread all over the country but are mainly concentrated in Antwerp and Brussels. Art gallery clusters are situated in the major cities and at the Belgian coast; African and non-European art are the most commonly traded art categories in Brussels.

Several art trade fairs are organised each year: BRAFA (Brussels' Antiques and Fine Art Fair), BRUNEAF (focused on African and non-European art) and Art Brussels (contemporary art). The contemporary art market is gaining importance and many Paris-based galleries have opened branches in Brussels.

Disputes involving art transactions have become more frequent and are more often fought openly in the courts. Absent special courts or tribunals, they are brought before the ordinary civil courts. If a claim involves a criminal offence, the case can also be brought before the criminal courts and will be tried as priority to the civil claim. The trend towards criminalisation of art offences may increase along with the growing regulation in the art and finance sphere, such as anti-money laundering and terrorist financing law.

II THE YEAR IN REVIEW

A number of new legislative projects affecting the art market have been finalised or passed. First, the Civil Code has been reformed and a new Book 3, dedicated to property law, has been inserted.[3]

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1 Lucie Lambrecht is the founder and managing partner and Charlotte Sartori is an associate at Lambrecht Law Office. The authors thank Zacharias Mawick, freelance research assistant, for his assistance with the chapter introduction.

2 'Artprice', Art Market Report 2015.

3 The New Civil Code has been introduced by an Act of 13 April 2019 replacing the old Civil Code in various stages. The new Book 3 (Property Law) will enter into force on 1 September 2021.

There are some noteworthy changes to the existing legal provisions, including:

a the legal treatment of treasure finds, which was historically based on a legal tradition dating back to Roman times and on a pragmatic approach in case law, has been redefined and regulated: finders' rights (to acquire ownership) have been made subject to a number of administrative requirements and waiting periods;

b the concepts of 'possession' and 'good faith' have been redefined; and

c the rights of the dispossessed owner of movable goods have been extended: as previously, original owners can reclaim a stolen or lost object from current holders within three years of a theft or loss, but the original owner is no longer required to reimburse the current holder the purchase price if the latter bought the object via auction or from a trader in the relevant market.

Second, a new act concerning trade of objects made of ivory, which prohibits virtually any export and import, even of antiquities, was supposed to have entered into force on 1 October 2019. However, the law is not yet in force as it has not been published in the Belgian State Gazette.[4] Due diligence in this paradox situation is a continuous topic.

The year 2020 also saw the implementation of the Fifth Anti-Money Laundering Directive in Europe.[5] The Belgian implementing act of 20 July 2020 entered into force on 15 August 2020,[6] shortly after Belgium had been referred to the European Court of Justice for failing to implement the Fourth Anti-Money Laundering Directive. The new legislation, inter alia, requires art dealers to identify customers involved in art-related transactions of €10,000 or more, which is perceived as a huge burden for art traders, galleries and art fairs, and to register with the federal government. Remarkably, the new requirements apply to all artworks and movable goods of more than 50 years old, which is far more extensive than the European notion of 'works of art' in the Fourth Anti-Money Laundering Directive.

In addition, the art market still needs to adjust to new administrative requirements in the context of the European Import Regulation,[7] which entered into force in 2019.

The current international trend of increasing regulation of the art market and art trade-related subjects in general can also be observed in Belgium.

III ART DISPUTES

i Title in art

Sales contracts are consensual contracts in the sense that they are not subject to any formal conditions to be valid: title is transferred to the buyer as soon as there is agreement about the price and the subject matter. Nevertheless, any transaction of more than €3,500 should, in principle, be evidenced in writing.[8]

4 As at the time of writing.

5 Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018.

6 Act of 20 July 2020 containing various provisions to prevent money laundering and terrorist financing and to limit the use of cash, MB/BS of 5 August 2020.

7 Regulation (EU) 2019/880 of the European Parliament and the European Council of 17 April 2019 on the introduction and the import of cultural goods.

8 Article 8.9 of the New Civil Code applicable as from 1 November 2020.

Buyers of works of art can also rely on bona fide possession to invoke good title in relation to third parties.[9] The buyer must have reasonably believed that he or she bought the object from the true owner (*verus dominus*), even if the seller was not, at the time of sale, the true owner. It does not suffice that the buyer did not know he or she was not buying from the true owner (actual knowledge), it must also be obvious that he or she could not have known this in the particular circumstances (constructive knowledge). These basic principles will not radically change with the implementation of the new Civil Code.[10]

The buyer's duty will be assessed differently according to the nature of the object and the capacity of the buyer as a professional or private party. The burden of proof rests with the claimant (original owner) to show that some facts peculiar to the situation should have triggered doubts with the buyer about the rights of his or her predecessor.

These rules apply similarly whether goods are acquired by auction or by private sale. In a private treaty situation, the buyer has more reason to be cautious than in a public sale where the auction process normally determines the price-setting. It is also obvious that the standard of diligence required when buying from a local auctioneer in a house sale is higher than when buying from an international auction house that abides by the highest professional standards.

ii Nazi-looted art and cultural property

In the context of the international agreements on the restitution of looted cultural assets during the Second World War, Belgium assigned a special team within the Ministerial Department of Economic Affairs to recover art and archives looted from Belgium. The mission of this team has since expired, even though not all registered items have yet been retraced or recovered. Where possible, Belgian enforcement authorities seek to rely on the (voluntary) assistance of the diplomatic or enforcement agencies of the country of the object's present location. No other specific laws have been enacted in relation to Nazi-looted art and cultural property. Case law is sparse in this area.

iii Limitation periods

In the case of theft or loss, the original owner has the right to reclaim the asset from the current possessor in the hands of whom he or she finds it during the first three years after the loss or theft occurred. This three-year limitation period is only applicable when the possessor is in good faith.[11]

In other cases, a purchaser (even in bad faith) can acquire ownership title by having quiet possession of an item for 30 years, provided his or her possession is continuous, undisturbed, public and unambiguous.

On the basis of the law implementing Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a Member State, which differs from the Belgian Civil Code in this respect, the Belgian state must request restitution within three years

9 Article 2279 of the (old) Civil Code.

10 See Section II regarding the new Civil Code provisions on property law. According to Article 3.22 of the new Civil Code, a possessor is in good faith if he or she may lawfully assume that he or she is the holder of the right that he or she possesses. Good faith is presumed subject to proof of the contrary.

11 Article 2279 of the (old) Civil Code. The same rule is enshrined in Article 3.28, Paragraph 1 of the New Civil Code.

of the authority having knowledge of the place of the item and the identity of the possessor and, in any case, 30 years from the moment the item was unlawfully removed from the Belgian territory.

There are no other special limitation periods such as for art misappropriated during the Nazi era.

The 30-year limitation issue has been addressed in the *Khurvin* case, which gave rise to a series of proceedings before the Belgian courts, instituted by the Islamic Republic of Iran in 1981 when it sought the return of 349 archaeological objects that had been brought into Belgium in 1964 by a French–Belgian collector, on the basis of their illegal exportation. In June 2013, after a lengthy procedural battle before the Brussels civil courts, the Court of Cassation rejected the finding of the Brussels Court of Appeal that the title claim of the Iranian Republic had expired after 30 years on the basis of Article 2262 of the Civil Code and annulled the Court of Appeal's judgment to that extent.[12] The case was then referred to the Court of Appeal of Liège, which resolved the issue on a definitive basis and decided to allow the objects to return to Iran.[13]

iv Alternative dispute resolution

The Belgian Judicial Code lays down specific rules and procedures for the following alternative dispute resolution methods:

a arbitration;
b mediation; and
c collaborative negotiating.

Since 2015, mediation (voluntary and judicial) has received equivalent status to court procedures and arbitration in all civil and commercial matters and is actively encouraged by judicial and bar authorities.

Collaborative negotiations, which – like mediation – can only be conducted by registered lawyers specially trained to that effect, have only been endorsed by procedural law since January 2019, in an effort to facilitate and widen the alternative means to settle disputes.

There are no specialised Belgian alternative dispute resolution organisations or other institutions dealing specifically in art matters.

IV FAKES, FORGERIES AND AUTHENTICATION

A commonly invoked civil law remedy is the action to rescind the sale contract for fraud (misrepresentation) or mistake (error).

Fraud or misrepresentation is defined in Article 1116 of the (old) Civil Code as the intentional use of artificial manoeuvres of such nature that the other party would never have contracted without such manoeuvres. This action is available up to 10 years after the discovery of the fraud. Upon rescission of the contract, the buyer must return the object sold and the seller must reimburse the price. Compensatory interests can be claimed, but as a rule, no compensation is provided for loss of profit or missed opportunities.

12 Court of Cassation, 4 October 2012, published on the official website of Belgian case law (http://jure.juridat.just.fgov.be).

13 Liège, 14 October 2014, unpublished.

'Error', as defined in Article 1110 of the (old) Civil Code, is established if it is excusable, meaning that the buyer erred about an essential feature of the object at the time he or she purchased it, such as its authenticity. The person in error must be in good faith, but it is up to him or her to prove that any other reasonable person in the same circumstances would have erred. The limitation period and the right to compensation are the same as for misrepresentation.

The seller also warrants the absence of defective title and hidden defects and must hold the buyer harmless against adverse third-party claims.

When facing an authenticity issue, Belgian courts tend to designate judicial (i.e., court-appointed) experts, in the absence of, or in addition to, expertise reports ordered by the parties, which may be produced together with their submissions.

Fakes or forgeries also constitute a criminal offence, punished by Article 498 of the Criminal Code, when the seller gives another or a similar object than what was contracted for (e.g., a fake painting) with the intention to deceive. Forgery and counterfeit can also constitute criminal offences under the Code of Economic Law.

See Section V.i for remedies under consumer legislation.

V ART TRANSACTIONS

i Private sales and auctions

Belgium has implemented the European directives on consumer sales (in Articles 1604 and 1649 *bis* et seq. of the old Civil Code). Accordingly, sellers of works of art must guarantee the conformity of the goods with the contract of sale, similar to any other consumer goods. The seller is liable towards the buyer-consumer for any lack of conformity that exists at the time of delivery of the goods and that becomes apparent within two years of the delivery. In the case of secondary market sales, the seller and consumer can agree a shorter time period for the seller's liability, which may not be less than one year.

No lack of conformity will be deemed to exist if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of, the lack of conformity. Thus, if adequate disclosure was given by the seller of the uncertainties relating to a work's authenticity, the buyer's claim should fail.

Legal remedies include the right to ask for the good to be repaired, replaced and reduced in price or (more likely in the case of fake works) for the contract to be rescinded.

Any clauses or agreements entered into before notification of a lack of conformity and that limit or exclude the consumer's rights under this regime will be null and void.

Consumer claims for non-conformity are subject to a limitation period of one year from the discovery of the lack of conformity, provided that this period cannot expire within the legal warranty period referred to above.

Distance sales and off-premises sales are moreover subject to a right of withdrawal of 14 days from the day the consumer acquires physical possession of the goods.[14] However, a consumer may not invoke the right to withdraw from the sale if it concerns an auction sale.[15]

The consumer protection rules on public sales are moreover expressly carved out for sales of artworks, objects from a collection – excluding tapestries and jewellery – and antiquities.[16]

Apart from those referred to above there are no specific laws governing auction sales.

14 Articles VI.47-52 and VI.67-73 of the Code of Economic Law.

15 Articles VI.53, 11° and VI.73, 11° of the Code of Economic Law.

16 Article VI.75, Paragraph 1, 2° of the Code of Economic Law.

ii Art loans

There is no published case law involving art loans to our knowledge.

Recent press has reported on a dispute between the authorities of the Ghent Museum of Fine Arts and the insurer in the context of the Jan Van Eyck exhibition that came abruptly to a halt in March 2020 following Belgian coronavirus restrictions. The question turns around who is liable to reimburse the €3 million worth of cancelled tickets.

The Belgian Judicial Code[17] provides that cultural property owned by foreign authorities is immune from execution (specifically, civil – conservatory or executory – attachment) when present in Belgium for the purpose of a public and temporary exhibition, provided such property is not used for economic or commercial activity of a private nature. Beneficiaries include state entities, provided they exercise some degree of sovereignty, and international governmental organisations. Privately held artworks do not benefit from this immunity privilege.

iii Cross-border transactions

In the event of a restitution or title claim, the competent jurisdiction within the European Union would be determined pursuant to Regulation (EU) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcements of judgments in civil and commercial matters. Article 7(4) establishes a new criterion of jurisdiction specific to art restitution claims: the courts for the place where the cultural object is situated will have jurisdictions concerning civil claims for the recovery of the object.

Regarding choice of law, the Belgian Private International Law Code provides a special rule for cultural property: when a good that is part of a state's cultural heritage leaves the territory of that state in breach of its law, the restitution claim by that state shall be governed by its law applicable at that time or, at that state's choice, by the law of the state on the territory of which the good is located at the time of the restitution claim.[18] However, if the law of the state of origin does not grant any protection to the possessor in good faith, the latter may invoke the protection that is attributed to him or her by the law of the state on the territory of which the property is located at the time of the restitution claim.

As a Member State of the European Union, Belgium is also subject to the European Import Regulation[19] and the European Export Regulation,[20] both specially dedicated to cultural property and establishing export and import licensing systems.

At an international level, Belgium ratified the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property on 31 March 2009; the Convention entered into force in Belgium on 1 July 2009. An implementing law has been in preparation for years, but no final instrument has yet been enacted.

Belgium is also a party to The Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict and its Protocols, as well as the Convention on the Protection of the Underwater Cultural Heritage.

17 Article 1412 *ter* of the Judicial Code.

18 Article 90 of the Private International Law Code.

19 Regulation (EU) 2019/880.

20 Council Regulation (EC) No. 116/2009.

Specific legislation to protect certain important items of cultural property has been enacted on a regional level, mainly providing for classification or listing measures and export restrictions.

In this regard, an essential feature of the Belgian constitutional system is the federalisation of the Belgian state. Movable cultural heritage falls within the powers of the three Belgian communities (Flemish, French and German-speaking) while the powers to regulate immovable cultural heritage belong to the three Belgian regions (Flanders, Wallonia and Brussels). However, in 2014, the Brussels region, given its specific status, was granted its own powers for the protection of immovable as well as movable and intangible cultural property 'of regional interest' situated in the Brussels region.

Accordingly, four regulations seek to protect movable cultural heritage in Belgium:

a Decree of the French Community of 11 July 2002;
b Decree of the Flemish Community of 24 January 2003, as occasionally amended;
c Decree of the German-Speaking Community of 20 February 2017; and
d Decree of the Brussels Region of 25 April 2019.

The territorial reach of those regulations depends on the actual location of the item within the Belgian territory. Some exceptions can come into play if the item has just been transferred from one community or region to the other, to prevent abuses.

There are no notable tax considerations in Belgium regarding art acquired internationally. In accordance with EU tax rules, Belgium levies import taxes and VAT on the import into Belgium from outside the European Union. Artworks benefit from a favourable rate of import VAT (currently 6 per cent).

iv Art finance

Art finance in Belgium has been incentivised by the possibility to take security on movable assets (including artworks) without taking possession (non-possessory pledge). Previously, a pledge on movable assets necessarily involved the physical dispossession of that asset. Pursuant to the new Pledge Act,[21] in force since January 2018, a pledge on movable artworks can simply be established by contract and made enforceable by third parties by its registration in the central Pledge Register.[22] The two methods (pledge with or without dispossession) co-exist and can be applied at the parties' choice.

(See Section II regarding the implementation of the Fifth Anti Money Laundering Directive in Belgium pursuant to which the client identification and know-your-customer rules henceforward also apply to the art market.)

The previous legal restriction on payments in cash subsists under the new legislation: no (art) professional may accept cash for the payment of artworks or otherwise in excess of €3,000. Penalties of up to €225,000 may be imposed in the case of infringement of this restriction but are capped at 10 per cent of the amount paid.[23]

21 Act of 25 December 2016 modifying several provisions relating to guarantees *in rem* on movable property, MB/BS of 30 December 2016.

22 The Pledge Register is operated and managed by the federal Department of Finance (https://pangafin.belgium.be/).

23 Article 67 *juncto* 137, 1° of the Act of 18 September 2017 on the prevention of money laundering and terrorist financing and on the restriction of the use of cash.

VI ARTIST RIGHTS

i Moral rights

Artists enjoy moral rights that are non-transferable (inalienable). Any overall waivers of these rights for the future are deemed null and void.

Moral rights include, inter alia:

a the right of disclosure (undisclosed works cannot be subject to attachment);

b the right to authorship; and

c the right of integrity, including the right to oppose any distortion, mutilation or other modification or degradation of a copyrighted work that can be harmful to the honour or reputation of the artist.[24]

Moral rights expire 70 years after the artist's death, similar to economic rights.

ii Resale rights

Belgium collects, in accordance with European Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art, the artist's resale right for original works of art, in the name of the living artist and in the name of the heirs, up to 70 years after the creator's death.[25] The royalty is payable by the vendor who is jointly and severally liable with the professional intermediary (gallery, auctioneer, art dealer) that brokered or carried out the sale. To qualify, the works of art must be executed by the artist himself or herself or be part of a series produced under the artist's supervision in limited edition.

Exempted from the resale right are first resales of works up to €10,000 within three years of the acquisition from the artist. Private sales with no professional intermediary involved are excluded altogether.

The artist's resale right is calculated on the total amount excluding VAT, with a minimum amount of €2,000 for the artwork to qualify. The maximum royalty on any resale is €12,500. The artist's resale right applies to Belgian artists, EU artists and other artists whose countries grant equivalent protection. Since 2015, artist's resale rights have been managed centrally by a single platform called 'eResaleRight'.[26]

iii Economic rights

Belgian copyright law has fully implemented all applicable European directives on copyright and neighbouring rights. This is reflected in the basic provision defining the scope of the artist's economic rights:[27]

> *Only the author of a literary or artistic work has the right to reproduce or cause to be reproduced, in whole or in part, by any means or in any form, direct or indirect, temporary or permanent (reproduction right).*
>
> *That right includes, inter alia, the exclusive right to authorise adaptation or translation of the work.*
>
> *This right also includes the exclusive right to authorise rental or lending of the work.*

24 Article XI.165 of the Code of Economic Law.

25 Article XI.175–178 of the Code of Economic Law.

26 www.resaleright.be.

27 Article XI.165, Paragraph 1 of the Code of Economic Law.

Only the author of a literary or artistic work shall have the right to communicate to the public the work by any means, including making it available to the public in such a way that members of the public may access it from a place and at a time individually chosen by them (right of communication to the public).

Only the author of a literary or artistic work shall have the right to authorise the distribution to the public, through sale or otherwise, of the original of the work or copies thereof (distribution right).

The first sale or other transfer of ownership in the European Union of the original or a copy of a literary or artistic work by its author or with his consent exhausts the distribution right of that original or copy in the European Union.

Specifically regarding artists' economic rights over their work, we note the following.

a The sale of an artwork allows the buyer to exhibit the work without asking the artist's consent but only in circumstances that do not affect the honour or reputation of the artist. Transfer of title does not imply the transfer of any (other) copyrights to the artwork. The artist retains the right of access to his or her work; for example, to make a copy, but he or she must exercise it in a reasonable manner. However, when the artwork incorporates a portrait of a person, the latter's permission (or his or her successors until 20 years after his or her death) is required to exhibit it in public.

b Reproducing images of an artwork in museum catalogues, websites or auction catalogues requires permission from the artist, unless these images are merely used to advertise the public exhibition or public sale of those artworks and do not serve any other commercial use. Works of art under copyright can also be freely reproduced for the sole purpose of illustration for teaching or scientific research, to the extent justified by the non-commercial purpose to be achieved and as long as the normal exploitation of the work is not affected, and provided further that the source, including the author's name, is indicated, unless this turns out to be impossible.

VII TRUSTS, FOUNDATIONS AND ESTATES

Private collections are mostly unincorporated; contractual structures vary depending on the family and estate planning of the owner or founder. If incorporated (hence separated from the founder's other assets), the private foundation is the preferred type of entity. Legal restrictions on free disposals such as forced heirship rules are an important factor in the choice of the appropriate form to hold and manage a private art collection.

The non-profit association and the foundation are the two basic types of not-for-profit entities that can be incorporated in Belgium. Trusts cannot be constituted under Belgian law.

A foundation with a cultural purpose can be recognised as a public utility foundation. Setting up a public utility foundation requires approval by royal decree, which gives the foundation an international quality label. The public utility foundation has a more advantageous tax status than a private foundation and is the preferred form for museums holding and managing important art collections.

Since the new Code of Companies and Associations came into force in May 2019, there are no minimum thresholds for members and directors except that a non-profit association must have at least three directors (or two directors if the association has only two members). A foundation can have one or more directors. For all other purposes, the law leaves a fair amount of scope to freely determine the internal organisation and operation of the entity.

Unlike a non-profit association, which can be dissolved by a special majority decision of its general assembly of members, a foundation can only be dissolved by a court decision.

The net assets remaining after the entity's liquidation must be assigned to another non-profitable purpose.

Tax aspects

Income tax

Private foundations and private museums taking the form of a non-profit association or a (private) foundation are, in principle, subject to the legal entities tax regime applicable to not-for-profit entities. The foundation or museum will not be assessed through the normal tax rate on its overall income but a withholding tax will be levied on certain types of income (real estate, financial and rental income).

VAT

Not-for-profit private museums are VAT-exempt taxpayers. Private foundations are subject to VAT if they perform economic activities other than exempt museum activities. A VAT exemption applies if the annual turnover subject to VAT does not exceed a certain threshold (€25,000).

Tax in compensation of inheritance taxes

Private foundations and non-profit associations are subject to an annual levy of 0.17 per cent on their assets situated in Belgium if the value of those assets exceeds €25,000. Public utility foundations are exempted from this tax, which makes it attractive to apply for public utility status if the foundation owns a valuable art collection.

Inheritance and gift taxes

Initial endowments to a foundation in the form of money or artworks are subject to gift or inheritance taxes at the applicable regional rate, depending on whether the initial endowment occurs during the founder's lifetime or upon his or her death. The rates can differ according to the region with the power to tax, being the region where the benefactor is or was last domiciled. If the benefactor has or had his or her tax residence in another country, no tax is due by the beneficiary unless Belgium-situated real estate is concerned.

The same tax treatment applies to subsequent endowments or contributions of money or artworks to an existing foundation.

Individuals and companies do not pay wealth tax on their assets including art and other cultural property.

Belgium does not levy a separate capital gains tax on the disposal of cultural assets. Income and capital gains on works of art and cultural property are taxable according to the general income taxation rules.

Capital gains on the sale of art and cultural property by:

a an individual in his or her private capacity acting within the 'normal management of his personal property' is not subject to tax;

b an individual speculating (e.g., when he or she has taken out loans for the purchase of artworks, or when the trading is significant and occurs on a regular basis) is taxable at a special personal income tax rate;

c an individual art market professional acting within the scope of his or her business or profession is taxable as professional income at the normal rate; and

d a commercial company (art dealers, auction houses, art galleries) is subject to corporate income tax at the normal rate.

Proceeds obtained by a non-profit entity that is subject to the tax on legal entities (e.g., museums in the form of a non-profit association or foundation) from the sale of art or cultural property are generally not taxable.

The power to impose inheritance and gift taxes belongs to the three Belgian regions with some residual powers still left with the federal state. The (last) residence of the donor or deceased determines which region is competent.

Formal donations (made by notarial deed) are subject to registration duties on donations if the notarial deed was drawn up before a Belgian notary or, if before a foreign notary, the deed is (voluntarily) registered in Belgium.[28] Informal gifts not incorporated in a deed are not subject as such to registration duties.

Tax rates for movables are flat and range from 3 per cent to 7 per cent depending on the parental link (if any) between donor and beneficiary. The 7 per cent rate applies to donations to unrelated parties including non-profit entities. Reduced rates apply to certain public entities while state museums and similar public authorities or entities are tax-exempt.

Inheritance taxes are due on the net estate of the deceased. Rates are progressive and differ according to the parental link. Legacies to unrelated parties are taxed at the highest rates, which go up to 65 per cent or 80 per cent, depending on the taxing region.

The taxable estate for inheritance tax purposes also comprises by legal fiction certain assets that are no longer part of the estate at the donor's death, including assets given away during the three-year period preceding the donor's death and that were not subjected to gift taxes (informal or unregistered gifts).

As for gift taxes, reduced rates apply to certain beneficiaries including non-profit entities. Bequests to state museums are tax-exempt.

No tax breaks are available when loaning or depositing art or other cultural property to public institutions.

Both lifetime gifting and bequeathing art or other cultural property to public institutions benefit from reduced gift and inheritance tax rates or from an outright tax exemption.

By making gifts or legacies to a public museum in a tax-efficient way, parties can reduce their total inheritance tax bill.

The 'acceptance in lieu' regime is where heirs or legatees of an important art collection can opt for payment of the inheritance taxes by means of works of art belonging to the estate of the deceased or the heirs or legatees, provided certain criteria are met, and subject to the appraisal and acceptance of the artworks by the relevant authorities.

Partial income tax relief is available to individual and (only for cash gifts) corporate taxpayers in the form of a deduction from taxable income, under certain conditions and subject to financial thresholds, in respect of gifts in cash exceeding (currently) €40 or gifts in the form of works of art made to or for the benefit of qualifying entities, including public museums and recognised cultural institutions.

28 A recent legal bill seeks to make the registration of Belgium of donation deeds passed abroad mandatory so as to trigger the Belgium registration duties immediately.

Gifts of money or other property to public institutions, which qualify as sponsoring or advertising expenses, are fully deductible if made within the scope of the donor's business and provided they are proportionate and reasonable.

VIII OUTLOOK AND CONCLUSIONS

The major legal issues requiring further implementation, clarification or guidelines include:

a guidance on the application of the anti-money laundering requirements on the art sector: as seen in certain other EU countries, it would be useful if the government or trade bodies could issue specific guidelines for art market participants, particularly regarding the new registration requirement for art professionals;

b guidance on the application of the European Import Regulation. The delicate question arises as to how the main obligation set out in Article 3(1) of the Regulation is to be construed and applied in practice given its wide and general scope,[29] pending the entry into force of the administrative requirements for issuing import statements and import licences;

c clarity is required on the entry into force of the new legal restrictions on the ivory trade;

d difficult issues and conflicts will undoubtedly arise out of the co-existence for some time of the old and new Civil Code and the application of the new provisions on pre-existing situations. Future case law may resolve some of those; and

e the outstanding question regarding Belgium's ratification of the UNESCO 1970 Convention is when the law implementing the Convention will finally be enacted. This law is long overdue (the Convention was ratified on 1 July 2009) and much anticipated by art law professionals.

29 Article 3(1) enters into force on 28 December 2020. It reads:
The introduction of cultural goods referred to in Part A of the Annex which were removed from the territory of the country where they were created or discovered in breach of the laws and regulations of that country shall be prohibited.

The customs authorities and the competent authorities shall take any appropriate measure when there is an attempt to introduce cultural goods as referred to in the first subparagraph.

Chapter 11

BRAZIL

Marcílio Toscano Franca Filho and Gustavo Tanouss de Miranda Moreira[1]

I INTRODUCTION

According to *The Art Market 2020*, the report drawn up by Art Basel and UBS, the global art market reached approximately US$64.1 billion in 2019.[2] The situation in Brazil – modest, when compared with other markets – is noteworthy; so much so that the country is mentioned 22 times in the UBS report and makes the top dozen import sources list.[3] Also, the sixth edition of the sector report on the primary contemporary art market in Brazil states that antiques and art exports had a turnover of over US$153 million in 2017, which is a high number by Brazilian standards.[4]

When one speaks of art law in Brazil, it must be acknowledged that over recent years there has been a boom in the country's art market. This was the headline *Art News* used to address the topic some years ago: 'Boom Time for Brazil's Art Market'. Important newspapers such as the *Financial Times*, *ArtEconomy – Il Sole 24 Ore* and *Il Giornale dell'Arte* have detected this same trend. Such an explosion has occurred in a twofold manner: the specialised press has noted that, on the one hand, Brazil has started consuming more art, and more Brazilian collectors have become part of the first team of international collectors, with a significant presence in fairs, auctions and galleries; on the other hand, more Brazilian artists have become more desirable, exhibited and collected abroad.

In recent years, big galleries such as White Cube, and renowned museums, including the Tate, the Whitney Museum, the Metropolitan Museum of Art and MoMA, have promoted the Brazilian art scene. In addition, Christie's, Sotheby's and Phillips have boosted Brazilian artists – including Os Gêmeos, Vik Muniz, Cildo Meireles, Lygia Pape, Sebastião Salgado, Tarsila do Amaral, Candido Portinari and Ernesto Neto – with auctions in London and New York.

Nonetheless, there are two sides to every coin: Interpol records demonstrate that South America and Brazil have been the origin and destination of illegally traded works of art. A visit to online auction sites, such as eBay and Catawiki, shows the variety and scale of this illicit market, which involves each and every type of artefact that may spark interest in the

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2 Clare McAndrew, *The Art Market 2020*, Basel, Zurich: Art Basel & UBS, 2020, pp. 17, 23.

3 id., p. 50.

4 ABACT, ApexBrasil and Latitude, *Pesquisa Setorial – O Mercado de Arte Contemporânea no Brasil*, Sixth Edition, December 2018.

international market. By way of illustration, the International Council of Museums (Icom) red lists indigenous funerary urns, colonial silverware and baroque religious statuary among the items sought in Latin America.

It is also interesting that the 'FBI Top Ten Art Crimes' lists the robbery at the Chácara do Céu Museum in Rio de Janeiro in 2006 in seventh place. Interpol data also reveal that Brazil ranks 26th on the list of countries with the highest number of stolen cultural objects, and an extremely low recovery percentage rate.

This has had obvious repercussions in the art law world. More books have been published, more events have been held, and we now have podcasts on the topic and art law chairs at universities. Nevertheless, it is true that art law themes have been under discussion in Brazil since the nineteenth century. For instance, in 1870, the *Tribuna Artística* newspaper, dedicated to discussing, disseminating and defending artists' rights, was in circulation in Rio de Janeiro, and in 1888, important painter Pedro Américo published a book reflecting on plagiarism in painting and literature. Nowadays, the Brazilian art law bibliography totals approximately 30 works, signifying a clear process of maturation.

II THE YEAR IN REVIEW

The year 2019 marked the beginning of the presidency of Jair Bolsonaro and the renewal of Congress representatives. On the administrative side, a change that has triggered nationwide backlash has been the extinguishing of the Ministry of Culture, which was absorbed by the Ministry of Citizenship in the form of a Special Secretariat for Culture. At the end of 2019, the Secretariat was integrated into the Ministry of Tourism. A particular point to note in this is that Italy has long had a single administrative structure to handle matters of both tourism and culture. Moreover, the enactment of Presidential Decree No. 9919/2019 and Ordinance No. 1576 of the Ministry of Citizenship – when the Ministry of Culture was still within the said Ministry – which have produced changes in the allocation of funds for national film production, reverberated in the judicial field, leading the Sustainability Network Party and the Federal Prosecution Office to file actions against these rules to eventually obtain a favourable preliminary injunction from the Federal Court of Rio de Janeiro.

Other executive acts have indeed caused much discussion. In Rio de Janeiro, the mayor ordered the seizure of *Avengers: The Children's Crusade*, a graphic novel portraying a homosexual kiss, at the Book Biennial. The case was taken to the Rio de Janeiro Court of Justice, whose Chief Justice permitted the withdrawal from public display of unsealed LGBT-themed works aimed at children and adolescents, a ruling that was quickly reversed by Brazil's Supreme Court.

In terms of seizure, for the first time an art gallery has been the target of judicial search and seizure warrants due to its close involvement in the money laundering schemes uncovered by anti-corruption efforts, notably the 65th phase of Operation Car Wash.

Lawmakers have passed the Anti-Criminal Package,[5] which includes an unprecedented provision in the Brazilian Code of Criminal Procedure that reads as follows: 'In the event of forfeiture of works of art or other goods of relevant cultural or artistic value, if the crime has no determined victim, the goods may be sent to public museums.'

5 Law No. 13964/2019.

III ART DISPUTES

i Title in art

The Brazilian Civil Code (BCC) provides that the ownership of a movable good is only transferred upon the sale of the item (i.e., the item is delivered to the buyer).[6] This is the situation for both private sales and auction sales. Pursuant to Article 1268, *caput*, of the BCC, in the sale of an object carried out by someone other than its owner, ownership cannot be transferred, except if the item, offered to the public at an auction or in a shop, is transferred in circumstances that make the seller, in the eyes of the person who buys in good faith or in the eyes of any one person, appear as the owner. The sale shall not lead to ownership transfer when it derives from a null title.[7]

Possession is in good faith 'if the possessor does not know the defect or obstacle which impedes the acquisition of the thing';[8] a condition that is only lost if (and when) concrete circumstances presume that the possessor knows that he or she possesses the object unduly.[9] Presuming good faith is a general principle: good faith is presumed; bad faith must be proven.

The BCC also states that, if an artist works on raw material that belongs to someone else, the painting, sculpture or writing eventually produced will belong to the artist if its value considerably exceeds that of the raw material.[10]

ii Nazi-looted art and cultural property

There is no rule in Brazilian domestic law that specifically refers to the return of works of art and cultural objects stolen by the Nazi regime, nor to acquisitive prescription in relation to objects confiscated by the Nazis.

In the late 1940s, like many countries in Latin America, Brazil was a common destination for fleeing Nazis, persecuted Jews and for works of art expropriated by the Nazis during the Second World War. Today, some Brazilian collections are the target of legal complaints by Jewish families from Europe and the United States.

Brazil's former President Fernando Henrique Cardoso even created the Special Commission for the Determination of Nazi Assets, by a decree of 7 April 1997.

In addition to being a signatory to the Icom Code of Ethics, Brazil took part in the 1998 Washington Conference on Holocaust-Era Assets.

iii Limitation periods

In general, the limitation period is 10 years, if no shorter term has been set by the law.[11]

With regard to acquisitive prescription upon movable property in general, the BCC sets forth that whoever possesses a movable object as theirs, in a continuous and unchallenged

6 Articles 1267, *caput*, and 1226 of the Brazilian Civil Code (BCC).
7 id., Article 1268, Paragraph 2.
8 id., Article 1201, *caput*.
9 id., Article 1202.
10 id., Article 1270, Paragraph 2.
11 id., Article 205.

manner for three years, in good faith and with good title, shall acquire ownership of the item.[12] However, if the possession of the movable object extends for five years, there shall be acquisitive prescription, regardless of analysis of good faith or title.[13]

iv Alternative dispute resolution

The 2015 Brazilian Code of Civil Procedure (BCCP) sets forth that the state, whenever possible, shall promote the consensual resolution of controversies, which shall be actioned by private lawyers, judges, prosecutors and public defenders participating in the course of the judicial process.[14] Arbitration has its own legislation: Law No. 9307 of 1996. In spite of this, there are no legal provisions specifically related to alternative dispute resolution of art disputes, nor there is a court in Brazil that specifically handles these disputes.

Brazil is a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In fact, in an increasingly globalised art market, where disputes are increasingly transnational, this is a major plus point.

In April 2019, the Court of Arbitration for Art was inaugurated in Rotterdam as the first international court dedicated to the settlement of art disputes. Initially contributing only one arbitrator, Brazil is now represented in the court by eight arbitrators.

IV FAKES, FORGERIES AND AUTHENTICATION

In Brazilian law, the civil liability for expert opinions is subjective; that is, it depends on the demonstration of fault – negligence, imprudence or malpractice or intent. An expert acting as an independent professional may fall within the scope of Article 14, Paragraph 4 of the Brazilian Consumer Defence Code (BCDC),[15] which prescribes that 'the personal liability of independent professionals shall be determined through the verification of fault'. As for artists' foundations and catalogue raisonnés authors, it seems that, by analogy, they are also subjectively liable. The case law on the matter is scant, and there are no legal provisions that specifically address this thorny problem.

As a general rule, the seller of works of art is also held subjectively liable, and the sale of a work that subsequently raises questions about its authenticity or real authorship may be cancelled on the basis of a substantial error. According to Article 139 of the BCC, the error is considered to be substantial when, in addition to other situations, 'it is relevant to the nature of the transaction, to the main object of the declaration, or to some quality essential to it'.

If the seller qualifies as a dealer, a consumer relationship occurs, demanding the application of the BCDC. It seems that the issue regarding the authenticity or authorship of a work of art – a work sold as being authentic but, in fact, a fake, or a work presented as having certain characteristics of authorship but, in fact, having different characteristics to those advertised – may fall within the scope of defect of the product, for which the dealer is held objectively liable; that is, regardless of fault.

12 id., Article 1260.

13 id., Article 1261.

14 Article 3, Paragraphs 2 and 3, of the Brazilian Code of Civil Procedure.

15 Law No. 8078 of 1990.

In relation to the auctioneer, Article 68 of Normative Instruction No. 72 of 2019 of the National Department of Commercial Registration and Integration, states that '[the] auctioneer is liable for the acts which, in the exercise of the profession, he or she carries out with intent ('dolus') or fault'.

Furthermore, regrettably, in Brazilian law there is no specific provision of the crime of forgery of a work of art. Article 189 of the Criminal Code only deals with the conduct of violating copyright and connected rights, without directly addressing art forgery. In August 2020, federal representative Felício Laterça (Social Liberal Party – Rio de Janeiro) presented to Congress Draft Bill No. 4293/20, which seeks to insert Article 62-A into Law No. 9605/1998, imposing the penalty of imprisonment of one to three years plus a fine to whoever forges a signature in a work of art.

V ART TRANSACTIONS

i Private sales and auctions

The United Nations Convention on Contracts for the International Sale of Goods entered into force in Brazil on 1 April 2014.

For contracts regulated by Brazilian law, the BCC encompasses two key principles: objective good faith and social function of the contract. Pursuant to Article 422 of the BCC 'contractors are obliged to keep the principles of probity and good faith both in the conclusion of the contract and in its execution'. As for the social function of the contract, Article 421 states that 'contractual freedom shall be exercised within the limits of the social function of the contract' and that 'the principle of minimal intervention and the exceptionality of contractual revision shall prevail in private contractual relationships'.

In the sphere of contractual principles, private sales are, in general, governed by Articles 481 to 532 of the BCC. Nevertheless, if a consumer relationship is present, as when a work is purchased from a gallery, for instance, the sale will be regulated by the BCDC, which is an undeniably advanced piece of legislation that recognises various consumer rights.

Auctions are primarily governed by the legally binding Decree No. 21981 of 1932, which regulates the auctioneer profession. Normative Instruction No. 72 of 2019, of the National Department of Commercial Registration and Integration, also exerts its influence over the matter.

Depending on the specific case, the BCC or the BCDC may apply to the auction sale, as stated by the Superior Court of Justice in the following: 'The BCDC's protection to the public sale promoted by the auctioneer depends on the type of trade that is practised. If it comes to the sale of goods from individuals, collectors, etc. to producers or collectors and individuals, such as the sale of artworks, family jewellery, estate goods and even livestock, BCC rules apply.'[16]

With regard to distance sales in the art market, be they private sales or auction sales, either the BCC or the BCDC may apply, according to the specific case. It should be highlighted that, in Brazil important rules apply to the digital environment, with special attention to the Brazilian Civil Rights Framework for the Internet (Law No. 12965 of 2014),

16 Brazil Superior Tribunal of Justice, Special Appeal No. 1.234.972 – RJ (2011/0025423-8), 2015, www.conjur.com.br/dl/voto-relator-leilao-incompleto.pdf, accessed 9 September 2020.

the General Law on the Protection of Personal Data (Law No. 13709 of 2018) and Decree No. 7962 of 2013 on contracting in electronic commerce in the situations in which the BCDC applies.

Judicial auctions find their regulation in Articles 879 to 903 of the BCCP; particularly Article 882, whose *caput* sets forth that the auction shall be held in person if it cannot be held electronically. From 21 September 2020 to 2 October 2020, an auction was held to dispose of works belonging to the insolvent Banco Santos estate. The sales included multiple works by artists such as Tarsila do Amaral, Cildo Meireles, Frank Stella, Zhang Linhai and Man Ray, and were held online.

ii Art loans

Significant loans were involved in the great art exhibitions Brazil hosted in 2019. The 'Tarsila Popular' exhibition, for instance, at the São Paulo Museum of Art (Masp), presented works by Tarsila do Amaral belonging to private collections and institutions from various countries, such as Brazil itself, Spain, France, Russia and Argentina, with particular attention to *Abaporu*,[17] an oil on canvas owned by the Buenos Aires Latin-American Art Museum and deemed to be the artist's masterpiece. The Masp has announced plans to hold an exhibition of works by Vincent van Gogh in 2025 – a five-year advance booking is necessary for loans of works by an artist of the calibre of the Dutch master.[18]

Despite this scenario, Brazilian law has no rules concerning immunity from suit or seizure for artworks and collections on loan.

iii Cross-border transactions

The regulation of the export of cultural objects in Brazil comprises a broad and diverse set of rules. First, the country is a signatory to the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and to the UNIDROIT 1995 Convention on Stolen or Illegally Exported Cultural Objects.

Domestic regulation of the circulation of cultural objects highlights that listed goods may only leave Brazilian territory for a short term and for cultural exchange purposes, and that a temporary leave shall not imply any transfer of ownership.[19]

Law No. 4845 of 1965 prohibits the definitive export of any artworks and traditional crafts produced prior to the end of the monarchical period, that is, up to 1889, covering drawings, engravings, sculptures, paintings, architectural elements, carved works, furniture, imagery and jewellery, among others.[20] The same applies to 'works of the same sort coming from Portugal and incorporated into the national environment during the colonial and imperial

17 'Exposição "Tarsila Popular" chega ao fim e conquista maior público dos últimos 20 anos do MASP', Jovem Pan, 29 July 2019, https://jovempan.com.br/programas/jornal-da-manha/exposicao-tarsila-popular-chega-ao-fim-e-conquista-maior-publico-dos-ultimos-20-anos-do-masp.html, accessed 8 September 2020.

18 Tatiane de Assis, 'Masp prepara mostra com obras de Van Gogh', *Veja São Paulo*, 29 November 2019, https://vejasp.abril.com.br/blog/arte-ao-redor/masp-prepara-mostra-com-obras-de-van-gogh, accessed 8 September 2020.

19 Article 14 of Decree-Law No. 25/37. Temporary leave is also reasonable in exceptional cases such as restoration or expert investigation.

20 Article 1 of Law No. 4845/1965.

regimes'.[21] Furthermore, the definitive export of sculptures, paintings and graphic artwork that, although produced abroad during the colonial and imperial periods, represent Brazilian culture, are related to the history of Brazil or are connected to the country's landscapes and customs, is forbidden.[22] The attempt to definitively export any of these objects shall result in their sequestration by the federal administration or by the state where they are located, for the benefit of their respective museums.[23]

Nevertheless, Article 4 of the Law exceptionally permits the export from Brazil of some works, provided this is for cultural exchange and temporary exhibition purposes, with the express authorisation from the competent body of the federal administration, which shall state the deadline for the objects to return to national territory.

In addition, Article 1 of Law No. 5471 of 1968 prohibits the definitive export of libraries and collections of documents made up of Brazilian works edited from the sixteenth to the nineteenth centuries, as well as parts or individual items of collections of works and documents; the Law also covers newspaper collections that are at least 10 years old, and original and ancient copies of sheet music.

Moreover, Article 20 of Law No. 3924 of 1961 states that 'no object which presents archaeological or prehistorical, numismatic or artistic interest shall be transferred abroad, without an express licence' from the Institute of National Historic and Artistic Heritage (Iphan), as a permit that specifies the objects to be exported. Failure to comply with the said provision shall result in the summary seizure of the object in question and its delivery to Iphan, notwithstanding other legal sanctions.[24]

With regard to the international art trade specifically, anyone wishing to import or export artworks shall initially register themselves with the Radar System (a system for registering and tracking customs agents' activities), controlled by the Federal Revenue Service (FRS).[25] Following this registration, they must register with the Siscomex (an electronic integrated trade system, also administered by the FRS); only after these conditions are met shall they be free to take part in foreign trade.[26]

For definitive export, the packing list, air waybill (AWB) and Iphan's permit to export the item are generally required, along with other documents, and details of the domestic and international means of transport, the packaging, collection, storage and insurance.[27] In this type of export, when works are sold abroad, only income tax applies.[28]

For definitive import, the following taxes apply: import tax and tax on industrialised goods and social contributions – social integration programme and contribution for social security financing – all of which are federal taxes; tax on the circulation of goods and services, at state level; and the storage tariff at the airport or port where the work has been unloaded.[29] The value of each of these taxes influences the calculation basis of the next, and insurance and freight charges are included in the calculation of the storage tariff as well as the taxes.[30]

21 id., Article 2.
22 id., Article 3.
23 id., Article 5.
24 Article 21 of Law No. 3924/1961.
25 Ministry of Culture and UNESCO, *Visual Artist's Guide: insertion and internationalisation*, 2018, p. 149.
26 id., pp. 149–150.
27 id., pp. 150–151.
28 id., p. 150.
29 id., p. 158.
30 id.

For definitive import, the packing list, AWB, commercial invoice and other documents are generally required, in addition to details of the domestic and international means of transport, packaging, collection, storage and insurance.[31]

Trade operations involving internationally acquired art, in turn, enjoy the exemption of most taxes that apply as a general rule to internal transactions, be they federal taxes or taxes charged at the state level, in a way that the taxation applied will depend on the nature of the agent involved, whether that is a natural person or a legal person.[32]

In conclusion, it is relevant to discuss choice of law. In the words of Article 8, *caput*, of the Introductory Law to the Rules of Brazilian Law, applicable to immovable property and to movable property of permanent location, thus consecrating the general *lex rei sitae* rule,[33] 'in order to qualify the good and to regulate the situations which concern them, the law of the country where they are located shall be applied'. On the other hand, in relation to movable property without a permanent location, such as movable goods in transit or those of the traveller's personal use[34] – the law of the country where the owner resides shall be applied.[35]

iv Art finance

Over the years, the Brazilian state has created tax incentive legislation for the cultural sector, whose pinnacle is Law No. 8313 of 1991 (the Federal Law for Cultural Incentive, popularly referred to as the Rouanet Law).[36] This Act makes it possible for natural and legal persons to sponsor various cultural projects – a public work of art, exhibition, fair, festival, production and printing of books or catalogues or creation or works – and deduct part or the total amount of the financial support given from what is due as income tax.[37] In addition to the Rouanet Law, applicable at federal level, there are laws for cultural incentive in states and municipalities that follow the same tax-deduction system.[38]

Financial support may also take the form of contests, notices and awards 'promoted by the government as well as by private institutions and even companies [that can] publicly . . . take submission of projects and proposals' set forth by artists.[39] This must all be carried out with the utmost transparency, a value that is crucial to the art market, contributing to the fight against laundering money and financing terrorism. In this context, Law No. 9613 of 1998 takes a prominent position. Indeed, this Act requires natural and legal persons from various economic and financial sectors – including 'natural or legal persons who trade jewellery, precious stones and metals, art objects and antiques'[40] – to comply with customer identification duties and keep customer records updated, among other obligations.[41]

31 id.

32 id., p. 164.

33 André de Carvalho Ramos, *Curso de direito internacional privado*, São Paulo: Saraiva Educação, 2018, pp. 390–391.

34 id., p. 391.

35 Article 8, Paragraph 1, of the Introductory Law to the Rules of Brazilian Law.

36 Ministry of Culture and UNESCO (footnote 25), p. 25.

37 id., p. 25; Rouanet Law, http://leideincentivoacultura.cultura.gov.br, accessed 10 September 2020.

38 Ministry of Culture and UNESCO (footnote 25), p. 26.

39 id., p. 19.

40 Article 9, sole paragraph, XI, of Law No. 9613 of 1998.

41 id., Articles 10 and 11; Marcílio Toscano Franca Filho, Matheus Costa do Vale, Nathálya Lins da Silva, 'Mercado de arte, integridade e due diligence no Brasil e no MERCOSUL Cultural', *Revista da Secretaria do Tribunal Permanente de Revisão do MERCOSUL*, Vol. 7, No. 14, August 2019, pp. 270–271.

Iphan Ordinance No. 396 of 2016 on proceedings to be observed by private dealers – whether natural or legal persons – of antiques or works of art of any nature, or both, is another relevant text on the subject matter.[42] In addition, Iphan maintains the National Register of Art and Antiques Dealers.

Law No. 13608 of 2018 introduced the concept of whistle-blower, which 'may serve as an instrument for reporting crimes within the international and national art market, to eventually reduce the risks to which this trade is subject'.[43]

In August 2019, federal representative Denis Bezerra (Brazilian Socialist Party – Ceará) presented a draft bill to Congress, making compulsory the public registration of artworks, pedigree animals and jewellery exceeding 25,000 reais in value, with a notary public.

VI ARTIST RIGHTS

i Moral rights

Irrevocable and inalienable moral rights[44] are listed in Article 24, *caput*, of Law No. 9610 of 1998 (the Copyright Law). The main right – the right to integrity – is enshrined in item IV: 'The author's moral rights are: . . . to ensure the integrity of the work, opposing any modifications or the practice of acts that, in any way, may harm the work or affect him or her, as an author, in their reputation or honour.' Brazil is also a signatory to the Berne Convention for the Protection of Literary and Artistic Works.

By virtue of the artist's death, the right to integrity and some other moral rights are transferred to the artist's heirs.[45]

ii Resale rights

Resale rights are inscribed in Article 38 of the Copyright Law. According to that provision, the author has the inalienable and irrevocable right to be paid at least 5 per cent of any gain in value that may occur each time one of his or her works of art or manuscripts is resold. If the author is not paid the resale rights at the time of resale, the seller is considered to be the depositary of the amount owed to the artist, except if the transaction is made by an auctioneer, in which case the auctioneer shall be the depositary of the amount.

iii Economic rights

In the words of Article 28 of the Copyright Law, 'the author has the exclusive right to use, enjoy and dispose of the literary, artistic or scientific work', in such a way that the subsequent Article sets forth that the author's prior and express authorisation is necessary for the use of the work to be possible, under any form, including: full or partial reproduction; editions; translation; adaptation, musical arrangement and any other transformation; inclusion in audiovisual productions or phonograms; and distribution, when it is not inherent in the contract concluded by the author with third parties for use or exploitation of the work.

42 Anauene Dias Soares, *Direito internacional do patrimônio cultural: o tráfico ilícito de bens culturais*, Fortaleza: IBDCult, 2018, p. 126.

43 Franca Filho, Vale and Silva (footnote 41), p. 275.

44 Article 27 of Law No. 9610/1998.

45 id., Article 24, Paragraph 1.

Economic rights run for 70 years, counted from 1 January of the year following that of the artist's death, obeying the succession order set forth in civil legislation.[46] After that time, the work falls into the public domain.

VII TRUSTS, FOUNDATIONS AND ESTATES

Even though Brazilian law provides for various types of fiduciary contract, there is no legal mechanism in the country identifiable as a trust.[47] Nonetheless, a trust set up abroad may have some effects in Brazil.[48]

In Brazil, private foundations are specifically regulated by the BCC,[49] the BCCP[50] and the Law on Public Registries.[51] Once certain requirements are met, private foundations may enjoy tax incentives.[52]

Law No. 13800 of 2019 introduced the concept of endowment funds in Brazil. These 'funds may support institutions related to education, science, technology, research and innovation, culture, health, environment, social assistance, sports, public security, human rights and other public interest purposes'.[53]

Estate planning may be carried out by setting up a family holding company.[54] As the holding company is usually formed when the property's owner is still alive, by developing an organisational structure to make administrative adjustments and to avoid the transfer of administration to someone fit to perform this, the tax incidence is reduced.[55] Moreover, the deviser may impose the restrictive clause of inalienability on the assets of the holding company, from which the clauses of unseizability and incommunicability (which prevents the patrimony from being shared with the holder's spouse or partner) automatically apply.[56] This scenario proves to be powerful for the protection of art collections, notably against their dispersal and transmission to a bad manager.

46 Article 41, *caput*, of Law No. 9610/1998.

47 Cláudio Finkelstein, 'O trust e o direito brasileiro', *Revista de Direito Bancário e do Mercado de Capitais*, Vol. 72, April/June 2016, www.mpsp.mp.br/portal/page/portal/documentacao_e_divulgacao/doc_biblioteca/bibli_servicos_produtos/bibli_boletim/bibli_bol_2006/RDBancMecCap_n.72.06.PDF, p. 3, accessed 22 September 2020.

48 See id., pp. 3–4.

49 Articles 62–69.

50 Articles 764 and 765.

51 Articles 114–121.

52 Article 15, Paragraphs 1 and 2 of Law No. 9532/1997.

53 Article 1 of Law No. 13800/2019.

54 Cristiano Chaves de Farias and Nelson Rosenvald, *Curso de Direito Civil: Sucessões*, Third Edition. Salvador: JusPodivm, 2017, p. 84.

55 id., p. 85.

56 id.; Article 1.911 of the BCC.

VIII OUTLOOK AND CONCLUSIONS

There exists no risk-free society. Perils are of the most diverse types and may affect everyone and everything, and works of art are no exception. From climate change to war, from thefts to fires, from domestic and transportation accidents to earthquakes – all of these, and much more, pose a threat to artworks. The unique nature of such objects demands the adoption of a proactive attitude. In that respect, art insurance – although not new – should clearly be encouraged and more widely used. Brazil has sadly seen fires rage in cultural institutions on at least a handful of occasions.

Such disasters and the scarcity of public resources for culture require creative solutions; art insurance is surely one of them.[57] Another interesting initiative for the art market is a security house – the first of which in Brazil has been recently set up in São Paulo – which is a rental system of insured private safes that serve to protect works of art confidentially.

57 Marcílio Toscano Franca Filho and Gustavo Tanouss, 'O risco sobre os riscos que riscamos', *Jota*, 15 December 2019, www.jota.info/paywall?redirect_to=//www.jota.info/opiniao-e -analise/artigos/o-risco-sobre-os-riscos-que-riscamos-15122019, accessed 28 September 2020.

Chapter 12

CANADA

Alexander Herman[1]

I INTRODUCTION

While Canada is not a major art market country, its role in the art trade is nevertheless significant. The domestic art market has been growing consistently, especially with regard to First Nation and other indigenous artists, and certain Canada-based art market players are making overtures on the international scene.[2] Canada's proximity to the US art market and its historical and ongoing links with Europe are assets. The newly minted US–Mexico–Canada Agreement and the Canada–EU Trade Agreement are likely indications that continental and transatlantic market relations will continue, or even grow, in the years ahead.

Canada is also an important case study in art law due to the ways in which federal legislation has continued to have an impact on the art market since the 1970s. Federal laws affect the import and export of cultural property, as well as areas such as copyright, moral rights and – a Canadian oddity – 'exhibition rights' for artists when their works are displayed at museums and galleries. As a middle or 'soft' power, Canada has always been involved in multilateralism on the world stage: in the context of art and cultural heritage, this means Canada has signed up to nearly all the major conventions and international agreements in this area. In many ways, Canada tends to go further than what is required under its international legal obligations. This can be seen in the way in which Canada implemented the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, as well as in the rights it has offered artists (i.e., exhibition rights) that go beyond the requirements of the Berne Convention for the Protection of Literary and Artistic Works.

On the whole, Canada can be seen as following the middle ground when it comes to state regulation of the art trade: there is more regulation than can be found in the United States, for example, but far less than exists in Continental Europe. The tension between these two extremes at times plays out on the Canadian judicial stage. On one side are the interests of art market players (dealers, auction houses and major collectors) and on the other the interests of the common good, namely protecting national heritage both at home and abroad. The case of *R v. Yorke* exemplifies this tension, as does the more recent decision in *Attorney General v. Heffel*, which is explained more fully in Section II.

1 Alexander Herman is the assistant director at the Institute of Art and Law.

2 See, for instance, the activities of the Heffel auction house: 'Colville masterpiece shatters artist record at Heffel's virtual live auction', Cision, 15 July 2020.

As Canada is a federal state, it is important to recall the different jurisdictional levels and the impact each might have on the trade in art. While there are significant laws and regulations at the federal level, each of Canada's 10 provinces and three territories will also bring their own rules to bear. Under the Canadian Constitution, the provinces have jurisdiction over 'property and civil rights', which means that major controls over dealing in heritage property are placed in the hands of the provinces, while the federal power controls international import and export, as well as intellectual property.[3] As a result, general heritage laws governing heritage properties, monuments and archaeological sites are found at the provincial level (i.e., each province will have its own). This means they can vary; for instance, the French-speaking province of Quebec will have a far more statist approach to heritage than the nine English-speaking provinces.

II THE YEAR IN REVIEW

Of course the coronavirus pandemic has been the major topic for the art market and museums in Canada over the past year, as it has been everywhere else. Both art market players and institutions have been struggling to deal with the financial turmoil caused by the pandemic and the lockdown. This has, to a large extent, placed esoteric 'art law' matters to the side for the time being. Following the pandemic, a government plan to assist laid-off employees and small businesses has certainly been helpful to art businesses, though there remain questions as to whether these subsidies will outlast the economic downturn.[4] A number of businesses have started selling off parts of their corporate collections to downsize and release much needed liquidity,[5] though it has yet to be seen whether such an approach will be followed by public sector institutions.[6] A government fund has been created to assist museums across the country,[7] while sector associations such as the Canadian Museums Association have been actively assisting the recovery for institutions both large and small.

In terms of art law, we are still dealing with the fallout from two important cases decided in 2019. The first of these was *Attorney General of Canada v. Heffel Gallery Limited*,[8] involving the judicial review of an export licensing decision over a painting by French Impressionist Gustave Caillebotte. The painting had been in a private Canadian collection since 1960 and was being exported after its sale to a UK buyer. The export permit had been delayed because the federal board that deals with export matters (the Canadian Cultural Property Export Review Board) had considered the work to be of 'outstanding significance' and of 'national importance'. This last determination was challenged through the courts, ultimately resulting in an unfavourable decision for the exporter from the Federal Court of Appeal,

3 Constitution Act 1867, Sections 91–92.

4 See, generally, the Canada Emergency Response Benefit, which ran until 27 September 2020, and the Canada Recovery Benefit, which will run until 25 September 2021 and, in relation to the arts community, the Canada Council for the Arts' emergency support: https://canadacouncil.ca/covid-19-information.

5 Andrew Willis, 'Creative downsizing: Companies are selling valuable art as they seek to cut office space and raise revenue', *Globe and Mail*, 16 October 2020.

6 Alexander Herman, 'Art museums need to consider their duty to the public when selling off their works', *Globe and Mail*, 23 October 2020.

7 See the Covid-19 Emergency Support Fund for Heritage Organizations, operated through the Museums Assistance Program.

8 2019 FCA 82.

which approved the Board's broad approach to the question of national importance. This decision, and a small but important change to the tax scheme for cultural property donations, has had a significant impact on the trade and collecting of art in Canada (see Section V.ii).

The second major case was that of *Hearn v. McLeod Estate*,[9] an Ontario decision involving the purchase of a painting by the celebrated First Nations artist Norval Morrisseau, a work that turned out to be fake. The buyer tried to recover the price paid, but the dealer who sold the work refused. It went to court and the final decision came from the Ontario Court of Appeal in 2019, which found in favour of the purchaser. Importantly, the Court made some useful pronouncements about when a contract of sale can imply a term as to the authenticity of the work. This decision puts Canada at odds with decisions over similar implied terms in England. Beyond the legal sphere, the dispute also did much to bring attention to a string of Morrisseau forgeries (possibly numbering in the hundreds) created in the 1970s and 1980s that are still in circulation. This has been comprehensively documented in the excellent film *There are no fakes* (2019) by director Jamie Kastner. It has also been written about in *Art Antiquity and Law*.[10]

Beyond this, there are lingering discussions at governmental levels about updating the copyright regime in Canada. Most of the talk now relates to digital service providers, without much knock-on effect for the art trade or museums, but the idea of introducing an artist's resale right similar to that in the European Union has been floated. This has not made much headway. Recall that Canada provides exhibition rights to its artists, for works made after 1988, which assists in providing a stream of royalties to artists for different types of exhibition of their works. On the flip side, museums and galleries often consider this an added cost to putting on exhibitions, which may in the end result in the staging of fewer shows of Canadian artists. Nevertheless, it may be that with this right already in existence, there is no stomach for an additional resale right.

III ART DISPUTES

i Title in art

For reasons relating to Canadian federalism, questions about property and ownership of personal or movable property are of provincial concern. This is because property and civil rights fall within the provincial jurisdiction under the Canadian Constitution. As a result, there is no pan-Canadian set of rules that applies when it comes to purchasing art and obtaining title, but rather one that will rely on the relevant province in which the transaction occurs. That said, certain generalities exist across the nine English-speaking provinces, which take their lead from English common law principles.

For instance, the common law principle of *nemo dat quod non habet* applies across Canada's English-speaking jurisdictions. The consequence of this is that title remains with the original owner of movable property and a subsequent possessor will not be able to pass on any better title than the possessor actually has. By this principle, a thief will never be able to pass on any better title than he or she has (that is, it can always be trumped by superior title on behalf of the true owner). However, this is subject to the limitation or prescription periods, which will be different depending on the province (see Section III.iii).

9 2019 ONCA 682.

10 See Charlotte Dunn, 'A New Importance for Provenance in Sales by Description? Hearn v. McLeod and Maslak-McLeod Gallery Inc', XXIV *Art Antiquity and Law* 371 (December 2019).

In the French-speaking province of Quebec, the situation is rather different. This is because Quebec operates a private law system on the basis of a Civil Code, similar in many ways to those found in Continental Europe, drawing their inspiration from the Napoleonic Code of 1804. As a result, some of the rules relating to acquisition and title share more with principles of French law than with the systems of Quebec's neighbouring provinces. This is one example of a challenge that has existed since Canada's inception: French and English embodying two solitudes at work within a single state. The Civil Code of Quebec, for instance, repeats the famous French adage that '*en fait de meubles, possession vaut titre*' ('regarding movable property, possession equals title'),[11] though this is of course subject to the rules of prescription (see Section III.iii).

ii Nazi-looted art and cultural property

In Canada, there have been surprisingly few restitution disputes relating to Nazi-spoliated art. As reported in the press, there have only been three returns by Canadian museums to the heirs of Holocaust victims: a Vuillard returned by the National Gallery of Canada in 2006, a van Honthorst returned by the Montreal Museum of Fine Arts in 2013 and a Verspronck returned by the Hamilton Museum in 2014.[12] As far as reported, these returns were all made upon moral, as opposed to legal, grounds. This is because of the issues relating to limitation and prescription periods (see Section III.iii) by which it would be almost inconceivable for the heirs of a spoliation victim to retain title despite the passage of time. Nevertheless, provenance work by some of the major museums has been undertaken and certain results made public.[13]

On the topic of the recovery of Nazi-spoliated art, something must be said about the work of the Max Stern Art Restitution Project (MSARP). This is a restitution campaign run out of Concordia University in Montreal that seeks to recover the more than 200 works sold by German Jewish dealer Max Stern at a forced-sale auction in Düsseldorf in 1937. After fleeing Germany, Stern had ended up in Canada where he had made a life for himself as a successful dealer in Canadian art. When he died in 1987 his beneficiaries were Concordia University, McGill University and the Hebrew University in Jerusalem. After learning about the 1937 forced sale, the beneficiaries decided to attempt to track down the paintings, scattered as they were around the world, and for this purpose established the MSARP. Beginning operations in 2002, it has successfully recovered over 20 works of art, including in the United States and Germany.

11 Civil Code of Quebec, Article 2276.

12 Adam Carter, 'Hamilton gallery returns art stolen by Nazis to Jewish family', CBC News, 4 November 2014.

13 See the Canadian Holocaust-Era Provenance Research and Best Practice Guidelines Project (2017), an initiative of the Canadian Art Museum Directors Organization.

iii Limitation periods

As with title and ownership, limitation periods are a matter of provincial jurisdiction. They will therefore differ across Canada's 10 provinces. For example, the general limitation period in Ontario, Canada's most populous province, is two years. This period generally begins when the claim has been discovered.[14] If a claim in conversion is brought against a purchaser of personal property for value acting in good faith, it must be brought within two years of the conversion.[15]

In Quebec, the Civil Code covers matters of 'prescription' (the term also found in France and most Continental European jurisdictions). The general rule is broadly as follows: a good faith possessor acquires title in movable property through acquisitive prescription three years from the original loss or theft. If the possessor is not in good faith, the acquisitive prescriptive period is 10 years. However, in both cases the possession must be peaceful, continuous, public and unequivocal to qualify.[16] This matter was recently dealt with by the Quebec Superior Court, which decided that, in the case of a stolen painting held by a good faith possessor, hanging the painting in his home was sufficient to qualify as 'public' possession. As such the possessor gained title through acquisitive prescription.[17]

iv Alternative dispute resolution

Like most advanced countries, the Canadian legal system is very familiar with arbitration as a method for resolving disputes, including art disputes. Each province will have specific laws recognising the validity of arbitration awards, which in cases of dispute may need to be approved through the courts.[18] There are no specific alternative dispute procedures for art-related disputes.

One of the longest and most bitterly fought arbitrations in the art world took place in Canada. This was the dispute over the collection of Lord Beaverbrook, a Canadian-born UK statesman and newspaper magnate who had assembled works during his lifetime and disposed of them in the 1950s. A man of great wealth, Beaverbrook had established a gallery in his boyhood province of New Brunswick and had transferred his collection to the gallery through the legal vehicle of a UK-based foundation. The near-entirety of the collection remained at the New Brunswick gallery for some 40 years following Beaverbrook's death in 1964. In 2003, a dispute arose when the UK foundation sought formal recognition of its ownership, as well as the return of the two most valuable works in the collection for the purposes of sale (JMW Turner, *The Fountain of Indolence* and Lucian Freud, *Hotel Bedroom*). The gallery fought back, claiming that these had been the subject of a gift by Beaverbrook to the gallery upon its opening in 1959.

The parties agreed to resolve the dispute through arbitration, and decided on a hearing by a single arbitrator, a retired justice of the Supreme Court of Canada. The arbitrator found in favour of the gallery, deciding the matter on the law of gift. The rules for gift in New Brunswick that applied were the same as in other common law jurisdictions: because there had been delivery, intention to give and acceptance, a gift of the collection works was

14 Ontario Limitations Act, S.O. 2002, c. 24, Sections 4–5.

15 id., Section 15(3).

16 Civil Code of Quebec, Articles 922, 2911, 2917 and 2919.

17 *White v. Galerie Samuel Lallouz* 2018 QCCS 874.

18 See, for example, Ontario's Arbitration Act, S.O. 1991, c. 17, and Quebec's Code of Civil Procedure, Book VII: 'Arbitrations'.

found to have occurred in 1959.[19] The UK foundation was not satisfied with the result and decided to appeal the award. The parties had provided for an appeal mechanism in their arbitration agreement, so an appeal was heard in Toronto by an appellate arbitral tribunal, this time consisting of three retired Canadian judges. Despite attempts by the appellant to undermine the original award (presenting, in the tribunal's words, a 'tsunami' of written and oral submissions), the tribunal approved the original arbitrator's award.[20] The gallery was therefore victorious and the vast majority of the works – including the Turner and the Freud – remained in Canada, at the Beaverbrook Gallery in New Brunswick.

IV FAKES, FORGERIES AND AUTHENTICATION

In the art market in Canada, as elsewhere, the best way for a buyer to protect him or herself from buying a fake or forgery is to provide a clear clause in the contract of sale whereby all moneys paid will be returned if the work turns out not to be genuine. However, this is easier said than done. Unless the buyer is extremely sophisticated, the seller (often a dealer) would usually use its own standard terms, which would almost certainly omit such a clause. And indeed, in many art market transactions, the sale occurs on invoice with no detailed clauses to speak of. In such cases, the buyer will have to rely on implied terms.

Contractual terms can be implied by law, fact or custom. Of most use to buyers will be those terms implied by law. The legislation affecting sales in Canada is provincial, so one would have to consult the rules in the Sale of Goods Act of the relevant province. In the English-speaking provinces, these are for the most part modelled on English legislation, so the implied terms will be similar, if not practically identical, to the English model. That means a buyer will have the ability to rely on implied terms as to title, quiet possession, freedom from charges or encumbrances, goods by description and, in certain circumstances, quality or fitness for purpose.[21] There is also consumer protection legislation in each province, which can be of use if the buyer is a consumer purchasing from a business, but usually identical or very similar implied terms as outlined in the general Sale of Goods Acts will apply, though the protection (especially regarding waivers or opt-out clauses) will be stronger in favour of consumers.

An implied term may not necessarily be enough in cases where a buyer has purchased a fake or a forgery. As far as the courts in England have been concerned, such works did not usually qualify under the implied terms for 'goods by description' or fitness for purpose: it has been stated on numerous occasions that a buyer who has contracted to purchase work X, thought to be by artist Y, and who receives work X after paying the price has been contractually satisfied, even if it later transpires that the work is not by artist Y.[22] The English courts have

19 Ina Jahn, 'Loan Versus Gifts: Determining the Donor's Intention', (2007) XII *Art Antiquity and Law* 81.

20 Alexander Herman, 'Loan or Gift Revisited: Determining the Donor's Intent (Once Again)', (2011) XVI *Art Antiquity and Law* 317.

21 See, for example, Ontario's Sale of Goods Act, R.S.O. 1990, c. S.1 as an example: Sections 13–15. Note, however, that the Ontario legislation uses 'conditions' or 'warranties' rather than the more general 'terms' utilised in the English legislation.

22 See *Harlingdon and Leinster Enterprises Ltd v. Christopher Hull Fine Art Ltd* [1991] Q.B. 564 and *Drake v. Thomas Agnew & Sons* [2002] EWHC 294 (Q.B.).

been very clear that if a buyer wants a warranty as to authorship of a work, it should be expressly set out in the sale agreement. Reliance should not be made on implied terms within sale of goods legislation.

A recent Canadian decision has taken a rather different approach. In *Hearn v. McLeod Estate*, the plaintiff had purchased a work said to be by the great First Nations artist Norval Morrisseau from the McLeod Gallery. After the purchase, the plaintiff had doubts as to the work's authenticity and returned to the gallery to ask for a provenance statement to help assuage those doubts. A provenance statement was provided by the gallery. Later on, the plaintiff came to the realisation that the work was a fake, and that the provenance statement provided was itself false, and so sought to recover the price paid from the gallery. The gallery refused and the matter went to court.

Overturning the trial judgment, the Ontario Court of Appeal held in favour of the plaintiff on the basis of the implied terms in Ontario's Sale of Goods Act. While the Court did not come to a conclusion as to the authenticity of the painting, it nevertheless held that the plaintiff, upon seeking a genuine provenance statement, had entered into a 'sale by description'. Because the gallery offered him a work with a false provenance statement, the goods could not have matched the description. Therefore, it came down to the provenance statement, rather than the authenticity of the work itself. Because the statement had been shown to be demonstrably false, the plaintiff had not received what he had sought in the bargain and so could obtain damages for breach of contract.[23] The lesson of this case – though it is not clear how far this would apply beyond the jurisdiction of Ontario – is for buyers to make provenance documentation an essential part of the contract. That way, fake or wrongful documentation can taint the contract, thus providing a possible avenue for redress if it turns out the work is not genuine.

V ART TRANSACTIONS

i Art loans

As elsewhere, art loans are an important aspect of museum practice in Canada. To protect cultural objects coming into a jurisdiction on loan, five of Canada's 10 provinces have immunity from seizure legislation. These are Quebec, Ontario, Manitoba, Alberta and British Columbia. These provinces first adopted such laws in the 1970s to assure protection of works loaned as part of a major exhibition from the Hermitage in Russia, an exhibition that was to travel across Canada. Because property and civil rights fall within provincial jurisdiction under the Canadian Constitution, immunity from seizure is a matter of provincial concern. There is no federal immunity legislation, as there is in the United States or Australia.

ii Cross-border transactions

In Canada, the import and export of cultural property is governed by a piece of federal legislation, the Cultural Property Export and Import Act (CPEIA). This law was first enacted in 1977 to comply with Canada's accession to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, which occurred the following year. As such, Canada was the first major

23 See Charlotte Dunn, 'A New Importance for Provenance in Sales by Description? Hearn v. McLeod and Maslak-McLeod Gallery inc', XXIV *Art Antiquity and Law* 371 (December 2019).

western state to adopt the Convention, paving the way for others such as the United States and Australia in the 1980s. The Canadian law, which now dates from 1985, governs both exports and imports of cultural material, though the Canadian legislation goes further than what is set out in the Convention at Articles 6 (for exports) and 7 (for import restrictions).

In relation to exports, the Canadian approach is very similar to that of the United Kingdom. As such, there are generally no permanent export bars, only deferrals, whereby an export permit for a cultural object of great importance will be withheld for a certain period of time (between two and six months) to allow Canadian institutions the opportunity to acquire the work and keep it in the country. The procedural details are set out within the CPEIA and its accompanying Regulations.[24]

The type of material that will require an export permit in the first place is set out in the Export Control List.[25] When an application is made, the permit officer will forward it to an expert examiner who will assess whether the object is (1) of 'outstanding significance' for reasons relating to history or national life; aesthetic qualities; or the study of arts and sciences, and (2) of 'such a degree of national importance that its loss to Canada would significantly diminish the national heritage'.[26] If the object meets both requirements, the export permit is denied. The decision can then be appealed to the Canadian Cultural Property Export Review Board, which will determine once and for all whether the object meets the above criteria. If it does, then the delay period of two to six months will be imposed. It is within this period that Canadian institutions can make a fair offer to purchase the object from the exporter, the amount for which will be set by the Board. If no such offer is made, at the end of the delay period, the exporter will receive the export permit.[27] The only way for an exporter to be refused a permit would be where he or she rejected a fair offer to purchase made by a Canadian institution.

The definition of 'national importance' under the CPEIA was put before the courts in the recent case of *Attorney General of Canada v. Heffel Gallery Limited*. As explained above, this involved the attempted export of a painting by the French Impressionist Gustave Caillebotte, *Iris bleus* (1892), that had been in a Canadian private collection since 1960. It was sold in 2016 to a UK buyer, a sale facilitated by the auction house Heffel, which then applied for an export permit. The matter went before the Board, which found the object to be of both outstanding significance and of national importance. The decision was challenged by Heffel in judicial review on the issue of whether the Board had interpreted national importance too broadly. While the Federal Court agreed with Heffel that the interpretation had indeed been too broad, this decision was overturned on appeal by the Federal Court of Appeal.[28] In its 2019 decision, the Federal Court of Appeal approved the Board's interpretation of national importance and reinstated the Board's decision. In the end, a deal was struck whereby the painting was sold to the Art Gallery of Ontario so it could remain in Canada.

There are generous tax credits available in Canada for donations of cultural property to Canadian institutions (provided they are Category A institutions as set out in the CPEIA),

24 The Cultural Property Export and Import Act, R.S.C., 1985, c. C-51 and the Cultural Property Export Regulations, C.R.C., c. 449.

25 The Canadian Cultural Property Export Control List, C.R.C., c. 448, updated 16 January 2020.

26 The Cultural Property Export and Import Act (CPEIA), Section 11.

27 id, Sections 29–30.

28 *Heffel v. Attorney General of Canada* 2018 FC 605, overturned on appeal in *Attorney General of Canada v. Heffel Gallery Limited* 2019 FCA 82.

and the assessment of the donated objects will fall under the same legislation, will use the same criteria and will be by the same Board as the export applications.[29] In fact, most of what the Board does today relates to tax certification for donations, rather than exports, despite the fact that the Board is known as an export review board.[30] More than 90 per cent of the matters before it relate to tax certification, likely because the tax credits available are generous to the taxpayer.[31] In addition, the federal government, in its 2019 budget, made it even easier to obtain cultural property certification for art donations by prospectively removing the requirement for national importance. Now, the donor only needs to show that the object is of outstanding significance for history or national life, its aesthetic qualities or the study of arts or sciences to obtain the benefit.

In relation to imports, the CPEIA also sets out the relevant rules. As a state party to the 1970 UNESCO Convention, Canada has implemented an import restriction for cultural property illegally exported from another state party to the Convention.[32] As such, the restriction in Canada goes much further than the obligation arising out of the Convention, which only requires states to prevent the import of cultural property stolen from a museum, monument or similar institution and appearing on an inventory.[33] There are also related criminal sanctions under the CPEIA for importing such material. These sanctions were challenged as being unconstitutional by an importer of Bolivian textiles in the case of *R v. Roger Yorke*,[34] but the courts upheld the provisions.

A provision was added to the CPEIA in 2005 for Canada to comply with its obligations under the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. This provision restricts imports of cultural property removed from an occupied territory, unless such removal was lawful or necessary for the item's protection or preservation.[35] There are also criminal sanctions associated with the import of such material.

VI ARTIST RIGHTS

The intangible rights of artists – for our purposes, copyright, moral rights and exhibition rights – are found within federal legislation: the Copyright Act. This is because intellectual property falls within the federal jurisdiction under the Canadian Constitution. As such, when it comes to copyright, no heed needs to be paid, in general terms, to provincial legislation. That said, there are statutes that exist to protect the 'status of the artist' at both the federal level and in certain provinces.[36]

29 CPEIA, Section 33.

30 Alexander Herman: 'Court decision on Caillebotte export rocks the boat', Institute of Art and Law (blog), 4 September 2018; 'Caillebotte storm is quelled, twice over', Institute of Art and Law (blog), 17 April 2019; 'Caillebotte painting shines light on woefully out-of-date rules', *Financial Post*, 17 September 2019.

31 Alexander Herman, 'Caillebotte painting shines light on woefully out-of-date rules', *Financial Post*, 17 September 2019.

32 CPEIA, Section 37.

33 Article 7(b)(i) of the Convention.

34 1998 NSCA.

35 CPEIA, Section 36.1.

36 Canada's Status of the Artist Act, 1992, c. 33; Quebec's Act Respecting the Professional Status of Artists in the Visual Arts, Arts and Crafts and Literature, and their Contracts with Promoters, Chapter S-32.01; Status of Ontario's Artists Act, S.O. 2007, c. 7, Schedule 39.

Like all other countries party to the Berne Convention for the Protection of Literary and Artistic Works, Canada protects the copyright in artistic works as well as certain moral rights for artists. Likewise, Canada will provide these rights for authors that are nationals of another Berne Convention state or for works first published in a Berne Convention state. Under the Copyright Act, all 'original' artistic works are protected, though originality is defined by the Supreme Court of Canada rather differently than it is in the United Kingdom or the United States: in the *CCH* case, the Court defined it as requiring intellectual effort that is 'more than trivial', which treads a typical middle ground between the low UK threshold and the somewhat higher US one.[37] Copyright duration in Canada traditionally stuck to the Berne Convention minimum of life of the author plus 50 years, though it appears that this will be extended to 70 years following the signing of the US–Mexico–Canada Trade Agreement in 2018, which requires the duration to be harmonised with that of the United States.

Under the Copyright Act, the moral rights of authors are also protected. These consist of the right to the integrity of the work and the right to be associated as the author of the work.[38] The integrity right is infringed if the work is, to the prejudice of the author's honour or reputation, either (1) distorted, mutilated or modified or (2) used with a product, service, cause or institution.[39] Certain acts will not on their own constitute a violation (such as a change in location or certain preservation work), whereas, when it comes to paintings or sculptures, mutilation or modification will be presumed to cause prejudice to the author.[40] These particularities are unique to Canadian law. As for the association right, it can be limited where 'reasonable in the circumstances'. Moral rights last the term of copyright in Canada, so for the moment 50 years after the death of the author.

While there is no artist resale right in Canada, discussions have been underway for many years to introduce such a right. Nevertheless, the Copyright Act already provides Canadian artists with an exhibition right for works made after 1988. Such a right does not exist elsewhere and so is a particularity of Canadian law that affects the management of artists and their exhibitions. This usually involves paying a royalty to artists if their work appears in an exhibition, and these royalties are set by an artists' rights organisation, CARFAC, with tariffs that are released each year.[41] These benefit artists whose works are frequently shown, but can act as an unwelcome cost for museums and galleries putting on shows of contemporary art in Canada.

VII OUTLOOK AND CONCLUSIONS

As mentioned above, the most pressing matter at the moment in the Canadian cultural sector, as elsewhere, is the coronavirus pandemic. As a result, this matter looms large over all others when considering the future of art law in Canada. It is almost certain that the market for art will slow down, which will inevitably affect exports of cultural property from Canada, while also limiting the transactions for art in the country on the whole. The most notable changes occurred recently – the kerfuffle over the *Heffel* decision and the subsequent change to the law brought about by the government in 2019, and the favourable appeal for the buyer

37 *Law Society of Upper Canada v. CCH Canadian Limited* [2004] 1 S.C.R. 339.

38 Copyright Act, Sections 14.1, 14.2, 17.1, 17.2, 28.1 and 28.2.

39 id., Section 28.2.

40 id.

41 CARFAC-RAAV Minimum Recommended Fee Schedule.

in *Hearn* – and the dust has yet to settle on those. There also remains the always-present suggestion that copyright law may be overhauled, and this time in a way that could affect artists and their works, though such a suggestion has been in existence for so long that it is hard to imagine that anything will change, at least not for now. On the whole, the outlook in Canada appears to be 'steady as she goes' while everyone tries to deal with the fallout from the pandemic.

Chapter 13

CZECH REPUBLIC

Filip Čabart and Vladek Krámek[1]

I INTRODUCTION

Virtually all legal aspects of the art trade needed to be reinvented and rebuilt for the new market conditions that followed the 1989 Velvet Revolution and the collapse of the communist regime in what was then Czechoslovakia. Because there was no real art market and virtually no specialised laws, professional art valuers or other art experts, the uncertainty in the art market was overwhelming. It took a very long time for professional and legal grounds to be established, and we are still facing remnants of that era in several outdated and insufficient laws today.

Despite these difficult beginnings, the Czech art market is quite lively and still developing rapidly, currently representing a value of over €50 million in annual auction turnover. Only €7 million is attributable to cross-border art transactions. The Czech art market is dominated by a small number of local auction houses, such as Adolf Loos Apartment and Gallery, Galerie Kodl and Arthouse Hejtmánek, while major international houses are not well established in the Czech Republic. A previous auction record is beaten almost every year: in 2020, a 1926 Toyen painting became the most expensive paining auctioned in the Czech Republic at nearly €3 million.

There are not many art disputes on public record, with the exception of a cultural heritage dispute regarding a 1913 Kupka painting, which was prohibited by court from being acquired by a foreign buyer under a 1987 law (see Section V.iii).

II THE YEAR IN REVIEW

There has been very little development in art legislation in the past year; however, an interesting proposal is due to reach the floor of the House, reinventing a surprisingly effective law from the communist era that would require a marginal percentage of any public building expenditure to be invested into art-related projects.

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III ART DISPUTES

i Title in art

Direct purchase from the artist

From a legal point of view, this is the simplest and, at the same time, safest form of acquiring an original or an authorised reproduction of an artwork. The buyer concludes a contract directly with the artist, who guarantees its originality and determines its price. Sometimes, additional agreements can add other conditions to the deal (conditions of placement, exhibition and availability to the public, resale, loan for exhibition, etc.). These conditions tend to be in the nature of a licensing agreement, so in this particular case, this would be a purchase agreement (in its pure form) or a mixed agreement (purchase and licensing contract).

In such cases good faith is presumed. However, it is recommended that the conditions of sale include the issue of an authenticity certificate containing a representation of the work, its description (usually physical dimensions, background material and design) and the signature of the artist, who hereby declares that the artwork is genuine and original. It is recommended that the new owners of the work also keep records of the negotiations that preceded the purchase of the work (correspondence with the author, photographs of the work and the artist taken during a possible visit to the studio, etc.) and keep a catalogue in which the work was mentioned or even depicted. The above also largely affects the direct business relationship with the artist's heirs.

If the authenticity of the work is not sufficiently documented during the purchase itself (e.g., due to the age of the work or other objective circumstances) and the buyer still decides to take a risk and purchase the work of art, it is appropriate to obtain an expert opinion or art historical and restoration expertise, at the expense of either the seller or the buyer. The buyer can agree with the owner that these documents will be obtained by the seller before the sale and, if the report confirms the authenticity of the work, the buyer will pay the costs associated with obtaining these documents (through which he or she will gain additional assurance that he or she is acquiring the authentic piece).

Purchase from a representative of the artist

These types of purchases are very similar to purchases from the author or heirs of the author. At the same time, it is necessary to take into account that the agent or representative is a person acting in the name and on behalf of the author, but is still a person or legal entity different from the artist or author of the work. This can have a major impact, especially on the exercise and enforcement of copyright (both property and personality rights). For this reason, the buyer should always verify that the representative is authorised by the author or heirs to enter into transactions with the work in question and is authorised to grant appropriate licences for the work.

Purchase through art galleries

This type of ownership transfer is a commission sale; the seller may be the artist himself or herself, the owner or a person who has no direct relationship with these persons. Most often, a commission contract is concluded when selling a work, but the contractual relationship can also be an agency or an intermediary contract. Sometimes the seller wants his or her identity to remain secret, sometimes it is the artist himself or herself, who sees the sale of his or her work merely as a time-consuming activity. Often, the seller is a gallery owner or antique

dealer, who acts in the name of the artist, heir or the owner of the artwork and on their behalf. The seller collects a commission determined either from the sale price of the work or a fixed amount (or a combination).

One of the differences in the acquisition of ownership through private sale or auction is mostly recognisable in situations where the ownership is acquired from a person who was not the real owner of the artwork. In the case that the ownership right is transferred through the auction from an unauthorised person, the buyer becomes the owner of the work as long as the artwork was not entered in any public list of lost or stolen art and the buyer acted in good faith. However, the above does not apply to persons who acquire ownership under a contract, so the buyer must be careful and require not only documents and expert opinions that certify the authenticity of the work, but ideally also evidence of the seller's ownership.

In general, good faith is presumed and therefore it does not need to be explicitly demonstrated at ownership transfer. However, when acquiring ownership, the new owner acquires not only the rights but also obligations associated with the object. In the case of paintings or other works of art the buyer acquires ownership, but the copyright remains with the author. The author can still decide on how his or her work should be used or displayed and the owner has no right to use the object beyond his or her personal needs unless he or she has obtained the appropriate licence rights.

There is no specific duty of inquiry into title by the purchaser upon purchase, just as there is no specific duty to prove title by the seller upon the sale. The lack of regulation in this area is largely criticised. However, prudent purchasers who do inquire into title of the acquired work do so in their own best interests.

ii Nazi-looted art and cultural property

The central problem of most lawsuits concerning confiscated property or artwork from Jewish or other families during the Second World War is that there are significant problems, namely the subsequent takeover of political power by the Czech Communist Party and the associated nationalisation of all property. Most property, including famous Czech works of art, was nationalised after the Second World War and the majority of litigation over it is conducted as part of restitution proceedings. However, such proceedings often end to the detriment of original owners, both in relation to art and property in general.

A well-known example concerns the restitution proceedings regarding the Waldes a spol factory. The company was originally owned by Jiří Waldes, a factory owner of Jewish origin. During the period of occupation, the Nazis looted not only the factory, but also a collection of almost 20 paintings, including several paintings by František Kupka, one of the most famous and best-selling Czech painters of modern times. Subsequently, all the company's assets were nationalised based on the Beneš decrees (the decrees of former president Edvard Beneš concerning the status of ethnic Germans in post-war Czechoslovakia, which formed the legal framework for the expulsion of Germans from Czechoslovakia). The ownership of the company, including the art collections, was transferred to the Koh-I-Noor company. The claims Waldes's original partners made during the nationalisation were not compensated by Czechoslovakia because the registered heirs were at that time 'persons unreliable for travelling abroad without the consent of the Czechoslovak authorities'.

After the Velvet Revolution in 1989, the courts concluded that previous decisions of the Czech authorities did not constitute an obstacle to the restitution claims of the Waldes family. However, the Constitutional Court did not agree and annulled all previous verdicts in the restitution case. According to the Constitutional Court, the factory owners lost all

their property before 1948, when the Beneš decrees came into effect, and were therefore not entitled to restitution. The final point behind the restitution dispute was subsequently made by the Supreme Court, which rejected the Waldes family's appeal against the interpretation of the Constitutional Court.

iii Limitation periods

Because a special legal regulation is lacking, the general rules of Act No. 89/2012 (the Civil Code) apply. If a work of art is a forgery or has other legal defects, the purchaser has rights arising from defective performance.

The good faith possessor acquires title by acquisitive prescription after three years of qualified possession, and by extraordinary acquisitive prescription a possessor acquires title even if he or she cannot prove a legal ground of his or her possession, unless fraudulent intent can be proven.

No special limitation periods apply to art misappropriated during the Nazi era. As mentioned above, most of the art or property in general that was confiscated by the Nazis during the Second World War was subsequently nationalised. Such action was made based on the Beneš decrees, and it is therefore necessary to demand it through the restitution procedure. However, the regulation of the restitution proceedings themselves, which often end with reference to the fact that the property was confiscated before 1948, and therefore prior to the decrees coming into effect, cannot be applied in such case.

iv Alternative dispute resolution

Alternative dispute resolution, including arbitration and mediation, exist and can be used for art disputes, but they are not prevalent. There is no specialised alternative dispute resolution organisation for art matters in the Czech Republic.

IV FAKES, FORGERIES AND AUTHENTICATION

Under Czech law, if a buyer purchased a fake or a forgery, the purchase is considered to be defective due to the defect of performance, and results in, inter alia, the buyer's entitlement to withdraw from the purchase agreement. The seller shall be liable for such defect unless the buyer could have recognised the defect with the usual levels of diligence associated with the purchase agreement. However, provided that the seller explicitly guaranteed the authenticity to the buyer, the seller's full liability remains preserved.

In addition to defects liability claims, under certain circumstances the buyer may be entitled to claim the difference between the purchase price actually paid and the real value of a fake or forgery, if the seller knew or should have known, by its expertise, that such piece is a fake or forgery. Moreover, the buyer may further consider taking necessary steps to initiate criminal proceeding.

However, the most efficient and recommended strategy minimising any potential risks is undoubtedly thorough due diligence on the buyer's part provided by thoroughly evidenced provenance and an expert's opinion from a distinguished expert.

V ART TRANSACTIONS

i Private sales and auctions

In the Czech Republic auctions are quite common, for rare and antiquarian items, as well as artworks. Art can be purchased by both natural persons and companies. Both domestic and foreign persons may participate as bidders. The acquisition of art objects may take place directly or indirectly through an agent.

The main laws governing private sales and public auctions in the Czech Republic are: Act No. 26/2000 on public auctions; Act No. 71/1994 on the sale and export of objects of cultural value (the Export Act) and the Civil Code.

Public auctions of art conducted in an auction house or online are subject to the Act on public auctions. The persons involved might be physically present or use audiovisual or electronic means to attend the auction. The auctioneer must have a trade licence to conduct public auctions. In a public auction, ownership of the auctioned item is acquired by the fall of the hammer provided that the bidder has paid the price achieved in the course of the auction within the set time period. The auctioneer shall, without undue delay, hand over the auctioned item to the person who has acquired ownership and issue a written confirmation of its acquisition of ownership.

For private auctions only the general regulation of the Civil Code applies, with no application of the Act on public auctions. Such privately held auctions are governed by auction rules issued by the organiser of the private auction and must reflect the relevant provisions of the Civil Code for consumer protection.

As further described bellowed, the Czech Republic applies several measures to the export and sale of antiques and art. Objects of cultural value in the field of archaeology or of a sacral and cult nature may be auctioned or offered for sale only if accompanied by a certificate for permanent export. Professional organisations listed by the Ministry of Culture, including museums, galleries, libraries and the National Heritage Institute, issue such certificates.

ii Art loans

Art loans are not particularly widely practised in the Czech Republic and there is thus no specific regulation in this regard other than general laws regarding object leases. The practice is generally embraced by minor or alternative galleries who lease artworks of emerging artists to various office spaces on a short-term basis.

iii Cross-border transactions

Export

In addition to EU law, the export of cultural property from the Czech Republic is regulated by several local legal acts, depending on the type of cultural property in question. The most profound protection is provided to artworks classified as cultural treasure or national cultural treasure, for which exports from the Czech Republic are subject to approval from either the Ministry of Culture or the government.[2] A similar regime applies to collections and collection items under Act No. 122/2000.

Furthermore, the sale and export of objects of cultural value is regulated by the Export Act. Objects of cultural value shall be exported from the Czech Republic only with an

2 Under Act No. 20/1987.

export permit issued by certain cultural institutions or the Ministry of Culture. The owner of the artwork applies for either a temporary export permit or, if the artwork fulfils certain characteristics, a permanent export permit. Artworks that require a permit are classified by their age of origin and price. The respective professional institution shall decide within 21 days of receipt of the application to either issue the export permit or, if it refuses to grant the permission, to submit an application to declare the relevant artwork as a cultural treasure to the Ministry of Culture, which shall issue its decision within three months. Moreover, if the artwork is to be exported outside the European Union, an additional export permit needs to be obtained by the Ministry of Culture, which cannot be issued separately and is only complementary to the general export permit described above.

The case that resonated within the art community in the Czech Republic is the one of a prominent Czech gallery against the Ministry of Culture regarding František Kupka's abstract *The Shape of Blue*, acquired by a foreign art collector for the very high sum of 55.75 million Czech korun. The Czech National Heritage Institute confirmed to the gallery via email prior to the auction that the respective abstract was not considered as cultural heritage. However, after the auction, to the new owner's disappointment, the Ministry of Culture declared that *The Shape of Blue* could not be exported because it belongs to a set of works declared as cultural treasure in 1997 by the Ministry of Culture. The gallery applied for annulment of the declaration, which was denied by the Ministry of Culture and was followed by an action by the gallery against the Ministry of Culture. After several appeals, *The Shape of Blue* remains a cultural treasure and may be exhibited outside the Czech Republic only upon the Ministry's consent.

Import

When it comes to import of cultural property to the Czech Republic, Czech legal regulation is far less restrictive and the import is subject to general conditions for import of goods as well as export conditions of the relevant jurisdiction of the country of origin.

In addition, the Czech Republic is a party to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects and the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights.

When it comes to acquiring artworks from another EU Member State and its subsequent local sale, it is crucial to correctly cover the following aspects of Czech tax law:

a value added tax (VAT);
b personal income tax (PIT) for natural persons; and
c corporate income tax (CIT) for legal entities.

VAT

Generally, when it comes to artwork acquired by a Czech entrepreneur or a legal entity (VAT payer), the standard VAT regime shall apply to the acquisition of the artwork from another EU Member State and its subsequent sale in the Czech Republic whereby self-assessment of VAT (i.e., a reverse-charge mechanism) applies to the goods acquired from the Member State and the standard 21 per cent output VAT rate applies to the full selling price of the artwork in its subsequent local sale. However, subject to the conditions of the Act on value added

tax, as amended (VATA),[3] a VAT payer who is a 'dealer of second-hand goods, artworks, collectors' items and antiques', pursuant to VATA may decide to apply a special voluntary regime (the Special Regime) in relation to such acquisition and its subsequent local sale. Under the Special Regime, the general 21 per cent VAT rate does not apply to the full selling price but solely to the art dealer's margin on the local sale (the respective VAT payer does not have the right to claim input VAT). However, when considering the VAT aspects of a cross-border artwork sale, it is vital to bear in mind that the Special Regime shall be applied to both the acquisition of the artwork from the EU Member State and the subsequent sale of the artwork in the Czech Republic. Thus, it is not possible to combine the standard VAT regime when acquiring the artwork from another EU Member State with the Special Regime to its subsequent local sale.

Subsequent sale of the artwork in the Czech Republic

PIT

Under Czech tax law, the respective tax base (income from the sale of the artwork decreased by specified expenses) is generally subject to a 15 per cent PIT rate, provided that it is sold by a natural person outside his or her business activity unless the conditions for exemption of such income are met.

On the other hand, if the artwork is sold by an entrepreneur acting as a professional art dealer (or natural person within his or her business activity), the respective tax base (income decreased by specified expenses – 'on a cash basis') is subject to a 15 per cent PIT rate, as well as a potential solidarity surcharge of 7 per cent of the individual's gross income, calculated on the amount by which his or her tax base exceeds 1,672,080 Czech korun.[4] Social security and health insurance must be also considered.

It is necessary to distinguish these cases from cases in which an entrepreneur sells artworks in his or her own name on behalf of someone else (e.g., in the form of commission sales), in which case the entrepreneur's taxable income consists only of remuneration for commission.

CIT

Under Czech tax law, if an artwork is sold by a legal entity, the respective tax base (revenues decreased by specified expenses – 'on an accrual basis') is generally subject to a 19 per cent CIT rate with no possible exemption for such income.

It is necessary to distinguish these cases from cases in which a legal entity sells artworks in its own name on behalf of someone else (e.g., in the form of a commission sale). According to the prevailing interpretations, in such case the taxable income of the legal person would consist only of remuneration for commission.

iv Art finance

The Czech Republic has a very unfortunate history in art-related lending from the 1990s, when several lenders, including major financial institutions, accepted forgeries or overvalued works as collateral. Due to several historical issues resulting from this, there is an overall reluctance to provide any finance against art works.

3 Act No. 235/2004.

4 2020 rate.

There are a few institutions, such as the Pro Arete investment fund, that are involved in fundraising and collective investing in art; however, leading artwork acquisitions are generally financed directly by private collectors.

Given the relatively low value of individual art pieces traded in the Czech Republic in comparison with artwork auctions taking place in leading art centres across the globe, the Czech market has not been a particular focus of international art finance providers either.

VI ARTIST RIGHTS

i Moral and resale rights

The moral and resale rights of artists in the Czech Republic are governed by the Copyright Act, as amended.[5] According to the Copyright Act the authors (artists) have the following moral rights:

a the right to decide on making his or her copyrighted work public;

b the right to claim authorship, including the right to decide whether and in what way his or her authorship is to be indicated when his or her copyrighted work is made public and further used;

c the right to the inviolability of his or her copyrighted work; in particular, the right to grant consent to any alteration or other intervention in his or her copyrighted work, unless otherwise stipulated in the Copyright Act; and

d the right of supervision over another person's right to use the copyrighted work (i.e., the author's supervision), unless its nature or its use implies otherwise, or unless it is not possible to fairly require the user to enable the author to exercise his or her right to supervision.

None of the above-mentioned rights can be waived, transferred or assigned to a third person.

Furthermore, all moral rights last for the lifetime of the author, but no one may arrogate authorship of the copyrighted work after the author's death. The copyrighted work may only be used in a way that shall not detract from its value, and the name of the author must be indicated (unless the copyrighted work is anonymous).

With respect to the resale rights of the author, according to the relevant provision of the Copyright Act, where the original work of art (that has been transferred by its author to the ownership of another person) is subsequently sold for a purchase price of €1,500 or more, the author (or his or her heirs for the duration of the author's economic rights) shall be entitled to royalties from any resale of the work as set out in the Annex to the Copyright Act, provided that a gallery operator, auctioneer or any other person who consistently deals in works of art takes part in the sale as a seller, purchaser or intermediary. The royalty ranges from 0.25 per cent to 4 per cent of the relevant part of the purchase price (depending on the amount), but the total amount of the royalty may not exceed €12,500.

The persons liable to pay the royalty shall be the seller and the dealer jointly and severally, who pay it to the relevant collective administrator, the Authors Copyright Protection Organisation, which is an association of authors of works of art, architecture and visual components of audiovisual works.

5 Act No. 121/2000 on copyright and related rights and on amendment to certain acts.

The right to royalties shall not apply to the first resale if the seller obtained the original work of art directly from the author less than three years before the resale and if the purchase price of the original work, when resold, does not exceed 250,000 Czech korun.

ii Economic rights

According to the Copyright Act, the author has the below-stated economic rights. However, if more than one person participated in the creation of the copyright work, the economic rights can only be exercised jointly.

Generally, economic rights last for the lifetime of the author plus 70 years. However, there is an exception in the case of anonymous or pseudonymous copyrighted work, where the economic rights last 70 years from the time the work has been lawfully made public.

Economic rights include:

a the right to use the work by:
- reproduction;
- distribution;
- rental;
- loan;
- exhibition;
- life performance of a work;
- performance of work from fixation;
- broadcasting;
- retransmission of the broadcast; and
- performing broadcast;

b resale rights;

c the right to remuneration in connection with the reproduction of work for personal use and for legal persons' own use; and

d the right to remuneration in connection with the rental of originals or copies of the work.

None of the above-mentioned economic rights can be waived, and are not transferable or subject to the execution of a decision. Furthermore, unlike moral rights, economic rights are inheritable.

VII TRUSTS, FOUNDATIONS AND ESTATES

The possibilities for the holding and administration of artworks and art collections as a specific type of asset do not substantially differ from the possibilities generally available for other types of assets. In determining a suitable method of acquiring and administering a work of art or an art collection, the decisive factor is the purpose of administration and the investor's (current or potential owner's) long-term plan.

i Holding and administration via a foundation, endowment fund or trust

In addition to direct ownership by a natural person and administration of property by the owner, there is the possibility of using traditional or less traditional entities that are often a safer and more effective and meaningful alternative. Suitable entities that can be set up under Czech law include a foundation, an endowment fund and a trust, all of which are regulated by the Civil Code.

A foundation is a traditional legal entity (endowment institution). It is created to permanently serve a socially or economically beneficial purpose. The purpose of a foundation may be public benefit, if it involves support of a public good, but also charitable, if it involves support for a certain group of persons. The setting up and operation of a fund is bound by a rigid legal regulation with unambiguous rules and clear-cut limits. The law prescribes the basic structure of the foundation's bodies (a management board, supervisory board or a supervisor) and determines the minimum amount of the principal (capital) of a foundation: 500,000 Czech korun. The legal regulation restricts the business of a foundation (which can only be its secondary activity), dealing with the assets of a foundation and the method of acquiring assets and contributions. From the practical perspective, administration of art collections via a foundation is a traditional and conservative option; major art collections are administered in this way, in particular where the owner wishes to preserve the collections and to support the development of fine arts and culture or other publicly beneficial purpose.

An endowment fund is also a traditional legal entity (endowment institution). It is more flexible than a foundation, offering the possibility of being used for a socially or economically beneficial purpose, which means that it can be used for purely private purposes that could also be achieved via business. The law regulates only the main state-related issues, all the rest is left to the settlor's will. An endowment fund does not create any principal or capital; its assets are formed by a set of donations and contributions. Dealing with the assets of an endowment fund is easier than in a foundation. An endowment fund is frequently used for dealing with works of art and is well suited to modest investor plans or for specific private or family situations. Endowment funds are also traditionally used to support art and culture.

A trust is a new concept to Czech law (since 1 January 2014). Its legal regulation was inspired abroad, namely and most closely by the legal regulation of trusts under the law of the Canadian province of Quebec. A trust is an entity without legal personality (it is not a person) and functionally it falls within the concept of administration of the property of others. The key functional role of a trust is the trustee, who administers the property of a trust in their name on account of the trust. A trust is more flexible than a foundation; the legal regulation is very minimal, with all its internal functioning (internal organisation, control, selection of beneficiaries, dealing with the property) being governed by rules set out by the settlor in the trust deed. The property of a trust is not owned by any person, it is appropriated to the purpose of the trust. In the context of dealing with art, a trust is an ideal means of asset protection, which also allows solving complicated and unique personal situations that would be difficult to solve if the property was privately owned or if traditional entities were used.

Foundations, endowment funds and trusts are subject to general tax regulation; particularly relevant are the Income Tax Act[6] and VATA. From the income tax perspective, for foundations (with some exceptions), the status of publicly beneficial taxpayer is applied, which involves the relevant tax benefits, such as application of special items reducing the tax base, subject to compliance with certain conditions. Also, the status of a family endowment institution (a foundation or an endowment fund set up to support the founder or persons close to the founder) may entail an advantageous tax regime, in particular in relation to the exemption for gratuitous income (of beneficiaries – natural persons) from a family endowment institution's property, subject to compliance with certain conditions. Under tax law, a trust operates de facto based on a legal assumption similar to a legal entity as a taxpayer of the respective tax; for example, gratuitous income (of beneficiaries – natural persons) from

6 Act No. 586/1992.

a trust's property is also (income) tax-exempt in certain circumstances. The appropriation of property to a trust or a family endowment institution for income tax purposes is regarded as a contribution to a company. Family endowment institutions, as well as trusts, constitute what are called tax-neutral entities, the existence and operation of which are basically not associated with any specific tax benefits or burdens based on which these entities could become effective tools for wider tax planning.

Family endowment institutions and trusts are suitable forms of inter-generational transfer of assets (works of art and art collections). In all cases, it is possible to simultaneously set detailed rules and prevent undesired disintegration of property in inheritance proceedings; it is also possible to involve second and further generations in the implementation of the owner's (investor's) plan during the owner's lifetime.

ii Holding and administration by other means

In the case of a prevailing business or commercial plan there is the possibility of using companies for holding and administration purposes (most often limited liability or joint-stock companies) pursuant to the Companies Act[7] or an investment company or investment fund pursuant to the Act on investment companies and funds.[8] A work of art or an art collection is then administered as part of the company's assets or an investment portfolio.

iii Key estate planning considerations relevant to art holdings

The most crucial aspect in planning the holding and administration of art (individual works of art or art collections) is the initial situation and vision. To choose a suitable model or course of action, the following factors are decisive: (1) the owner's or investor's personal situation, (2) the quality, quantity, nature and value of works of art or art collections, and (3) the owner's or investor's plan and objective. A personal situation determines whether planning requires active or passive involvement of the owner (investor) in a new project, whether the goal is to expand or effectively optimise an art collection or whether the reason for planning is an inter-generational transfer of assets or other involvement of third parties. The second factor involves requirements regarding the suitability of the solution chosen from the perspective of economic justification and tax implications, and the third aspect involves a timeline approach.

If art is considered a conservative investment with the potential for steady and permanent appreciation, the key aspect is the long-term goal, which means that such an investment needs to be set so that:

a it outlives the original owner (investor);
b the art is suitably separated from the owner's (investor's) personal and business assets;
c it enables achieving the owner's (investor's) long-term goals;
d it enables efficient and continuous administration of the property;
e it enables appreciation of the property and involvement of select persons; and
f it enables the flow of revenue from the administration of the property or other benefits to select persons.

7 Act No. 90/2019.
8 Act No. 240/2013.

When taking the above criteria into account, the most important steps in planning are (1) carefully formulating the owner's (investor, settlor or founder) plan and (2) carefully considering all legal, economic and tax implications as the plan will run simultaneously with the entity's business operations.

In addition to these criteria, in planning the administration of art collections, tax implications (e.g., complex issues of VAT on works of art) and specific legal regulations limiting certain types of dealing with works of art also play a role. These circumstances should be kept in mind in specific cases, in particular in relation to imports and exports of artefacts; in general, however, they do not play a significant role.

VIII OUTLOOK AND CONCLUSIONS

The major obstacles in the art market in the Czech Republic are primarily the lack of commonly accepted market standards of legal documentation that both merchants and buyers can safely rely on. This is especially important as the legislation is still underdeveloped, which creates an aura of legal uncertainty that prevents the market from further developing and adopting international standards. We can expect the legislation to slowly follow such developments and market trends. This is particularly applicable to tax legislation, which also significantly impairs this emerging market.

Chapter 14

FRANCE

Jean-François Canat, Philippe Hansen, Line-Alexa Glotin and Laure Assumpçao[1]

I INTRODUCTION

Before the covid-19 crisis, 2019 had marked a flourishing year for the art market in France, with auction revenue at an all-time high of €1.07 billion (including buyer's premium).[2] Most of this revenue originated from the five most important auction houses in France, namely – in rank order – Sotheby's, Christie's, Artcurial, Aguttes and Millon.

France ranks fourth among the major powers in the art market and is the second top-selling country, just behind the United States (with 99,000 lots sold) and ahead of the United Kingdom (70,000 lots) and China (66,000 lots) for 2019.[3] The French auction house Artcurial is now the largest in Europe and ranks 11th worldwide.[4] Auction sales collapsed by 80 per cent during the pandemic lockdown and auction houses are attempting to carry on by organising more and more online auction sales.

One big change that impacted the French art market in 2019 was Brexit, which has enticed prestigious international galleries, such as David Zwirner, to open – or consider opening – premises in the French capital, thus boosting total revenue in the French art market.

From a legal point of view, art law transactions are subject to the common law rules of the French Civil Code but with favourable tax rules specific to the art market. Overall, these rules are extremely protective of participants in the art market and especially buyers of artworks. An error in the attribution of an artwork can very easily void a sales contract – and may have implications for sales and value for a very long period afterwards. Misattribution of an artwork thus creates much insecurity in the sphere of art market transactions and intermediaries may incur liability if they provide an unqualified opinion without making the status of the opinion clear and it subsequently proves to be erroneous (see Section IV).

In terms of property law, French law clearly favours the bona fide purchaser over the dispossessed owner, in that it seeks to secure ownership arising from a transaction through the creation of a new title that stems from mere possession of the item (see Section III.i). Auction sales are subject to a specific body of rules with a clear trend over the past 20 years towards

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2 M Potard, '2019, année exceptionnelle pour les maisons de ventes en France', *Le Journal des Arts*, 16 January 2020, www.lejournaldesarts.fr.

3 Le marché de l'art en 2019, artprice.com (https://fr.artprice.com/artprice-reports/le-marche-de-lart-en-2019).

4 Le marché de l'art en 2019, artprice.com (https://fr.artprice.com/artprice-reports/le-marche-de-lart-en-2019).

greater liberalisation of the sector, reflecting its adaptation to the rules of the European single market (see below). Other professional art market intermediaries (such as galleries and art dealers) are not subject to specific rules but, rather, self-regulate.

II THE YEAR IN REVIEW

The year 2020 was marked in France by a vast investigation led by the Central Office for the Fight against Trafficking in Cultural Property (OCBC) into possible trafficking of antiquities looted in war zones and politically unstable areas in the Near and Middle East and sold on the French art market. Five important personalities from the French art market were arrested and questioned by the OCBC, two of whom have been indicted.[5]

This case takes place in a context of the ever growing concern of the French public authorities to condemn the traffic of cultural goods in relation to money laundering and the financing of terrorism. France adopted in early June 2016 a law[6] creating a new specific offence criminalising intentional participation in the trafficking of cultural property from areas under terrorist control.[7] New provisions were adopted concomitantly prohibiting the import of cultural goods from a state party to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the 1970 UNESCO Convention) against illicit trafficking in the absence of a document attesting to the legality of the import from its country of origin.[8]

The year 2020 has also been marked by a bill currently being examined by the French Parliament (it was adopted unanimously on 6 October 2020 by the National Assembly) for the restitution by France of 26 objects to Benin and a sword to Senegal. This bill is part of President Emmanuel Macron's public wish, expressed in his 28 November 2017 speech in Ouagadougou, to have cultural heritage taken during colonial times restituted to African countries.[9] A report, commissioned on that occasion, was published by two academics in November 2018 advising the French government on the modalities of the restitution of African cultural heritage.[10]

III ART DISPUTES

i Title in art

Each transfer of an artwork creates a new title (independent from the former title) that stems from mere possession of the artwork according to a core principle under French law, which states that possession equals title as far as movable goods are concerned.[11] A reminder

5 'Trafic d'antiquités du Moyen-Orient en France: un expert en archéologie et son mari inculpés', *Le Journal des Arts*, www.lejournaldesarts.fr.

6 Law No. 2016-736 of 3 June 2016 strengthening the fight against organised crime, terrorism and their financing, and improving the efficiency and guarantees of criminal procedure.

7 Criminal Code, Article 322-3-2.

8 Heritage Code, Articles L.111-8 to L.111-12.

9 Bill No. 3221 on the restitution of cultural property to the Republic of Benin and the Republic of Senegal, 16 July 2020.

10 See Sarr–Savoy report commissioned by President Emmanuel Macron published on November 2018 advising the French government on the modalities of the restitution of African cultural heritage (https://bj.ambafrance.org/Telecharger-l-integralite-du-Rapport-Sarr-Savoy-sur-la-restitution-du).

11 Civil Code, Article 2276.

of one notable exception to this rule was recently provided by the French Supreme Court in a 13 February 2019 decision.[12] The Court ruled that a new title could not be validly refused to the French state, even by a bona fide possessor, when the state claims the return of cultural goods that belong in the public domain (i.e., goods belonging to a public institution that are of particular interest from a historical, artistic, archaeological, scientific or technical point of view). The Court found that state interference of this kind pursued a legitimate aim insofar as the protection of the integrity of the French public domain relates to the general public interest.

Good faith is always presumed.[13] A possessor is deemed to be in good faith if he or she regards himself or herself as entitled to the property, and this belief must be reasonable.

In the context of a sale, title passes from seller to buyer as soon as they have agreed on the artwork to be sold and on its sale price. This is so even if the artwork has not yet been delivered nor the price paid.[14] However, buyer and seller can contractually agree to postpone the transfer of ownership until, for instance, payment or delivery of the artwork. At auction, title passes from seller to buyer at the time the auctioneer declares the lot sold to the highest bidder, although many auction houses in their conditions of sale contractually postpone the title transfer until the payment of the price by the purchaser in full and the funds cleared.

The purchaser has no formal legal duty of inquiry as to title. However, the purchaser will be considered to be in bad faith if he or she has reasons to doubt, or has been grossly negligent in assessing, the seller's title; for example, by not conducting basic research on available databases of stolen works.

ii Nazi-looted art and cultural property

Claims to Nazi-looted art and cultural property are still governed by a 21 April 1945 ordinance[15] adopted after the Second World War. The claimant in a Nazi-looted art claim must first establish the ownership of his or her ancestor over the item, and this is becoming more and more difficult with the passage of time. The claimant must also prove that his or her ancestor was wrongly dispossessed during the Nazi occupation. The wrongful dispossession may be presumed on the basis of contextual elements, such as the date of the transactions (during the Nazi occupation in France), the identities of the parties to the transaction (such as parties known to be implicated in the Nazi regime) and the conditions of the sale (if the sale was made under threat of violence, for instance). Finally, the claimant must show that he or she was unable to launch an action before 31 December 1949.

In a 1 July 2020 decision,[16] the French Supreme Court upheld the first instance judges who had ordered the return of a Camille Pissaro painting, *La cueillette des pois*, to the heirs of a businessman wrongfully dispossessed of his artwork during the Nazi occupation in France. The Court recalled that subsequent purchasers of a property recognised as looted cannot become the legal owners, even if they purchase it in good faith.

On 30 September 2020, the Paris Court of Appeal also ordered the French state to return three André Derain paintings to the heirs of a Jewish art collector, overruling a first instance decision that had found there were 'persistent uncertainties as to the identification

12 Supreme Court, 1st Civil Chamber, 13 February 2019, No. 18-13.748.

13 Civil Code, Article 2274.

14 Civil Code, Article 1583.

15 Ordinance No. 45-770 of 21 April 1945 on the nullity of acts of spoliation carried out by the enemy.

16 Supreme Court, 1st Civil Chamber, 1 July 2020, No. 18-25.695.

of the paintings'.[17] The Paris Court of Appeal ruled to the contrary, finding that there were 'precise, serious and concordant indications' that the three paintings had indeed been looted and that their sale thus had to be voided pursuant to the 21 April 1945 ordinance.

iii Limitation periods

Art claims in France are subject to the general rules relating to limitation periods. The principle under French law is that the right of ownership is imprescriptible.[18] In theory, the restitution claim of a dispossessed owner is thus not subject to any statute of limitations.

In practice, since French law provides that bona fide possession immediately creates a new title independent from the former,[19] restitution claims are often unsuccessful despite their theoretically imprescriptible character. In a notable exception, a new title will only be created after a three-year period if the artwork has been lost or stolen.[20]

Neither Nazi-looted art claims nor restitution claims from public entities regarding art that belongs in the public domain are subject to any limitations in time nor may they be validly opposed on grounds of adverse possession.

iv Alternative dispute resolution

French law increasingly encourages recourse to alternative dispute resolution (ADR) methods. For instance, following the adoption of a decree on 11 December 2019,[21] any claim for the resolution of a dispute (and art disputes are no exception) whose financial stake is less than €5,000 is inadmissible in court if it has not first been subject to an attempt at conciliation or mediation.

French law is also highly favourable towards arbitration. Paris is a recognised centre of arbitration, in particular as the seat of the Court of Arbitration of the International Court of Commerce.

Nevertheless, recourse to arbitration or other ADR mechanisms still appears relatively scarce in France in the context of art disputes, in particular since art professionals almost always provide for the exclusive jurisdiction of the French courts in their contracts or general terms and conditions of sale.

There are no specialist ADR organisations or institutions dealing specifically in art matters in France.

IV FAKES, FORGERIES AND AUTHENTICATION

French law is very protective of the buyer of fakes, forgeries and inauthentic pieces. There are two main remedies available, often brought in conjunction.

First, the buyer may bring an action against the seller to void the sale on the basis that his or her consent was vitiated by an error on the authenticity of the artwork. If the buyer successfully demonstrates that his or her consent was vitiated (almost exclusively after obtaining an expert report from a court-mandated expert), the contract is voided *ab initio*

17 Paris Court of Appeal, 30 September 2020, RG No. 19/18087.

18 Civil Code, Article 2227.

19 Civil Code, Article 2276.

20 Civil Code, Article 2276.

21 Decree No. 2019-1333 of 11 December 2019 reforming civil procedure.

(i.e., the sale is treated as never having been concluded).[22] Hence the parties must be returned to the situation they were in before contracting the sale: the buyer must return the artwork to the seller and the seller must refund the price to the buyer. The action to void a sales contract is subject to a five-year limitation period, which starts to run from the discovery of the error; it is stipulated that no action on a contract may be brought once 20 years have elapsed after the date the contract was entered into.

Second, the buyer may also bring an action in contract or in tort against the professional seller, depending on the source of the rights and obligations of the latter. In the context of a contract, the seller's liability will depend on the contract terms.

When conducting public auctions, auction houses and their experts incur joint liability – of a tortious nature as regards the buyer with whom they have no contract – and this liability may be neither limited nor excluded[23] and must be covered by professional liability insurance.

While tortious liability is normally only incurred if a fault was committed, recent case law has seemed to adopt a form of strict liability, judging that 'the expert who asserts the authenticity of an artwork without reserve incurs liability on this mere assertion', thus exempting the buyer from having to prove that the expert was either negligent or reckless.[24] In a recent decision,[25] the Supreme Court may have initiated a shift from the position taken in its previous case law requiring conduct that could be characterised as a fault, when it judged that the auctioneers in the case, in asserting the authenticity of a bronze, incurred liability. Indeed, the Court not only found that authenticity had been asserted without reservation, but also noted that the auctioneers had particular knowledge in the relevant domain of the arts and had admitted having had a doubt as to the estimate to give, which had prompted a request for a second expert opinion and that despite this doubt they still proceeded with the auction sale. The Court found that not only did the auction catalogue fail to mention any reservations as to the authenticity of the work, but also insisted on the exceptional character of the bronze and its prestigious provenance to increase the attractiveness of the disputed property to potential purchasers and to strengthen their belief in its authenticity.[26]

V ART TRANSACTIONS

i Private sales and auctions

Private sales of artworks are not subject to any specific body of law and are governed by the general rules governing sale contracts under French law. The general legal warranties granted by the seller to the buyer thus apply. It should be noted that auction houses were originally forbidden to conduct private sales. The authorisation for auction houses to conduct private sales was first limited to unsold lots at auction[27] and then, from 2011,[28] to any consigned goods, provided that the auction house has duly informed the client of the possibility of resorting to auction.[29]

22 Civil Code, Article 1130 et seq.

23 Commercial Code, Article L.321-17.

24 See, for instance, Supreme Court, 1st Civil Chamber, 7 November 1995, No. 93-11.418.

25 Supreme Court, 1st Civil Chamber, 3 May 2018, No. 16-13.656.

26 M Ranouil, 'Un an de droit du marché de l'art', CCE No. 3, March 2019, chron. 5, 2A.

27 Law No. 2000-642, 10 July 2000 regulating the voluntary sale of goods at auction.

28 Law No. 2011-850, 20 July 2011 of liberalisation of auction sales of goods.

29 Commercial Code, Article L.321-5.

In private sales involving a professional seller and concluded remotely (such as online sales) or off the professional seller's premises, the buyer (if he or she is not a professional) has the right to cancel the sale within a period of 14 working days. The consumer's right of withdrawal does not apply to auction sales (including phone or online bids). It also does not apply to private sales concluded in fairs and salons. However, two legislative bills were introduced in June 2019[30] to grant consumers in art fairs and salons the benefit of the withdrawal right. One is still under scrutiny.

In contrast to private sales, auction sales are strictly regulated in France. The law defines what types of goods may be sold at auction, who may sell at auction, who may conduct the auctions and the modalities of the auction sales. Online auctions are subject to the same rules.[31] All auction houses must declare their activity to the regulatory authority for auction sales, the Voluntary Sales Council (CVV), which notably has disciplinary powers. A reform of this institution is currently under scrutiny by the Senate.[32]

One specific warranty granted by the professional seller to the consumer in art market transactions – whether private or at auction – should be mentioned. In art market transactions, the professional seller warrants to the consumer that the description of the artwork put up for sale is accurate.[33] For instance, the title or denomination of a work directly followed by a reference to a historical period, century or era warrants to the buyer that the work or item was actually produced during the period of reference; the use of the term 'attributed to' followed by the artist's name indicates that the work or the object was executed during the period of production of the artist mentioned and that serious assumptions indicate that this artist is the likely author; the use of the term 'school of' followed by the artist's name warrants that the author of the work has been the pupil of the master cited or has been known to have been influenced or have benefited from his or her technique.

ii Art loans

Art loans involving French public institutions – whether as lenders[34] or borrowers[35] – are governed by a set of detailed rules in the French Heritage Code. These rules notably provide an obligation for a contract to be signed.[36] A commission oversees the lending or borrowing process and renders opinions on the condition of the artwork and the safety guarantees. Loans of artworks to public museums must be granted for free. Insurance may be requested and it is specified that a guarantee[37] may be granted by the French state to national public institutions for the liability they may incur towards lenders of artworks for temporary exhibitions when the total insurance value of artworks that do not belong to the state exceeds a certain amount.[38]

30 National Assembly bill No. 2000, 5 June 2019, Senate bill No. 574, 13 June 2019.

31 Commercial Code, Article L.321-3.

32 Senate bill No. 14, 23 October 2019.

33 Decree on the prevention of frauds in art and collectible sales, 3 March 1981, No. 81-255 (commonly known as the 'Marcus decree').

34 Heritage Code, Article R.451-26 to R.451-28.

35 Heritage Code, Article R.451-29 to R.451-34.

36 Heritage Code, Article L.451-11.

37 Law No. 93-20 on the institution of a state guarantee for certain temporary exhibitions of works of art, 7 January 1993.

38 Valued, by the French Heritage Code, at 300 million francs.

Artworks that are loaned to a public museum in France may be protected against seizure for the period of the loan if the lender is a foreign country, public body or cultural institution, in which case, a request must be filed with the Ministry of Culture to obtain an anti-seizure order made jointly by the Minister of Culture and the Minister of Foreign Affairs.[39] The request must describe in details the art, antiques or collectibles for which the anti-seizure order is requested and provide pictures of the item.

This process is not applicable to foreign private individuals or foreign private for-profit organisations. For instance, the heirs of a businessman wrongfully dispossessed during the Nazi occupation in France took advantage of the fact that a Pissaro painting, *La cueillette des pois*, was on loan to the Marmottan Monet Museum in Paris to have it seized to file a Nazi restitution claim before the French courts for its return. The lenders, a couple of American collectors, could not benefit from the immunity from seizure regime.

Other art loans not involving public institutions are subject to the general rules of the Civil Code. The disputes that arise most regularly have to do with lack of safety measures taken by the borrowing party. For instance, an association that had organised a temporary exhibition of photographic works by Joan Fontcuberta that were stolen during the exhibition was found liable for having insufficiently protected the premises and had to pay damages to the artist.[40]

In a recent case heard by the Paris Court of Appeal,[41] the owners of a bronze cast attributed to Brancusi consigned the work to an expert to confirm the authenticity of the work and monitor its sale. The expert had signed an agreement with a Belgian institution for the loan of the work. However, the owners of the work, who had recovered their property in the meantime, refused to lend it. The expert filed a summary claim against the owners of the Brancusi work to compel the owners to proceed with the loan (the expert notably claimed that his reputation and the extent of his consideration were undermined by the owners' attitude). The court rejected the expert's claim on the grounds that it had been agreed between all parties that the work would only be loaned if its authenticity were definitely asserted by art historians, and there still remained some uncertainty on this count at the date of the loan.

iii Cross-border transactions

Artworks are subject to export controls outside and inside the European Union. For the protection of national treasures, Article 36 of the Treaty on the Functioning of the European Union provides for an exception to the prohibition between Member States of customs duties on imports and exports on goods.[42]

Items belonging to public collections and French museum collections, as well as items classified as historical monuments, are automatically considered national treasures under French law. There is also a secondary category of goods that may be considered national treasures if they are 'of major interest for national heritage from a historical, artistic or archaeological point of view'.[43] The permanent export of national treasures is forbidden.[44]

39 Law No. 94-679, 8 August 1994, Article 61.

40 Nimes, 28 April 2016, No. 14/04887.

41 Paris, 3 October 2019, No. 19/16317.

42 Treaty on the Functioning of the European Union, consolidated version 2016 (OCJ 202, 7 June 2016).

43 Heritage Code, Article L.111-1.

44 Heritage Code, Article L.111-2.

The temporary or permanent export of cultural goods from the secondary category is contingent upon the issuance of an export certificate (and an export licence if the item is exported outside the EU) if the items fall within the 15 categories listed by the French Heritage Code.[45] The major interest for national heritage is defined in this list according to two criteria: age and value. For instance, the following are subject to the prior issuance of an export certificate: paintings, sculptures and drawings that are more than 50 years old and worth more than €15,000; photographs that are more than 50 years old and worth more than €50,000; and archaeological objects that are more than 100 years old and worth more than €1,500.

The procedure for the issuance of an export certificate is designed to give time to the French administration to review the cultural value of the items and decide whether to classify the goods as a national treasure (i.e., to ensure that the item remains permanently on French territory). For instance, in December 2019, the French state blocked the export of a Cimabue masterpiece, *Christ Mocked*, which had been discovered in the house of an old lady in Compiègne a few months prior. The painting had sold at auction in October 2019 for €24 million, making it the highest bid of 2019 and the world's highest bid ever for a primitive painting.

The owner of goods intended for export must file an application for an export certificate including a photograph of the item, in person or through an agent, with the Ministry of Culture. The Ministry of Culture has four months to review the application. At the expiration of this four-month period, the Minister must issue or refuse the certificate.

When granted, the certificate permanently attests that the item is not a national treasure. This certification is final (except for items less than 100 years old).

Upon refusal of an export certificate, a 30-month period commences, during which the cultural goods may not leave French territory. The applicant cannot claim any compensation for the refusal of the export certificate (but the applicant can challenge the decision through an administrative tribunal). Upon the expiration of this 30-month period, a new application for the issuance of an export certificate cannot be denied unless the cultural goods have either been classified as a historic monument or the state has made an offer to purchase them. If the owner refuses a purchase offer from the states, the refusal to issue an export certificate is renewed with no compensation (i.e., the item remains blocked on French territory).

Penalties for failing to apply for an export certificate or failure to comply with refusal of export authorisation are the same: a fine of €450,000, three years' imprisonment and confiscation of the item.

Import of cultural goods is in principle free of any controls. However, following a July 2016 law, some controls have been implemented on the import of cultural property of archaeological, prehistoric, historical, literary, artistic or scientific interest from non-member states of the EU that are party to the 1970 UNESCO Convention. The import of such goods is now subject to a requirement for a certificate or equivalent document authorising the export from the exporting state when this is provided for by the exporting state's legislation. In the absence of such a certificate, the import will be forbidden.[46]

The import of cultural goods that have left the territory of a state unlawfully is also forbidden.[47] Cultural goods that have been seized at customs because they left the territory

45 Heritage Code, Article L.111-2.

46 Heritage Code, Article L.111-8.

47 Heritage Code, Article L.111-9.

of a non-member state of the EU may be placed in a museum accredited by the French state for the purpose of their conservation and presentation to the public while the research of the legitimate owner by the competent authorities is ongoing.

Current French tax legislation has not been modified and will not be, as the French government is protective of the art market, especially in the present circumstances. In any event, French law derives mainly from EU regulations and case law.

We anticipate Brexit being an issue for auction houses with offices in Paris, as formalities and tax consequences of the transfer of pieces of art from or to the United Kingdom will in all likelihood be more burdensome as a result.

One notable event relating to the covid-19 crisis is that France's national furniture collection intends to sell off items at auction in aid of French healthcare workers.

iv Art finance

Art market professionals (auction houses, art dealers, gallerists, etc.) are subject to anti-money laundering obligations. In particular, art market professionals must carry out anti-money laundering checks such as the identity, domicile and profession of their clients, and gather information on all relevant elements of the client's estate and the provenance of the sums involved. Art market professionals must declare to TRACFIN, the French anti-money laundering unit, any sums that they suspect may be the product of a criminal offence punishable by a prison sentence of more than one year or that may be connected to the financing of terrorism.

In recent years, and particularly since 2016,[48] the French authorities have strengthened anti-money-laundering measures considerably, assisting art market professionals to combat the illicit traffic of cultural goods and the financing of terrorism. Guidelines for persons habitually engaged in trade in antiques and works of art were adopted in May 2019.[49]

VI ARTIST RIGHTS

i Moral rights

French law grants authors moral prerogatives on their works. These rights are directly attached to the author as a person and they are perpetual, inalienable and imprescriptible.[50]

The author may thus not waive nor transfer his or her moral rights during his or her lifetime (the author may, however, bequeath it to a third party upon death) and any contractual stipulation providing otherwise would be null and void.

There are four types of moral prerogative:

a the right to paternity allowing the author to command that his or her name be associated with his or her works;

b the right of integrity of the works, which allows the author to oppose any alteration of his or her works and any misuse of the works;

c the right of disclosure, which allows the author to decide when and how his or her works will be communicated to the public and to oppose the exploitation of a work that he or she has not made public; and

48 Ordinance No. 2016-1635, 1 December 2016; Decree No. 2018-284, 18 April 2018.

49 www.economie.gouv.fr/files/2019-02-05_LD_Antiquaires.pdf.

50 Intellectual Property Code, Article L.121-1.

d the right of withdrawal or to reconsider, which allows the author to decide either to discontinue the exploitation of, or to alter, the work (right of withdrawal and right to reconsider respectively).

A 10-year dispute between an auction house, its photographer and a private company operating an online database on the art market on the question of the protection of auction catalogues by intellectual property rights was recently the occasion for the courts to address the questions on the paternity and integrity aspects of the moral rights of the author.[51] After having obtained from the courts the recognition that auction sale catalogue photographs are protected and that their reproduction amounts to a violation of the photographer's and the creator of the auction catalogue's intellectual property rights, the photographer working for the auction house also obtained a judgment in his favour against the database company for violating his moral rights.

The Paris Court of Appeal[52] found that the database company had infringed upon the photographer's right of integrity by presenting cut out or cropped versions of the original photographs displayed in the auction catalogue, and for having added a watermark above the pictures. The photographer's right of paternity was also found to have been infringed by the database company for not having credited each and every picture displayed on the online database with the name of the photographer (despite the fact that the French Supreme Court[53] had apparently considered that a single mention of the artist's name for various pictures could suffice).

ii Resale rights

The resale right is an inalienable right for the author of a work to receive a share of the proceeds of any resale of an artwork after its first sale made by the artist or his or her successors.[54] The resale royalty is levied on sales involving art market professionals as sellers, buyers or intermediaries (i.e., art galleries, art dealers and auction houses).

The royalty right benefits the artist (who can neither waive nor transfer the right because of its inalienable character) during his or her lifetime and his or her heirs and legatees for 70 years after the artist's death. It should be noted that the option for an author to bequeath his or her royalty right was forbidden until fairly recently (July 2016).

No royalty is levied on first direct sales by the artist or the artist's heirs nor on the resale by a seller of artworks acquired directly from the artist less than three years before that resale and where the resale price does not exceed €10,000, nor on any resale for a price lower than €750.

The rates of the royalty applicable are regressive:

a 4 per cent for a sale price of between €750 and €50,000;
b 3 per cent for a sale price of between €50,000 and €200,000;
c 1 per cent for a sale price of between €200,000 and €350,000;
d 0.5 per cent for a sale price of between €350,000 and €500,000; and
e 0.25 per cent for a sale price over €500,000.

51 Paris Court of Appeal, 1 October 2019, No. 18/20049.

52 E Marcilhac, 'Suite et peut-être fin de l'affaire Camard contre Artprice', *Le Journal des Arts*, 9 October 2019, www.lejournaldesarts.fr.

53 Supreme Court, Commercial Chamber, 5 April 2018, No. 13-21.001.

54 Intellectual Property Code, Article L.122-8.

The total amount of the royalty may not exceed €12,500. In other words, all artworks sold for €2 million and over are subject to a flat €12,500 royalty.

The Supreme Court (in its most solemn composition) finally decided in a 9 November 2018 decision[55] – after almost 10 years of contradictory case law – that the burden of the royalty could be transferred contractually from the seller to the buyer despite the fact that Article L.122-8 of the Intellectual Property Code clearly provides that 'the royalty shall be payable by the seller'. In any event, an art market professional who acts as an intermediary in a sale (i.e., an auction house) is always responsible for collecting the royalty from whomever is responsible for its payment, and for passing it to the relevant collecting agency.

iii Economic rights

Aside from the resale right, French law recognises two economic rights: representation and reproduction rights.

The representation right entails the right to communicate an artwork to the public by any means[56] while the reproduction right entails the right to materially fix the artwork by any process making it possible to communicate it to the public in an indirect manner.[57]

Any representation or reproduction – whether full or partial – of an artwork must be authorised by the author.[58] Any unauthorised representation or reproduction of an artwork amounts to copyright infringement.

Both economic rights may be freely transferred, in contrast to the moral right and the resale right.[59] Economic rights last for the duration of the author's lifetime plus 70 years after his or her death, after which time his or her works fall into the public domain (in terms of intellectual property law) and may be freely used.[60]

The Paris Court of Appeal,[61] for example, recently found that the sculpture *Naked* made by Jeff Koons in 1988 infringed a photograph taken by Jean-François Bauret called *Enfants*. The Court found that the Koons sculpture appropriated the combination of characteristics that made Bauret's photograph original. Koons was unsuccessful in his freedom-of-speech and parody defences. The Court found that the artist did not prove that the use of the photograph without its author's authorisation was necessary to express his freedom of artistic expression and thus did not justify appropriating another's work. Nor did Jeff Koons give any evidence of the work having a humorous character. For having reproduced the sculpture in documents related to an exhibition of the sculpture to the public, the Pompidou Centre was found jointly liable for an amount of 10 per cent of the fines imposed.

55 Supreme Court, Plenary Assembly, 9 November 2018, No. 17-16.335.
56 Intellectual Property Code, Article L.122-2.
57 Intellectual Property Code, Article L.122-3.
58 Intellectual Property Code, Article L.122-4.
59 Intellectual Property Code, Article L.122-7.
60 Intellectual Property Code, Article L.123-1.
61 Paris Court of Appeal, 17 December 2019, No. 17/09695.

VII TRUSTS, FOUNDATIONS AND ESTATES

Structures appropriate for art collections depend mainly on the jurisdiction of residence of the owner and on applicable tax treaty provisions. French residents generally opt for direct detention. Foundations have been used by families for protecting and transferring art collections for generations, with wealth and inheritance tax exemption benefits. Regulations applicable to trusts introduced by the previous government may generate difficulties for families whose assets are structured on the basis of fiduciary relationships, considering the substantial reporting obligations and the absence of inheritance tax exemptions.

Companies and groups may create art foundations and through these enjoy specific tax deductions from their taxable profits, amounting to 60 per cent of the funds donated up to a ceiling of 5 per mille of their annual turnover.

French law provides several specific tax breaks of benefit to public institutions and private charities, notably inheritance tax exemption on transfers made through a lifetime gift or upon death to the benefit of the state, public institutions and charities as defined by applicable legislation.

In contrast, although transfer by reason of death is free between spouses, art is subject to substantial inheritance and gift tax between family members (45 per cent in lineal descendance above €1.8 million) and non-related persons (60 per cent from the first euro). This motivates collectors to structure their collections using civil partnerships where they wish to keep control over the collection through generations and avoid successive (taxable) transfers between family members, or in foundations for securing the family collection.

VIII OUTLOOK AND CONCLUSIONS

Laws on the liberalisation of auction sales are currently under legislative scrutiny. Their adoption may be one of the hot topics in art law in 2021 and may notably impact the online sales that auction houses have increasingly resorted to during the coronavirus pandemic.

Also under scrutiny is the furthering of France's policy on the return of cultural heritage objects taken to African countries during colonial times, which is one of President Macron's undertakings before the end of his presidential term. However, the covid-19 crisis may modify the contemplated legislative calendar.

Chapter 15

GERMANY

Katharina Garbers-von Boehm[1]

I INTRODUCTION

Germany has many internationally recognised world-class public museums, a growing number of superb private museums and a thriving contemporary art scene. Nevertheless, from a global perspective and compared to markets like China or the United States, the German art market is relatively small, according to the Art Basel and UBS report *The Art Market 2020*, with only slightly more than 2 per cent of worldwide turnover being made in Germany.[2] One of the highlights in the UBS report regarding the emerging online art market is that German collectors seem to be open to buying art online, even in the higher price segments.[3]

II THE YEAR IN REVIEW

Three major issues are currently being discussed – and criticised – by German art market participants and by art law policymakers, since these issues are considered to be competitive disadvantages for the art market in Germany.

a From 1 January 2020, new regulations derived from recent European anti-money laundering legislation have required art dealers to fulfil certain formalities for almost every transaction.[4]

b German cultural protection legislation underwent a broad reform in 2018, which introduced a rather bureaucratic system of export licences that have to be obtained before exporting cultural goods located in Germany. Several complaints against numerous provisions of the new law have been filed with the Federal Constitutional Court. The decision on whether these complaints will be upheld is due in 2020.

c On 1 January 2014, the value added tax (VAT) rate in Germany on sales of artworks increased from 7 per cent to 19 per cent. This topic reappeared at the top of the agenda during the covid-19 pandemic as the rate of VAT was temporarily reduced.

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2 Art Basel and UBS report, *The Art Market 2020*, p. 36.

3 Art Basel and UBS report, *The Art Market 2020*, p. 276.

4 Gesetz zur Umsetzung der Änderungsrichtlinie der 4. EU-Geldwäscherichtlinie.

Mention must also be made, however, of some very positive policy developments, such as the state loans granted to art galleries during the covid-19 crisis[5] and the increase in the federal budget for art purchases.[6]

III ART DISPUTES

i Title in art

Passing of title

In general, according to German law, the purchase of any goods has two aspects.

a First, the parties have to conclude a valid contract (oral or written) containing all the essential components of the transaction, such as which object is being bought for what price or which object is to pass to another owner by way of a gift.

b Second, the passing of property requires that the parties agree that (1) the title should pass, and (2) the item should be handed over to the buyer. Instead of physically handing over the object to the buyer, it is sufficient that the parties agree on the passing of title if the object is already in the possession of the buyer. There are, however, also alternatives to the physical handing over of the object: if the seller is in possession of the work, it is sufficient that the seller and the buyer agree to a contract that has the effect that the buyer acquires indirect possession. This could be, for example, a loan either between the buyer and the seller or between the buyer and a third party. In addition, if a third party, such as a museum, is in possession of the object, the physical transfer of the object can be replaced by passing on the claims against the third-party possessor (e.g., a museum) to the new owner.

Good-faith acquisition

The issue of whether title is acquired does not necessarily depend on whether the person in possession of the object, and who wants to transfer it to another person, is actually the owner of the object – unless the recipient of the object is not acting in good faith. The recipient of the object is not acting in good faith if either (1) he or she knows that the person from whom he or she is receiving the object is not the owner of the object, or (2) the circumstances of the ownership of the object are unknown to the recipient because of gross negligence on his or her part. There is no general obligation in civil law to investigate the title of the seller, but under unusual circumstances (e.g., deals at flea markets, cash deals or other suspicious circumstances) due diligence becomes necessary. In addition to the rather lax due diligence obligations found in general civil law, new due diligence requirements were recently introduced in the Cultural Property Protection Act, which prohibits putting stolen items on the market.[7]

Nevertheless, as a principle, acquisition in good faith cannot take place if the item was stolen, lost or otherwise left the owner's possession against his or her will.[8] An exception to

5 https://news.artnet.com/market/german-commercial-galleries-bailout-1911212.

6 https://news.artnet.com/market/german-neustart-acquisitions-1899176.

7 § 40 ff German Cultural Property Protection Act (KGSG).

8 § 935 Abs. 1 German Civil Code (BGB).

this rule (i.e., whereby acquisition in good faith is possible even for stolen goods) is made for money (coins, notes, etc.) and for items that are sold at public auction[9] – an extremely important, and often criticised, exception for the art market.

Furthermore, German civil law recognises the legal principle of usucapion. According to this principle, it is possible to become the owner of any item (even a stolen item) after receiving and directly possessing it for 10 years in good faith. The institution of usucapion often plays an obstructive role in restitution cases, when looted or stolen art has been in the hands of the current possessor for a long time.

In addition to usucapion, there can generally be a transfer of property if an item is sold at public auction, even if it was stolen.[10]

Burden of proof

There are several provisions in the law regarding the burden of proof that make it difficult for a former owner who was dispossessed to reclaim an artwork from the current holder.

According to the general principles of German civil law, the burden of proof lies with the person who is making a claim. As a consequence, the person who argues that the current holder of an object is not the owner, but that he or she instead is the owner, has to prove that: (1) he or she acquired ownership; (2) he or she did not lose the ownership; and (3) the current holder is not the owner but, rather, acquired the object in bad faith.[11]

Moreover, German civil law provides for a presumption that the possessor of an object is actually the owner of the object. Thus, as far as stolen objects are concerned, the burden of proof lies in principle with the previous owner, not with the current holder.[12]

Finally, as far as usucapion is concerned, it generally suffices if the current holder proves that he or she has had the item concerned in his or her possession for 10 years or more. It is up to the previous owner to prove that the current holder acquired the object in bad faith or that bad faith occurred during the 10-year period.[13]

A recent case that went up to the German supreme court, the Federal Court of Justice, concerning a Purrmann painting gave occasion for the Court to issue some general guidelines regarding the burden of proof of the current holder when the current holder is defending a restitution claim by arguing that he or she acquired a work of art by possessing it in good faith for 10 years or more: the Supreme Court emphasised that, despite the rather relaxed rules on burden of proof mentioned above, the current holder at least has to explain how he or she acquired the work. If this explanation proves to be wrong, he or she cannot claim that he or she acquired ownership through usucapion.[14]

9 § 935 Abs. 2 BGB.

10 § 935 Abs. 2 BGB.

11 Federal Court of Justice, the German supreme court in criminal and private law matters (BGH), NJW 82-38; BGH NJW 91,1415, Palandt-Herler, 78. Aufl. 2019, § 932 Rn. 15.

12 § 1006 BGB.

13 § 937 BGB.

14 BGH, judgment dated 19 July 2019, Az. V ZR 255/17.

ii Nazi-looted art and cultural property

Nazi-looted art

In Germany, cases regarding Nazi-looted art are rarely litigated because there has usually either been good-faith acquisition or, if this is not the case, all limitation periods have expired. Regarding Nazi-looted art, there is no specific exception to the maximum limitation period of 30 years for ownership claims. This is much criticised as there is a high risk that a restitution case litigated in Germany will not be successful, mainly because of limitation periods and good-faith acquisition.

However, even today it is not at all impossible to successfully reclaim looted art, especially if the current holder is a public museum.

This is because after the Washington Conference, a 'common declaration of the federal government and the states to find and restitute Nazi-looted art' was signed and ever since it has served as 'soft law', according to which German museums have to respect the Washington Principles[15] by way of 'self-obligation'.[16]

Many restitutions from public museums to heirs of Holocaust victims take place on this basis every year.

The following are selected examples of restitutions of Nazi-looted art that took place in 2019 and 2020.

a In April 2019, the Prussian Cultural Heritage Foundation restituted a drawing by Jakob Philipp Hackert to the heirs of businessman Friedrich Emil Guttsmann, who was forced to sell his valuables in 1939 because of the financial hardships caused by Nazi persecution.[17]

b In May 2019, the Prussian Cultural Heritage Foundation returned five works (three paintings and two bronzes) to the heirs of the art dealer Heinrich Ueberall, who had to give up his business between 1936 and 1938 and was murdered in Sachsenhausen concentration camp in September 1939.[18]

c In August 2019, the Bavarian state museums returned a total of nine artworks (five paintings, one wooden panel, three engravings) to the heirs of Julius and Semaya Franziska Davidsohn, two art collectors who were dispossessed by the Gestapo in November 1938 and eventually murdered in Theresienstadt concentration camp in August 1942 and April 1943.[19]

15 www.lostart.de/Webs/EN/Datenbank/Grundlagen/WashingtonerPrinzipien.html.

16 Erklärung der Bundesregierung, der Länder und der kommunalen Spitzenverbände zur Auffindung und zur Rückgabe NS-verfolgungsbedingt entzogenen Kulturgutes, insbesondere aus jüdischem Besitz (Gemeinsame Erklärung) www.kulturgutverluste.de/Content/08_Downloads/DE/Grundlagen/Gemeinsame-Erklaerung/Gemeinsame-Erklaerung.pdf?__blob=publicationFile&v=15.

17 For details see: www.preussischer-kulturbesitz.de/fileadmin/user_upload_SPK/documents/presse/pressemitteilungen/2019/190430_Restitution-Guttsman-ENG.pdf.

18 For details see: www.smb.museum/en/whats-new/detail/five-works-from-the-gemaeldegelerie-and-the-alte-nationalgalerie-restituted/.

19 For details see: https://news.artnet.com/art-world/restitution-munich-museums-1616695.

d In September 2019, the Prussian Cultural Heritage Foundation returned two late medieval panels to the heirs of Harry Fuld Senior, a Jewish businessman and art collector whose family was dispossessed and whose company was 'Aryanised' during the Nazi era.[20]

e In November 2019, the Leopold Hoesch Museum in the city of Düren restituted a painting by Heinrich Campendonk to the heirs of the Jewish shoe manufacturer Alfred Hess, whose wife, Thekla Hess, was ordered by the Gestapo to return a part of his art collection to Germany after she managed to move a large part of the collection to Switzerland following his death in 1931. Some of the returned works were then stolen from the Cologne Art Association's storage, among them most probably the Campendonk painting, which resurfaced in a gallery in Düsseldorf in 1950.[21]

f In January 2020, the Prussian Cultural Heritage Foundation returned a painting by Hans Baldung Grien to the heirs of the painter Hans Purrmann, who was persecuted by the Nazi regime as a 'degenerate' artist and was therefore forced to sell the painting because of his difficult financial situation in 1937.[22]

If a matter regarding Nazi-looted art cannot be settled between the parties (e.g., between a museum and claiming heirs), there is in place a possibility for alternative dispute resolution:

Following an agreement between the federal government and the German federal states, the Advisory Commission came into being in 2003 and since then has continued its work in a number of cases brought before it. On the basis of the Washington Principles and the 1999 common declaration on the restitution of Nazi-looted art[23] mentioned above, the Advisory Commission issues advisory recommendations in restitution cases. Cases that involve works of art looted or otherwise taken from their owners between 30 January 1933 and 8 May 1945 under the terror regime of Nazi Germany can be brought before the Commission, which consists of 10 very senior, experienced and respected experts with backgrounds in law and the arts.

The recommendations are not legally binding but are usually followed by the parties involved; only 18 recommendations have been issued so far.

Both sides (mostly heirs of victims of Nazi Germany on one side and public art institutions such as museums and collections on the other) have to agree to mediation by the Commission and need to express their commitment to accepting the Commission's recommendation. After handing in an application (which needs to fulfil certain requirements, such as sufficient documentation of the dispossession), the Commission asks for written statements from the parties involved and first tries to reach an amicable solution. If this fails, the Commission calls for a hearing during which the parties can again present their cases. The Commission then issues a recommendation on the basis of the Washington Principles.

20 For details see: https://news.artnet.com/art-world/artworks-confiscated-nazis-restituted-jewish-art-collector-1640692; www.preussischer-kulturbesitz.de/news-detail/article/2019/08/30/two-medieval-predella-panels-restituted.html.

21 For details see: www.theartnewspaper.com/news/german-museum-acquires-heinrich-campendonk-painting-after-restitution-to-jewish-collector-s-heir.

22 For details see: www.theartnewspaper.com/news/berlin-restitutes-painting-to-heirs-of-degenerate-artist-for-the-first-time; www.smb.museum/en/whats-new/detail/?tx_smb_pi1%5BnewUid%5D=930&cHash=4fe533e0f9dd0e9d95babdeb644cb2f5.

23 See footnote 15.

The recommendation can range from denying the application altogether to full restitution to the applicant, with various measures in between (payment of compensation, public display of the artwork's provenance, etc.).

As an example of how this works, the Commission this year recommended that the Bavarian State Painting Collection restitute a painting by Jacob Ochtervelt[24] but also stated that the State Painting Collection was to be paid half of the purchase price if the painting were sold by the heirs in the 10 years following restitution. Although the heirs had no legal claim to repossess the painting, the Commission recommended restitution, taking into account all the facts of the specific case along with moral and ethical considerations. However, the requirement to keep the painting for 10 years is an unusual restriction and this case was the first time such a restriction has been imposed on claimants.

Because there are no special rules or explicit provisions regarding Nazi-looted art in relation to German limitation periods – a situation that is widely criticised – cases of Nazi-looted art are sometimes litigated abroad, even though they have a link to Germany or even concern cultural goods located in Germany. One example of this is the case of the Guelph Treasure, in which the Advisory Commission recommended that the treasure should not be restituted to the claimants; the claimants did not want to accept this and are now litigating the case in the United States.[25]

Cultural property protection law

In 2016, German cultural protection law underwent a reform with the entry into force that year of the new Cultural Property Protection Act, following which German cultural property law has become more relevant and at the same time more bureaucratic.

The reform aimed at bringing together the two key aspects of protecting cultural property, which were previously regulated in two different acts: first, the protection of important national cultural property against removal from Germany[26] and, second, the return of cultural property illegally removed.[27] The new Cultural Property Protection Act therefore introduced a number of measures to govern the import, export and placing on the market of cultural property, as well as the return of unlawfully imported cultural property.

Export licensing

A key change was the introduction of the obligation to obtain an export licence for exporting works of art that exceed a certain age and a certain value, even within the EU's internal market (depending on the type of cultural property).

In the table below are the applicable age and value thresholds. An export licence is mandatory if these thresholds are met.

24 1 July 2020, Heirs of A.B. v. Bayerische Staatsgemäldesammlung (Bavarian State Painting Collection).

25 In July 2020, the US Supreme Court agreed to hear an appeal by Germany and the Prussian Cultural Heritage Foundation. The Court will now (mainly) rule if cases concerning Nazi looted art fall within the field of application of the expropriation exception to the Foreign Sovereign Immunities Act, which, inter alia, states that foreign sovereign states (and its agencies or instrumentalities) shall not be immune from the jurisdiction of courts in the United States in any case in which property was taken away in violation of international law.

26 See § 1 Nos. 1–3 KGSG.

27 See § 1 Nos. 4–6 KGSG.

A licence will be granted if the item concerned is not included on the list of 'valuable national cultural property' or found to be of 'national importance'. In the latter case, the item will be put on the list as a valuable national cultural property[28] by an administrative act. Listed items can no longer be exported, unless their export is permitted (which is unlikely).

The process of listing can be started regardless of the age or value of the cultural goods.

Categories	Export from Germany outside the EU		Export from Germany within the EU	
	Age (years)	Value (€)	Age (years)	Value (€)
1 Archaeological objects from excavations and archaeological finds on land or under water, from archaeological sites or archaeological collections	100	0	100	0
2 Elements forming an integral part of artistic, historical or religious monuments that have been broken up	100	0	100	0
3 Pictures and paintings that do not belong to their creators, other than those included in categories 4 or 5	50	150,000	75	300,000
4 Watercolours, gouaches and pastels that do not belong to their originators	50	30,000	75	100,000
5 Mosaics (other than those included in categories 1 or 2) and drawings that do not belong to their originators	50	15,000	75	50,000
6 Original engravings, prints, silkscreen prints and lithographs with their respective plates and original posters that do not belong to their originators	50	15,000	75	50,000
7 Original sculptures or statuary and copies produced by the same process as the original that do not belong to their originators (other than those in category 1)	50	50,000	75	100,000
8 Photographs, films and negatives thereof that do not belong to their originators	50	15,000	75	50,000
9 Manuscripts that do not belong to their originators, including maps and musical scores or incunabula	50	0	75	50,000
10 Books	100	50,000	100	100,000
11 Printed maps	200	15,000	200	30,000
12 Archives	50	0	50	50,000
13(a) Collections and specimens from zoological, botanical, mineralogical or anatomical collections	No age threshold	50,000	No age threshold	100,000
13(b) Collections of historical, palaeontological, ethnographic or numismatic interest				
14 Means of transport	75	50,000	150	100,000
15(a) Any other antique items not included in categories 1–4	50–100	50,000	100	100,000
15(b) Any other antique items not included in categories 1–14	100	50,000	100	100,000

28 The list is publicly accessible at www.kulturgutschutz-deutschland.de.

Import restrictions

An item can only be legally imported into Germany if it has been legally exported from its country of origin.[29] This is the case if all applicable legislation in the country of origin and all applicable international law has been respected. Sanctions in cases of non-compliance are severe (up to five years' imprisonment, fines and confiscation of the item).[30]

In addition, the law provides for public law repatriation claims in cases in which cultural property has been unlawfully removed from a sovereign state.[31]

Due diligence

As mentioned above, the new Law provides for due diligence obligations when placing artworks on the market, which, as a result, make provenance research more important.[32]

Whoever puts cultural goods on the market should make sure that the goods are not stolen, illegally excavated or illegally imported. However, as far as non-professionals are concerned, further inquiry is only necessary if there are any suspicious circumstances.

Whoever puts cultural property into circulation in the exercise of his or her commercial activity is generally obliged to conduct additional due diligence: he or she has to establish the name and address of the seller, the consignor, the person acquiring the property or the client; to prepare a description and an illustration suitable for establishing the identity of the cultural property; to check the provenance of the cultural property; to examine documents proving lawful import and export; to examine prohibitions and restrictions on import, export and trade; to check whether the cultural property is registered in publicly accessible directories and databases; and to obtain a written or electronically transmitted declaration from the consignor or vendor that the latter is entitled to dispose of the cultural property.

According to the wording of the Law, it is forbidden to place any items on the market that were stolen, illegally excavated or illegally imported. Sales of such items are invalid.[33] Thus, someone who places a work on the market must make sure that the work was not stolen, illegally excavated or illegally imported (i.e., they must inquire into the work's provenance) however, only to the extent that is economically reasonable.[34] Works that are suspected of having been looted during the Nazi era (e.g., because they can be found in the database on the website www.lostart.de) can only be placed on the market once it is possible to eliminate this suspicion through provenance research or if a just and fair solution has been reached.

iii Limitation periods

There is no specific limitation period for art claims in German law – they fall under the general limitation periods governing all civil law claims.

The following general limitation periods are important in the context of art cases:

Warranty claims regarding sales of goods are time-barred 30, five or two years following the transfer of the goods,[35] and almost all cases concerning the sale of art will fall under the two-year clause.

29 § 28 KGSG.
30 §§ 83 ff KGSG.
31 § 49 ff KGSG.
32 §§ 40 ff KGSG.
33 § 40 KGSG.
34 § 42 KGSG.
35 § 438 Abs. 1 Nos.1–3 BGB.

A declaration of will that was based on deceit can be contested for up to one year after the deceived person discovers the deception and up to, at the latest, 10 years after the declaration of will was given.[36]

A claim of the owner of a work against the current holder of the work, who did not acquire any title (i.e., a claim against the possessor of a stolen item) is time-barred after 30 years after the loss of the item (i.e., the theft).[37] However, if the possessor of the stolen item both acquired it and retained it in good faith for a period of 10 years, usucapion takes place after that 10 years and the original owner can no longer reclaim the stolen item.

iv Alternative dispute resolution

Alternative dispute resolution in the field of restitution has a certain tradition in Germany because of the existence of the Advisory Commission (see Section III.ii).

In recent years, alternative dispute resolution has also been discussed and put in place in areas of art law other than restitution. There are several arbitration bodies worldwide that deal with art-related cases from different angles, including WIPO[38] (as far as intellectual property and copyright disputes are concerned) and the recently inaugurated international arbitration body specialising in art matters, the Court of Arbitration for Art, which is based in Rotterdam.[39]

In addition, certain national arbitration organisations such as the German Arbitration Institute have expressed an interest in alternative dispute resolution for art-related cases.[40]

IV FAKES, FORGERIES AND AUTHENTICATION

Even prior to the spectacular *Beltracchi* case, which had its epicentre in Germany but affected dealers and collectors worldwide, the fear of fakes, forgeries and inauthentic art was, and remains, an issue in the art market. Forgeries raise complex legal questions, not only regarding criminal law.

According to the chapter in the German Civil Code dealing with the sale of goods, a thing is free from material defects if, upon the passing of the risk, the object has the agreed quality.[41] Therefore, in the context of an authenticity issue, it becomes key to establish what exactly the parties have agreed upon regarding the authenticity of a work of art. Such an agreement does not necessarily need to be explicit, it can also be implied (e.g., by referring to expert opinion, a catalogue raisonné, an artist's signature or a certificate of authenticity during the sales negotiations or in a catalogue of an auction house). German courts, however, tend to focus on the exact details of the individual case and are sometimes hesitant to assume a binding agreement regarding the authenticity of an item. According to German law on sales of goods, if the quality (or, in this case, authenticity) has not been agreed upon, the object (or, in this case, the artwork) is considered to be free of material defects if it is suitable for its customary use and if its quality is usual in things of the same kind and the buyer may expect

36 § 123 Abs. 1 BGB.

37 § 197 I Nr. 2, 200 BGB.

38 World Intellectual Property Organization.

39 www.cafa.world/cafa/about_us/.

40 In 2018, the institute's international autumn conference was exclusively dealing with ADR in art-related matters.

41 § 434 I S. 1 BGB.

this quality in view of the type of the thing.[42] To determine the quality that the buyer can expect, public statements made by the seller – again, references to expert opinion, a catalogue raisonné, etc. – can play an important role when assessing if a work of art is defective in the legal sense.[43] If the item is defective, the buyer has an array of rights, most importantly the right to revocation of the agreement[44] or to demand damages or reimbursement of futile expenditure.[45]

In addition to these specific remedies regarding a purchased item that is defective, the buyer can, according to the general rules of civil law, retroactively cancel his or her declaration of will under certain circumstances. Most relevant in the case of forgeries is the retroactive cancellation in cases of deception,[46] a right that can be exercised for up to one year upon becoming aware of the deception and, at the latest, up to 10 years after having given the declaration of will (i.e., conclusion of the contract). The consequence of such a cancellation is the reversal of the transaction according to the civil law rules governing unjustified enrichment.[47]

V ART TRANSACTIONS

i Private sales and auctions

There are no specific rules for private sales. Depending on the specific terms, the transactions for such sales can be legally structured in different ways, such as a simple sales contract or, if an intermediary is involved, as an agency or a commission, following the rules laid down in the Commercial Code.

Auctions are regulated by public law regulations; to conduct auctions, an auctioneer needs a permit.[48] Auctioneers' ways of doing business are regulated in specific public law directives.[49]

From a legal perspective, one of the main differences between private sales and auctions is the fact that an auctioneer can transfer title to a good-faith purchaser when the item is sold at a public auction, even if the item was stolen.[50] In a private sale, however, the buyer has more options for negotiating contractual guarantees.

ii Art loans

For works on loan in museums in Germany, there is the possibility of applying for immunity from seizure.

To 'immunise' artworks that are temporarily on loan for a public exhibition or other forms of public presentation (e.g., research purposes) against the possibility of being seized, the owner can apply for a legally binding commitment to return cultural property, which is

42 § 434 I S. 2 Nr. 2 BGB.
43 § 434 I S. 3 BGB.
44 § 437 Nr. 2 BGB.
45 § 437 Nr. 3 BGB.
46 § 123 BGB.
47 § 812 ff BGB.
48 § 34b Absatz 1 der Gewerbeordnung.
49 Versteigererverordnung vom 24 April 2003 (BGBl. I S. 547), die zuletzt durch Artikel 101 des Gesetzes vom 29 March 2017 (BGBl. I S. 626).
50 § 935 Abs. 2 BGB.

issued by the highest federal authority (usually the Ministry of Culture of the federal state in which the work will be shown) in consultation with the Federal Government Commissioner for Culture and Media.[51] The application for such a legally binding commitment needs to be submitted in a timely fashion before the cultural property is imported; the duration of immunity from seizure shall not exceed two years but can be extended to up to four years in justified exceptional cases.

The effects of such immunity from seizure are many and they do grant far-reaching protection.

a No conflicting third-party rights to the cultural property may be asserted against the lender's right to the return of the cultural property, which guarantees far-reaching protection against seizures during its stay in Germany.

b Legal action for recovery, arrest, attachment or seizure as well as official acts of enforcement or seizure are not permitted before the cultural property is returned to the lender.

c Moreover, the legally binding commitment prevents the initiation of the process for entry in the register of cultural property of national significance.

d No export licence is needed for the return of the property.

It is important to note that the administrative decision providing immunity from seizure may not be cancelled, withdrawn or revoked after being issued and is immediately enforceable for public authorities while the cultural property is located in Germany.

Public museums in Germany often arrange for a public law guarantee of reimbursement by the state in the event of loss or damage as an alternative to taking out insurance with an insurance company, if this is acceptable to the borrower.

iii Cross-border transactions

As far as international conventions and treaties are concerned, Germany is a member of the 1970 UNESCO convention. Germany did not sign the UNIDROIT convention.

See Section III.ii regarding cultural property protection for a discussion of import and export restrictions.

As regards tax considerations regarding art acquired internationally, the following generally applies.

The current German basic VAT rate applicable to sales of artworks is 19 per cent (however, because of the pandemic, this was lowered to 16 per cent from 1 July 2020 until the end of the year), unless an artwork is bought directly from the artist or the artist's heirs, in which case a VAT rate of 7 per cent applies (currently lowered to 5 per cent).[52]

If the seller is an entrepreneur whose turnover exceeds a certain threshold, any sale of goods that takes place in Germany is subject to German VAT. The sale of goods is regarded as taking place in Germany if the goods are located and sold in Germany.

For non-EU resident buyers, a VAT exemption applies in certain situations (assessed on a case-by-case basis) if the goods are bought in Germany and taken to the home country of the non-EU resident buyer or if the goods are delivered there directly.[53]

51 § 73 ff KGSG.

52 § 12 Abs. 2 Nr. 13 German VAT Tax Code (UStG).

53 § 4 Nr. 1(a) UStG in connection with § 6 UStG.

Deliveries to entrepreneurs in another EU country may, under certain conditions (assessed on a case-by-case basis), elect for an exemption, so that the sale is exempt from German VAT and the VAT of the other EU state applies instead.[54]

Import from a non-EU state might give rise to import VAT as well as customs duties.

Regarding customs duties, there is the possibility of temporarily importing artworks for less than 24 months without any customs duties being charged if they are being imported for public exhibition and sale.[55]

iv Art finance

Certain banks in Germany offer loans that have artworks as collateral. The legal structure used for the collateral is a pledge in most cases, which means that the artworks have to be stored with the bank. As there is no register of security interests in Germany and because of the possibilities of good-faith acquisition mentioned above, most banks refrain from using other legal structures that would allow the artwork to remain with the beneficiary of the loan. Some banks make exceptions in specific circumstances, however.

Similarly, some companies and dealers offer loans to their clients. If this is done on a regular basis, a banking licence might be required under certain circumstances.

The art trade as well as art storage warehouses are subject to the money laundering regulations of the updated German Anti-money Laundering Code,[56] which transposes the new rules of the EU Fifth Anti-Money Laundering Directive into national law. In practice, this means a certain administrative burden for the art trade, such as the obligation for a photocopy to be made of the personal identification card or passport[57] of any client involved in a transaction or series of connected transactions involving a value of €10,000 or more; the photocopy must be kept for five years[58] after the end of the contractual relationship. If the buyer is a legal entity, not a natural person, it is necessary to inquire as to who is the ultimate beneficiary (known as the know-your-client check), to document this inquiry and keep the documentation for five years. In cases of doubt or if the ultimate beneficiary is not indicated in the transparency register, the art dealer must make enquiries with the national Financial Intelligence Unit.[59]

VI ARTIST RIGHTS

i Moral rights

According to German copyright law, the moral rights of the author consist of the rights:

a to publish a work for the first time;[60]

b to be named (or not to be named) as the author (attribution right);[61] and

c to ensure that the work is not distorted.[62]

54 § 4 Nr. 1b UStG in connection with 6a UStG.

55 With an ATA carnet or without the ATA proceedings; in the latter case, generally a security has to be provided.

56 § 2 Abs. 1 Nr. 13 of the German Anti-money Laundering Code (GWG).

57 § 12 GWG.

58 § 8 GWG.

59 Financial Intelligence Unit; see § 27 ff GWG.

60 § 12 German Copyright Act (UrhG).

61 § 13 UrhG.

62 § 14 UrhG.

The moral right to ensure that a work is not distorted often plays a role in the context of works of architecture, if a building is later modified or changed, as well as with public artworks, especially if they are installed on buildings.

Moral rights expire 70 years after the author's death.

The issue as to whether removal and destruction of a work of art constitutes a distortion was highly disputed until 2019, with most scholars and case law being of the opinion that the owner of an artwork is free to destroy it, with destruction not being a form of distortion. This case law was changed in 2019: the Federal Court of Justice pointed out that the provision establishing the author's right of defence against distortion of the work[63] protects the intellectual and personal interest of the artist regarding the sheer existence of the work and the Court came to the conclusion that the protective scope of this rule includes the right of the author to defend himself or herself against the destruction of his or her work, possibly even if the rightful owner wishes to destroy the work of art, albeit the owner's own property. So the Court made clear that the destruction of a work of art falls under the scope of Section 14 of the German Copyright Act, destruction being the most severe form of distortion. Therefore, it is now necessary to assess carefully in each single case whether the artist's moral right outweighs the owner's right to freely deal with his or her property.

ii Resale rights

In Germany, the artist or the artist's heirs are entitled to receive resale royalties for 70 years following the artist's death under the following conditions.

If the original of an artwork or of a photographic work is resold and if an art dealer or an auctioneer is involved as purchaser, vendor or intermediary, the vendor has to pay the author a share of the net selling price.[64] If the vendor is a person acting in his or her private capacity, the art dealer or the auctioneer involved as purchaser or intermediary shall be jointly and severally liable in addition to the vendor; however, in the relationship between the vendor and art dealer or auctioneer, it is the vendor alone who shall be liable for payment.

This rule does not apply for sales of less than €400 or to architectural works and works of applied art.

The extent of the selling price share gradually decreases; it starts at 4 per cent for a selling price of up to €50,000 and goes down to 0.25 per cent where the selling price exceeds €500,000. The share cannot be more than €2,500, however, regardless of how high the selling price is.

To be able to assert a claim for resale rights, the law provides for a right to request the provision of information from an art dealer or auctioneer (e.g., the amount of the selling price) regarding past sales of the artist's work (during the past three years); this includes the name and address of the vendor, if necessary for the assertion of the claim. An art dealer or auctioneer may refuse to provide the name and address of a vendor if the dealer himself or herself pays the share to the author. Such an information request may only be made by a collecting society, which can even ask for access to the account books or to other documents if there is reasonable doubt as to the accuracy or completeness of the information provided.

63 § 14 UrhG.

64 § 26 UrhG.

iii Economic rights

German copyright law provides as a principle that the author of a work should be appropriately remunerated for its exploitation.

German copyright law[65] provides for the following economic rights:

a the right to make a work available to the public;
b the right of distribution;
c the right of reproduction; and
d the right of broadcasting.

Generally speaking, each use of an artwork or its reproduction, other than exhibiting the artwork, requires the prior consent of the artist.

According to a recent case currently still pending at the European Court of Justice, this might also be true for 'framing'. According to Advocate General Szpunar, the embedding of works from other websites in a web page by means of automatic links (inline linking) requires the authorisation of the holder of the rights in those works.[66]

Reproduction rights as well as the broadcasting rights of artists are often administered by the German copyright collecting society, VG Bild Kunst, or its international sister copyright collecting societies.

According to German jurisprudence, total buy-out contracts are regarded very critically and in most cases viewed as being invalid.

VII TRUSTS, FOUNDATIONS AND ESTATES

There are different options when it comes to keeping a collection or an artist's legacy together.

The classical option is to set up a private foundation. However, the assets of the foundation must guarantee that the foundation can pursue its purpose in a self-sustaining way. Therefore, and particularly in times of very low or even negative interest rates, it takes a considerable financial effort to set up a foundation. In addition, the foundation must have a long-term objective. In all, it can be said that a foundation is not necessarily the most flexible structure.

Alternatively, it is also possible to set up a limited liability company or an association or other type of entity.

All such entities can, under certain conditions, apply for official non-profit status to be able to receive charitable gifts and obtain certain tax benefits. No gift tax or inheritance tax applies to gifts or bequests to non-profit organisations and non-profit museums.

To give or bequeath artworks can be beneficial as far as gift tax or inheritance tax (which are actually provided for in one and the same statute) is concerned: in general, the rate of gift tax or inheritance tax is currently levied at up to 30 per cent, or even 50 per cent in certain cases, depending on the asset and the degree of kinship of the parties. Transactions concerning art gifts or bequests of artworks can be exempted from the applicable tax to the

65 § 15 ff UrhG.

66 However, embedding by means of clickable links using framing technique does not require such authorisation, which is deemed to have been given by the right holder when the work was initially made available. The same applies even where that embedding circumvents technological protection measures against framing adopted or imposed by the rights holder; see press release regarding the opinion of the Advocate General: https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-09/cp200103en.pdf.

extent of 60 per cent, or even 100 per cent under certain conditions, if there is a public interest in safeguarding the artworks and if they are publicly accessible for the purpose of educating the general public for at least 10 years.[67]

There is no such legal entity as an 'estate' in German law. If an artist or a collector, for example, dies without having provided for any of the options mentioned above, the heirs simply step into the shoes of the artist.[68]

VIII OUTLOOK AND CONCLUSIONS

Art law in Germany is a complex field, as very different kinds of general legal rules apply, stemming from civil law, commercial law, public law and criminal law, as well as certain special legal rules (e.g., those concerning cultural property) and finally external legally established rules, such as the Washington Principles. Art law in Germany is permanently evolving through case law and new legislation.

67 § 13 Abs. 1 Nr. 2(a) and (b) Inheritance Tax and Gift Tax Law.

68 § 1922 BGB.

Chapter 16

GREECE

Dimitris E Paraskevas[1]

I INTRODUCTION

Greece has produced great artists and collectors throughout the past 2,500 years or so. Other than works of the Greek antiquity, which are not traded in Greece for legal and commercial reasons, the artists El Greco, Kounelis (from the Arte Povera movement), Rallis (the Orientalist), Takis (with exhibitions at the Tate in London and Palais de Tokyo in Paris), Chryssa and Samaras, both Greek-American artists, Moralis, Gikas, Tsarouchis, Akrithakis, Lytras, Gyzis, Iakovidis, Volanakis, Altamouras and Fassianos are among those whose works have been traded successful on the art market in Greece and abroad.

In addition to sales of Greek artworks, most of which fetch prices below €1 million, Greece's contribution to the international art market includes some of the world's leading collectors of non-Greek artworks. The Cézanne painting *The Card Players* sold to the royal family of Qatar for around US$250 million was one of the Goulandris collection masterpieces, and the Niarchos collection, worth several billion dollars, is arguably the best privately held Impressionists collection in the world. Notable among the numerous other significant Greek collections are the Ioannou collection (a patron of Jeff Koons and George Condo among others), the Economou collection, the Martinos collection and the Daskalopoulos collection.

Bonhams international auction house holds dedicated 'Greek sales' twice a year in London with the help of leading Greek experts Art Expertise SA, while Christie's and Sotheby's often include Greek works in their European sales. The leading local auction house, Vergos, specialises in books and philhellenic materials.

There are about 30 established galleries in Greece, with Bernier, Zouboulakis, Breeder and Kappatos being, perhaps, the most well known.

The market perception is that only about 20 per cent percent of the works traded become public knowledge as, in addition to auction house and gallery sales, collector-to-collector transactions or direct transactions with the artist or the artist's estate are not uncommon in the Greek market.

The number of collectors and the domestic market in Greek artworks are small, with annual turnover of probably less than €10 million, whereas the scale of the international market in Greece (i.e., for international artworks) and the Greek collectors operating in this sphere are pretty substantial. One should not forget that about 50 per cent of Greeks reside abroad and Greek shipping is number one in the world, with many billionaires, some of whom have both a passion and an eye for the arts.

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Art transactions are contracts of sale governed by the provisions of the Greek Civil Code (which is similar to the German and Swiss ones) and the Code of Civil Procedure when transactions are carried out locally. Otherwise, English law is the law most commonly chosen by the parties in transactions. With regard to antiquities, there is a market in New York and as a result US law is applicable in these cases.

Disputes are usually related to tort, fakes, intellectual property and breach of compulsory law provisions in relation to antiquities and works from the Byzantine period (mostly icons). Perhaps the most publicised case was *Diamantidis v. Sotheby's*. Diamantidis, a Greek shipowner, claimed successfully that works he had bought at auction at Sotheby's by a Greek artist named Parthenis were in fact fakes. This was an unfortunate incident for Sotheby's, which has had a respected presence in the Greek market for decades.

II THE YEAR IN REVIEW

Clearly, the covid-19 situation has been the hot topic of 2020 and there have been no other local developments that have had such a major impact.

There have not really been any distinct trends in art law in Greece over the past year, although transactions have been subject to greater scrutiny from an anti money-laundering perspective, as is the case in general internationally.

Yiannis Moralis is perhaps the artist whose work is most in demand locally, with works easily fetching between €200,000 and €500,000. Allegedly, there are works that have exchanged hands for just under €1 million.

Greece has seen a couple of significant thefts and criminal law-related cases, including the purchase of a manuscript that proved to have been stolen from a monastery years ago. The collectors established that they had no knowledge of the crime and could not have anticipated that the work was stolen, as there was no description connecting the work with Greece in the auction's catalogue, so no charges were pressed against them.

Finally, an offer of several hundred million euros was made for a masterpiece in one of the country's most well-known collections but was not successful, as the owners were not interested in selling the work at any price.

III ART DISPUTES

i Title in art

The Greek Civil Code regulates contracts of sale in Article 513 et seq.

In accordance with a contract of sale, a seller has the obligation to transfer ownership and possession of the artwork and the buyer to pay the agreed price.

Title passes according to the stipulations in the contract of sale.

If a buyer buys a work remotely (e.g., by participating in an auction) the buyer, as a consumer, has the right to withdraw from the sale within 14 days of the purchase. Clearly, a bidder who behaves in this way may be blacklisted, so the exercise of this legal right ultimately may not be commercially beneficial.

If a buyer buys from, for example, a gallery a work that proves not to meet the advertised criteria or to be defective, the seller would have to repair, replace or reduce the price of the work or return the purchase price to the buyer.

Good faith plays a role, with the buyer assumed to be acting in good faith when buying at an auction or from a gallery.

ii Nazi-looted art and cultural property

There are no specific provisions or precedents on Nazi-looted art in Greek law. Greece has publicly suggested that it has claims against Germany in respect of looted art, but it has never pursued any such claims (perhaps reflecting the fact that Germany is Greece's number one trading partner). Similarly, Greece has stated that it has a claim against the British Museum for the Elgin Marbles, also known as the Parthenon Marbles, but it has never pursued this claim, contrary to the advice of high-profile barrister Amal Clooney.

iii Limitation periods

Generally, there is a five-year limitation period from the day of the transaction, which may be extended if the buyer formally informs the seller of defects within the five-year period.

The position with regard to looted art is not totally clear and there is a view that there is no limitation period in cases of this kind – such as that of the Parthenon Marbles.

iv Alternative dispute resolution

There are provisions and procedures for resolving disputes via arbitration or mediation. Law 4640/19 encourages mediation in general, while a mediation effort is now mandatory for amounts in dispute in excess of €30,000.

Sadly, there are no specialised art mediators and the local field of experts is quite thin.

IV FAKES, FORGERIES AND AUTHENTICATION

Greek law provides protection at both the civil and the criminal law level. From a civil law perspective, a buyer can request that a transaction is reversed, the price adjusted, the seller provide another artwork or rectify defects (although that is generally not possible in the case of fakes).[2]

In addition to the above, a seller may be prosecuted for fraud or forgery if the transaction in question comes to the attention of a prosecutor or the buyer (or another) files a criminal complaint.

Warranties are regulated as in other civil law jurisdictions. A seller warrants title and authenticity by law as a matter of course, even if there is no express warranty.

The roles of experts, artist foundations and catalogues raisonnés are no different from those in any other mature market.

V ART TRANSACTIONS

i Private sales and auctions

The dispute that may arise from private sales and auctions locally are subject to the provisions of the Greek Civil Code and the Greek Code of Civil Procedure. The Greek Consumer Protection Law[3] also applies.

According to the Consumer Protection Law, a buyer may change his or her mind within 14 days of the date the sale took place. This period may be extended to one year if the seller did not inform the consumer of this right to change his or her mind. This right is

2 Article 534 Greek Civil Code.

3 Law 2251/1994.

also applicable to online auctions and purchases (e.g., from eBay), in which case, the right of withdrawal commences on the day the consumer receives the artwork. It follows that if a consumer exercises this right, he or she is entitled to the return of the purchase price.

ii Art loans

There is some growth in this market; however, the market domestically is in its infancy and at present artworks on loan may be subject to seizure.

iii Cross-border transactions

Cross-border transactions are generally governed by English law, while the provisions of Greek private international law may also play a role. A major concern locally is what will happen when the United Kingdom finally exits the EU, in particular with regard to works purchased in the United Kingdom or imported from, for example, the United States via the United Kingdom.

For an artwork to be exported, a licence is required from the National Gallery. Antiquities and icons are subject to special regulations, which generally restrict their export. This is also the case for a handful of other artists' works, (e.g., the artist Theophilos), which form part of the list of domestic cultural treasures.

Greece has ratified the following related international conventions and implemented them in national law:

a the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict;[4]

b the Convention Concerning the Protection of the World Cultural and Natural Heritage;[5] and

c the Convention for the Protection of the Architectural Heritage of Europe.[6]

Moreover, the following national laws are applicable:

a Law 3028/2002 defines matters related to the protection of cultural heritage and, in particular, matters related to the access to, reproduction and disposal (for simple or further use) of the reproductions of cultural monuments;

b Law 3317/2005 on ratification of the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict;

c Law 3348/2005 on the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects;

d Law 3378/2005 on the revised Convention for the Protection of the Architectural Heritage of Europe;

e Law 3520/2006 on the Convention on the Protection and Promotion of the Diversity of Cultural Expressions;

f Law 3521/2006 on the Convention for the Safeguarding of the Intangible Cultural Heritage; and

g Law 3658/2008 defines measures for the protection of cultural property.

4 Law 1114/1981.

5 Law 1126/1981.

6 Law 2039/1992.

Postal items upon being imported from third (non-EU) countries in the customs territory of the EU, regardless of the type of their content, are subject to customs control and customs clearance, if required, in accordance with customs legislation. Artworks belong to this category of items and are subject to customs clearance and to value added tax.

iv Art finance

Although in theory some local banks provide art finance services, in practice there is no local art finance 'market'. Major collectors may use the facilities of international banks, which are now generally limited, or they may pledge liquid assets and invest in art.

There is no special legislation on art loans.

Greece has transposed the Fifth Anti-Money Laundering Directive[7] into national law through Law 4557/2018 and its recent amendment by Law 4734/2020, ensuring stricter controls in the financial environment, in line with the trend internationally.

VI ARTIST RIGHTS

i Moral rights

Under national law, artists have the right to exploit their artwork (property right) and safeguard their personal connection with it (moral right.)

The artist's moral rights include the right to publication, recognition, the integrity of the work (i.e., no unauthorised alteration of the work) and access.

ii Resale rights

Having transposed the Resale Right Directive[8] into the Greek legal system, Article 5 of Law 2121/93 recognises the resale right of a creator.

iii Economic rights

A creator may allow or restrict registration, reproduction and translation of an artwork and, generally, enjoys the economic rights recognised according to international practice.

VII TRUSTS, FOUNDATIONS AND ESTATES

Generally, the concept of a 'trust' as a legal relationship is not formally recognised in Greece. However, there is an understanding of the concept and legislation has developed to treat trusts as taxable entities. Distributions are taxed as dividends (at 5 per cent), but the transfer of assets for the formation of a trust is viewed as a gift. This is a complex area. In a nutshell, wealthy Greek collectors have become non-residents of Greece and have settled trusts and established foundations just as other international collectors do.

7 Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU.

8 Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art.

From a domestic practice perspective, contributions to a trust may be viewed as gifts, but the bottom line is that there are no established guidelines in the form of either precedent or case law.

VIII OUTLOOK AND CONCLUSIONS

Greece's awareness of the importance of its culture has in recent years been reflected in a renewed emphasis on investing in its museums, promoting cultural tourism and modernising its legislation and practices in these areas, which offer enormous potential for development.

The domestic market is likely to remain small while financial conditions (as in many parts of the world) continue to be characterised by increased inequality. Some works will rise and rise in value, while others will be sold for next to nothing. Greek collectors will continue to play a significant role in the international market and new wealth will generate demand for new collections, artists, galleries, etc.

As part of the EU, Greece will follow and adopt European legislation, while the country's efforts to introduce a Greek non-domiciled tax resident regime (following the example of the United Kingdom and other countries such as Portugal and Italy) and to welcome pensioners will put pressure on the system to develop a greater level of depth and sophistication.

Chapter 17

HONG KONG

Angus Forsyth[1]

I INTRODUCTION

Twenty-first century Hong Kong has a growing and increasingly vigorous art scene.

There are two principal cultural concepts embraced here, which are, first, the law relating to what one might describe as cultural objects being tangible, physical facts that by being of a tangible and physical nature excludes literature and music per se but can and does include their physical means of expression such as musical instruments and rare books.

The real but disembodied second concept is concerned with what might be described as 'cultural heritage' as a conceptual essence of any realised intangible asset of or appertaining to the software comprising what a person appreciates in his or her life as his or her surroundings and environment.

The realistic and accepted status of both of these concepts in the Hong Kong community has been a slow one to take off as will be seen but is now a strong and firmly embedded cultural reality.

Since its founding by commercially aggressive Scottish pioneers in 1841, the needs and requirements of international entrepôt trade have been the paramount focus of Hong Kong's existence.

There was an established Hong Kong museum in the 1860s but this was subsequently demolished in the late nineteenth century and was not replaced. Hong Kong became a place of fast trade, horse racing and society balls – in short, a cultural desert.

Following the end of the Second World War in 1945, Hong Kong, with a population then of some 600,000, became an attractive magnet for refugees fleeing from the turmoil demonstrated by the Civil War in China, and huge numbers of people poured into Hong Kong with scant means to support themselves other than hard work and little time for, or interest in, the softer side of life such as any form of art appreciation.

The laws that apply to art and art-related matters today were all on the statute book but only as a utility available to businessmen for court resolution of commercial disputes. It took the huge growth in the art market to find that this body of law also flexibly applies to art market issues and is respected by all participants.

In the 1950s there were no formal degree schools or programmes in any way related to art. There were very few galleries and the Hong Kong Museum of Art did not exist.

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i Statute law

In Hong Kong, the following statutory enactments, although limited in application and effect, were and have been a revolutionary attempt to come towards and to address and create the cultural educational toolbox available to the growing numbers of people interested in and caring for cultural heritage as a bedrock to nurture arts appreciation.

Antiquities and Monuments Ordinance

This Law was first enacted in 1976 as a response to increasing cultural unrest in the community, which was a rapidly growing phenomenon of which the Hong Kong government had been entirely unaware.

The background to the Antiquities and Monuments Ordinance (AMO) was the government's vision of a massive need in a place basically formed of mountains and with very little flat land to address the fast-growing priority requirement for high-rise property development. In the absence of new developable land, this need was provided for by way of the physical destruction and redevelopment of existing built heritage into high rise. Accordingly, from the early 1970s, the Hong Kong government encouraged the demolition of the often century-old built heritage of Hong Kong of usually one-, two- or three-storey brick and granite buildings and their replacement by huge new concrete structures much better able to accommodate the growing numbers of human participators in Hong Kong life, providing new and secure environments for both commercial and residential use and with scant regard for any cultural softening in life.

However, as a legislative innovation, the AMO did introduce to Hong Kong statute law for the first time a definition of 'antiquity' to mean:

> *(a) a relic;*
>
> *(b) a place, building, site or structure erected, formed, or built by human agency before the year 1800 and the ruins or remains of any such place, building, site or structure whether or not the same has been modified, added to or restored after the year 1799.*

Two interesting real points emerged from these definitions, which are, first, that in a revolutionary marker for Hong Kong legislation the AMO recognises the existence of a 'relic' and second, given that Hong Kong was ceded to the United Kingdom in 1841, the AMO provides for no recognition of antiquity in the buildings of the colonial period after 1841. Accordingly, the AMO takes no position on preservation of buildings from the colonial era.

However, 'relic' is defined as:

> *(a) a movable object made, shaped, painted, carved, inscribed or otherwise created, manufactured, produced or modified by human agency before the year 1800, whether or not it has been modified, added to or restored after the year 1979; and*
>
> *(b) fossil remains or impressions.*

For the purposes of art law, 'relics' were and are covered by the AMO but with the limited effect to enact that the ownership of every relic discovered in Hong Kong after the commencement of the AMO vests in the government from the moment of discovery.

This automatic vesting in the government upon discovery of a relic in Hong Kong can be disclaimed by the Secretary for Development empowered under the AMO and, if so

disclaimed, government ownership of that relic shall be extinguished and its ownership shall vest in the person who, but for the enactment of the AMO, would otherwise have been the owner thereof.

Section 11 of the AMO, without specific inclusion of built heritage or relic, provides that any person who discovers or knows of the discovery of an antiquity shall forthwith report the discovery to the Secretary for Development or to a designated person being either the officer in charge of a police station or any person specified by the Secretary for Development by notice in the Hong Kong Government Gazette.

Apart from the discovery of an antiquity, the AMO provides for the establishment of the Antiquities Advisory Board (AAB) and the AAB is charged to advise the Secretary for Development on any matters relating to antiquities or any proposed monuments and under Section 22 the Chief Executive is empowered to make regulations on a wide range of subjects that, for our purposes, regulate the conduct of excavations and searches for antiquities and provide for the management and control of antiquities.

Environmental Impact Assessment Ordinance

The Environmental Impact Assessment (EIA) Ordinance effectively requires property developers to comply with impact assessment supported by detailed plans of potential environmental damage to be caused to a site of cultural heritage by the property development proposal. Although the requirements of the EIA Ordinance are a step in the right direction in recognising popular appreciation of heritage sites and providing a measure of safeguard against wanton property development in this most congested of cities, its direct effect upon art is small but in terms of value to the community, the results of the assessment are indirect and extremely limited.

ii Legislation as a support for growth

Section I summarises the legislated protection in Hong Kong for the ownership of any antiquity or relic, the licensing of those who search for antiquities and for the gazetting of monuments, which, in terms of action by the legislature, is an extremely limited venture into antiquity protection but has established and put firmly in place an underpinning of Hong Kong laws that have had the effect of gradual growing awareness of arts and culture recognition and protection with ever-deepening roots.

iii The growth of popular arts appreciation

The Development Bureau of the Hong Kong government set up a Commissioner for Heritage with a brief to conserve and revitalise the heritage of the city through imaginative reuse of unique heritage buildings. This office has grown into a series of specialised departments and serves as a focal point of contact both locally and overseas.

In the late 1970s, the then Governor of Hong Kong lent a responsive ear to the growing demand for arts appreciation and the government granted a limited plot of land on the Wanchai reclamation for the construction of an arts centre. A purpose drafted Ordinance, the Hong Kong Arts Centre Ordinance, was enacted and public funds were found to subvent and top up those being raised by a body of enthusiastic volunteers who had laboured hard and successfully against the hitherto unshakeable inertia borne of commercial priority.

Today the Hong Kong Arts Centre promotes contemporary performing arts, visual arts and film and video arts and is an accredited educational institute.

This scene was further well set such that by the early 1980s a much larger piece of immediately adjacent land was set aside for the establishment of the Hong Kong Academy for Performing Arts, which, at the time of inception and still today, is the leading arts academy in Asia for educating, training and graduating many of the leading figures in a whole variety of performing arts disciplines and arts supported by them.

In November 2006, the government took a decision to extend the Hong Kong Island north shore reclamation out into the harbour from the Central District, effectively eliminating the harbourside Queens Pier, which had been the landing place for more than 100 years of British colonial governors setting their first foot upon Hong Kong Island following their appointment. Much to the government's surprise an enormous underswell of opposition, first to the demolition of the somewhat mundane practicality of the Queens Pier structure and, second, popular clamour against its subsequent relocation, emerged to the point that young local Chinese citizens of Hong Kong sat under the bulldozers with every intention of stopping the destruction. They failed in their immediate project but the impact they made has taken root and imbued the entire population with a respect for the historical development of Hong Kong's built heritage in the way that nothing else could have done. Following this, the AMO has designated 114 monuments with the highest level of protection and listed 134 historic buildings under grade one (outstanding merits), grade two (special merits) or grade three (some merits) status.

With an even greater accent on sites and site importance in the Central District area, the former Central Hong Kong Police Station and Central Magistracy, with splendid buildings dating from the mid to third quarter of the nineteenth century, were mandated by the government to the Hong Kong Jockey Club for conservation and preservation. Following significant expenditure over a 10-year period, the result has been the conversion of the former police station and Central Magistracy building to Tai Kwun, an extremely popular art and lifestyle centre.

Now, not only do tangible items officially qualify for cultural heritage status and respect, as the Leisure and Cultural Services Department of the Hong Kong government has devised and published the Representative List of the Intangible Cultural Heritage of Hong Kong, led predominantly by both traditional and modern songs and festival celebrations.

There has also been a distinct development of the 'Hong Kong artist'.

Since the 1950s, when artists active in Hong Kong painted at night, having paid for their subsistence through a day job, independently creating works of art in their own disciplined manner, there has been a development from that foundation, which called upon inspiration that was both self-inculcated and influenced by reference to overseas artwork.

However, the generation born in Hong Kong after 1946 began to come of age in the 1970s with a growing awareness of productive creation nurtured under the umbrella that the East/West symbiosis so well reflected in Hong Kong. This fertilised the growing interest in art and art appreciation, which began to flower and has gone from strength to strength since.

Sotheby's auction house of London opened its Hong Kong office in 1974 followed by Christie's in the mid-1980s.

Until these times, law and art had no real meeting ground. However, and particularly under the influence of developments in China fathered by the practical liberation and 'opening up' under the reform-minded practical eye of Deng Xiao Ping, the art world in China moved from the Maoist tenets of restricted 'realist' art to a flowering of cross-border connection and talent that very quickly saw both China and Hong Kong develop impressive forward direction.

With the active progression of developments of identifiable artist creation of what became 'definitive art', the appreciation of what was happening began to coalesce into university interest, galleries opening and business being carried out in antique and curio shops, all combining to satisfy an incipient demand leading to many well-attended exhibitions and auction sales.

A gradual development of art appreciation occurred over the following 20 years, with the availability of art galleries as outlets for sale of original artwork growing and developing exponentially to the point of a genuine identity of Hong Kong art created and produced by Hong Kong artists whose number grows year on year and all of whom mature in striking ways to maintain an increasingly admired and patronised high intellectual and original standard in their creations.

The University of Hong Kong, the Chinese University of Hong Kong, the City University of Hong Kong, the Baptist University and the Hong Kong University of Science and Technology all actively promote fine arts in specialised departments and graduate numbers of educated arts-appreciative and arts-competent artistic minds that frequently commence dedicated artistic careers in Hong Kong, whether in the arts trade or in management. All this in an environment of widening appreciative interest where this career development is, increasingly, a practical reality.

The Hong Kong Museum of Art, the major repository of the traditional arts of China, underwent a five-year closure, emerging in 2019 with a splendid presentation of all its holdings.

On a large piece of reclaimed land from the harbour at the tip of the Kowloon Peninsula, the government has established an independent statutory body to plan, set up, build, stock and organise a modern art museum under the name 'M Plus' (M+ museum). The funding for this building and surrounding art venues has been enormous and the museum building itself is scheduled to open in 2021. It is composed of several thousand major works of art by, principally, artists in China, Hong Kong, South East Asia and other global territories and countries and is said to become an international landmark of art appreciation constituting a final flourish of maturity of the Hong Kong art appreciation scene.

Local art galleries have enjoyed very active success over the past 20 years and mount regular exhibitions of both local and overseas artists.

Major international art galleries from the United States, Japan, the United Kingdom and Europe have established their own gallery outlets in Hong Kong and they are very well patronised by interested buyer parties from both Hong Kong and overseas.

II THE YEAR IN REVIEW

The hottest topic in the Hong Kong art market in 2020 has been the almost total and successful turning of both the auction market and often huge artwork exhibitions to the internet.

For many years and up to 2019, the major auction houses in Hong Kong of Christie's and Sotheby's, together with Bonhams and the fast-growing China mainland auction house of China Guardian, habitually held their twice yearly specialist sales of Chinese antiquities, modern and traditional Chinese paintings, jewellery and wine by taking huge spaces in the Hong Kong Convention Centre, for the benefit of a huge international live market.

Hong Kong, in common with many – if not most – jurisdictions worldwide, suffered an initial January 2020 outbreak of the coronavirus and suffers further resurgent outbreaks

and, in common with all governments worldwide, imposes increasingly strict regulation of social distancing for physical activity out of doors and in relation to places of entertainment and food consumption.

The standard forms of restriction, requiring the wearing of face mask coverings on public transport and in shopping centres, the banning of more than four persons per restaurant table with social distancing of at least two metres between each table and the dampening – not to say liquidating – effect on the previously bubbling and active art market, would have been extreme but the art market – in common with many other markets – has been saved by the internet.

Accordingly, all auction houses are able to choose either to have the traditional physical viewing period of up to one week followed by personal live auction sales in the Hong Kong Convention Centre or in their own spacious office premises or to hold their auctions online. The skilful arrangement and organisation of online auctions has become a state of the art practice in Hong Kong and indeed worldwide and not only for the sales of art but also for the holding of exhibitions of all manner of related subjects given that all public museums, galleries and art spaces are shut.

The world famous Art Basel Fair held three times a year in Hong Kong, Miami and Basel, was very quick off the mark regarding the fixed dates for their five-day March 2020 Hong Kong fair. The physical fair was cancelled but Art Basel organised a very clever and very participatory structure whereby all participating galleries were connected online to all the worldwide Art Basel Hong Kong subscribers, and the news was that substantial art business was done in this way.

Having seen the successful online organisation of art exhibitions by Art Basel and others, local Hong Kong art galleries are now well attuned to holding online exhibitions in tandem with physical exhibitions in their galleries in Hong Kong.

The communication on the internet of all these explorations into art and art appreciation has begun to generate intellectual property issues with particular reference to copyright, broadcast controls, defamation issues, personal data privacy issues and possibly other avenues that the common law has historic ability to generate.

Although the market is generally agreed that there is no substitute for the physical seeing and handling of a work of art to assist the purchasing decision, the very real and very popular online option is now a fact of life and looks set to continue, although hopefully not to the exclusion of the physical arrangement of fairs in the future.

In terms of the art being dealt with, and in addition to the activities in Hong Kong of the major international auction houses, there are many international fine art dealers who have established offices and galleries in Hong Kong to cater for an increasingly large and growing art consumer market in both Hong Kong and the region. The result is that the Hong Kong venue has been a popular attraction for visitors from all over Asia. Of course, physical air travel and quarantine restrictions have brought this up-close-and-personal actual acquaintanceship to a current close. Hopefully this is temporary but, as mentioned above, the online outreach of all these galleries is strong and growing.

The government's Leisure and Culture Services Department has closely communicated with arts groups and artists during the coronavirus pandemic in the hope of offering flexibility for their performances.

It is accordingly clear that from a position of almost no interest in or support for the arts some 40 to 50 years ago, the Hong Kong government is now an active supporter and funder of the maintenance and continued growth of the lively Hong Kong arts scene.

The demand for Chinese art at auction remains extremely strong. The strongest fields are early Ming dynasty blue and white ceramics, Song dynasty ceramics, archaic jade, modern Chinese ink paintings and modern Chinese works in the Western idiom. Good results are maintained for leading South East Asian – particularly Balinese – artists, and Japanese modern artists are extremely popular. Hong Kong artists are themselves becoming a very successful niche focus in the market. Many of them are well established and growing in popularity.

Hong Kong has developed annual arts turnover in the hundreds of millions of US dollars and has become the third world centre for arts sales, along with London and New York.

III ART DISPUTES

i Title in art

The standard two entry routes into the art market for sellers and buyers in Hong Kong are auctions, for both antique and modern art works, and the commercial trade, particularly for the antique section of the market where the basic rule of market overt is the yardstick of market safety.

The same rules apply whether a work of art is sold by auction or in the commercial trade. Given the considerable publicity attracted to the mega-auction Hong Kong sale transactions in the public eye, there is an amazing lack of dispute in the market and there are no recent cases of substance.

ii Limitation periods

The standard and only limitation in contract established by the Limitations Ordinance is a six-year period that runs from the date the cause of action arose. This period is non-extendable.

iii Alternative dispute resolution

Under the rules of court, the parties are required by the court master at the interlocutory stage of case management of every legal action to confirm whether they have, but unsuccessfully, resorted to alternative dispute resolution. Without this confirmation, the trial cannot proceed.

Separately from the requirement of the rules of court, alternative dispute resolution by mediation is gaining in popularity largely due to its informality and the privacy of the forum in which all the dirty linen can be exchanged between the parties out of the public eye and leading to an enforceable agreement through a mediated result.

There is a large and increasing body of professionally skilled mediators and the basic disadvantage is that the parties to mediation must hire the mediation premises and hire the mediators, whereas in court proceedings the court premises are provided free of charge together with the services of the judge.

Currently, there are no specialised alternative dispute resolution organisations for mediation of disputes in art matters. However, whether in court or in private mediation, independent art experts can be called as witnesses.

iv Hong Kong sales of imported antiquities

The Hong Kong art and antiques markets have extensive local and international ramifications and there are well-known cases of important artefacts from countries such as India and Cambodia appearing on the Hong Kong market and being sold for export from Hong Kong on the order of the buyer in overseas territories.

Sometimes such items come to the notice of relevant authorities in Cambodia or India that protest, but without proper direction of such protest and its legal support there is often no available legal action of recovery.

That said, it is known for responsible museum owners to simply return the object concerned to the rightful overseas claimant, usually writing-off the loss as part of the curatorial function of the museum concerned.

IV FAKES, FORGERIES AND AUTHENTICATION

To pass off a fake, forgery or inauthentic piece as genuine is a fraudulent act under the Crimes Ordinance.

In terms of theft, the Theft Ordinance not surprisingly defines theft as the dishonest appropriation of property belonging to another with the intention of permanently depriving the other of it.

However, regardless of theft, under the Crimes Ordinance Hong Kong law provides for criminal liability for forgery. This is defined as where a person makes a false instrument (document) intending that the maker or any third party shall use it to induce another person to accept it as genuine and by such acceptance does or does not carry out some act that in either case prejudices that other person or a third party.

Conviction carries a maximum sentence of 14 years' imprisonment.

The Crimes Ordinance also provides for the offence of counterfeiting, which is restricted to currency notes or coins resembling the genuine article and reasonably capable of passing for the genuine article. This offence also extends to include the genuine article that has been altered to become capable of passing for a currency note or coin of another description.

Forgery and commission of forgery by way of or with intent to defraud is rare in Hong Kong although there are actual cases of counterfeiting currency. Notably, the HK$1,000 bank note issued by HSBC was the subject of very skilful counterfeiting some years ago with the result that HSBC has withdrawn as many as possible of the notes in circulation.

Expert witnesses can be called for either the buyer or the seller in a court case to give their opinion as to authenticity or otherwise of any particular piece.

i Common law and the market

In relation to what has become an extremely active art and antiquities market in Hong Kong, the real and fundamental impact of law is found in the statutory support of market overt and in the common law applications of management and control.

ii Transfer of title and market overt

The common law doctrine of market overt was enacted into the Sale of Goods Act in the United Kingdom. It has recently been dropped from the Sale of Goods Act in the UK but the Sale of Goods Ordinance in Hong Kong, which was substantially modelled on the UK Sale of Goods Act, continues to maintain two principal provisions on transfer of title.

The first provision on transfer of title is that where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires the same title as the seller (i.e., no title to goods the title of which has in fact never left the real owner unless, of course, the real owner is by his or her conduct precluded from denying the seller's authority to sell).

Accordingly, the crime of theft does not create an ownership in stolen goods with the thief and the transfer of title by sale provision of the Sale of Goods Ordinance acts to negative any legitimacy of title transfer by the thief.

However, the second principal provision on sale in the Sale of Goods Ordinance is that which establishes the passing of goods title in market overt.

Where goods are openly sold in a shop or market in Hong Kong, in the ordinary course of the business of such shop or market, the buyer acquires a good title to the goods provided always that he or she buys them in good faith and without notice of any defect or want of title on the part of the seller.

As is well known but not covered in detail in this chapter, the People's Republic of China has established an extensive body of statute law in its civil law jurisdiction with express application to any transactional dealing in China in cultural property, including antiques.

However, under a clear provision of the China-enacted Basic Law for Hong Kong, the law of China does not apply in Hong Kong.

Accordingly, it is a well-established fact that artefacts of Chinese antiquity are freely and openly tradeable in Hong Kong shops or markets and when there is no reason for the buyer to have any notice of any defect or want of title in the goods concerned, then good title is passed to the buyer.

As a measure of control introduced into the United Kingdom in part to address a growing trade in cultural objects from the basic world treasuries of cultural objects, such as those from Greece, Egypt, Central America and China, the United Kingdom enacted the Dealing in Cultural Objects (Offences) Act in 2003.

This Act creates a definition of 'tainted cultural objects' as meaning an object of historical, architectural or archaeological interest that is tainted if a person removes it from a building or structure of archaeological interest or its removal or excavation in its place of origin constitutes an offence.

In this chapter we go no further into the effect of that Act in the UK but it has no equivalent in Hong Kong legislation and so there is no impediment created by any such Act upon the free dealing in Hong Kong on the open market in cultural objects that, accordingly, has continued and will continue without any such controls.

As is further well known, the territory of Hong Kong is a freeport. This means that the only customs controls on movement into and out of Hong Kong are upon alcoholic spirits (not wine), cosmetics and hydrocarbon oils. All other goods are free of customs control on import into or export out of Hong Kong.

iii Warranties on sale

The Sale of Goods Ordinance provides for implied warranties that are defined in the Ordinance to be subject to the sale contract but collateral to its main purpose. The breach of such a warranty gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated.

The Sale of Goods Ordinance provides for implied conditions that, on the part of the seller in the case of sale, he or she has the right to sell the goods and an implied warranty that the goods are free and will remain free until the time when the property is to pass from any charge or encumbrance not disclosed or known to the buyer before the contract is made and that the buyer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known.

If the contract of sale enables an inference of intention that the seller should transfer only such title as he, she or a third person may have, there is an implied warranty that all charges or encumbrances known to the seller and not known to the buyer have been disclosed to the buyer before the contract is made.

There is a further implied warranty that neither the seller nor in a case where the seller should transfer only such title as a third person may have, that person nor any one claiming through or under the seller or that third person will disturb the buyer's quiet possession of the goods.

There is an implied condition where goods are sold by description that they shall correspond to the description.

Note that any implied warranty can be negatived or varied by express agreement or by the course of dealings between the parties or by usage if the usage is such as to bind both parties to the contract.

An express condition or warranty does not negative a condition or warranty implied by the Sale of Goods Ordinance unless inconsistent therewith.

From the above it can be seen that a wise seller will provide for exclusion of implied warranties under the Sale of Goods Ordinance from any transaction of sale of an art piece to the buyer.

V ART TRANSACTIONS

i Auction sales

The Sale of Goods Ordinance provides for auction sale. In the case of a sale by auction each lot is prima facie deemed to be the subject of a separate contract of sale and the sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made, any bidder may retract his or her bid.

To avoid the rigging of auction sale results, where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it is not lawful for the seller to bid himself or herself or to employ any person to bid at such sale or for the auctioneer knowingly to take any bid from the seller or any such person.

Any sale contravening this rule may be treated as fraudulent by the buyer.

However, a sale by auction may be notified to be subject to a reserve or upset price and a right to bid may also be reserved expressly by or on behalf of the seller.

Finally, where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his or her behalf, may bid at the auction.

Note, however, that sales by auction are through a middleman who is the auctioneer and his or her role is made abundantly clear in extensive auction conditions that traditionally exclude the implied warranties under the Sale of Goods Ordinance.

Although auction sales and their results of major Chinese works of art in overseas territories such as France have been the result of very substantial misrepresentation or disagreement, there is no recent similar case in Hong Kong.

ii Private sales

In another well-known case finalised in 2019, an established Hong Kong collector of Chinese porcelain had been persuaded by a fraudulent conspiracy to invest in gold in the Hong Kong unofficial board of the London gold market with repeated reports of substantial losses that

the collector was only able to finance through the sale of valuable pieces from his Chinese porcelain collection. In the High Court action brought by the collector against the alleged fraudsters, the Court was persuaded to prohibit any dealing by any of the alleged fraudsters with any of the items in the collector's collection and the case continues.

It is not unknown for buyers from China bidding successfully for works of art at Hong Kong auctions and failing to pay, but whether this is through principle, change of mind or impecuniosity is not always clear. This usually leads to legal action in Hong Kong by the auction house pursuant to its conditions of sale.

The main difficulty arising out of such occurrences is that the mainland Chinese buyer usually has a residential address in China and not in Hong Kong and there are enormous complexities that arise when a legal action is commenced in Hong Kong with a defendant whose entire locus is in China, commencing with a difficulty of arranging service of the proceedings and continuing thereafter into the fair and appropriate service of interlocutory stages of the action and eventually realising on the amount of any successful judgment.

iii Art loans

In tandem with the healthy growth of consuming public interest in the visual arts in Hong Kong, a very healthy programme of art lending has developed in both the public and private sectors.

Public sector

Hong Kong museums are in regular contact with major overseas museums for loan exhibitions. The British Museum and the Victoria and Albert Museum in London have both lent stunning works of special exhibition art from their collections for exhibit in Hong Kong museums. Major Chinese and US museums have also made substantial loans to Hong Kong museums for public exhibitions.

An exhibition of major works by the famous Renaissance artist Sandro Botticelli and his contemporaries, on loan from the Uffizi Gallery in Florence, is running at the Hong Kong Museum of Art from November 2020 to February 2021.

Private loans

Hong Kong museums are fortunate in being able to draw upon local private collections, principally of Chinese art and archaeology, for very effective catalogued display in public and university museums.

iv Art theft

Surprisingly, given the enormous market value of works of art traded, collected and housed in Hong Kong, from authentic Chinese works of art from many millennia ago to non-Chinese art works in many different media, art theft is not common in Hong Kong. Most collectors and others concerned in the trade have excellent photographic records of the assets.

However, in September 2020, a theft of massive pecuniary value was committed by a small group. Among the principal targets stolen by the thieves were a large calligraphy scroll written personally by Chairman Mao Tse-Tung, whose calligraphy is extremely famous, and a number of exceedingly rare 1960s-issue Chinese Cultural Revolution postage stamps.

v Cross-border transactions

The principal international cross-border restriction on 'illicit import, export and transfer of ownership of cultural property' is provided for in the UNESCO 1970 Convention as an international treaty signed on 14 November 1970. It came into effect on 24 April 1972 and was ratified by China on 25 September 1989.

The accession to this Convention by China – as in every other country and territory to which it has been extended – sets a date prior to which any trade in a cultural object is prohibited. The Convention does not apply to any trade after 1970 and what it has given rise to is a fascinating body of practice relating to the provenance or licit origin of the first marketing of a work of art.

China has subsequently published a report on the 1970 Convention declaring that in its new Law of the People's Republic of China on the Protection of Cultural Relics, amended in 2002, the definition of 'cultural property' is broader in scope than the definition in the 1970 Convention because it is expanded to include not only movable objects but also sites and monuments. That report was the first in a series setting out the extensive framework and ramifications of China's activities in the entire cultural property field.

However, China has not extended the 1970 Convention to Hong Kong. Effectively, therefore, and given that Hong Kong has been an integral part of the People's Republic of China since the 1997 handover from the United Kingdom to the PRC, the common law system of Hong Kong continues as a separate system from the civil law system in China and the law of China does not extend to or apply in Hong Kong.

The result of this is, and has for many years been, an active traffic in cultural objects from China in the Hong Kong markets although the position taken by major auction houses in Hong Kong is that they will not sell any objects that are considered by them to have been exported from China after the 1970 Convention.

vi Tax considerations in the Hong Kong jurisdiction

There is no applicable Hong Kong taxation legislation related to cultural objects acquired in Hong Kong or internationally and brought into Hong Kong after such acquisition.

vii Art finance

Art loans are available through internet offers from both reputable overseas financing houses and financing houses in Hong Kong. Generally, the making of such loans and the transactional history of performing the loans is not a matter of public view and it is fair to say that the Hong Kong courts do not have a frequent history of adjudicating issues arising out of art loans.

VI ARTIST RIGHTS

i Copyright Ordinance

Copyright protects copyright ownership as an exclusive right in respect of, inter alia, literary, musical and artistic, graphic and photographic works for a period of 50 years from the end of the calendar year in which the author dies, and the right is an exclusive right to copy the work, issue copies of the work to the public and carry out other acts as particularised in the Ordinance.

Copyright ownership can either be with the original creator of the artistic work or any validly transferred assignee.

There are a limited number of fair dealing exceptions for educational, library and public administration use.

There is no system for registration of copyright and a copyright claim is best supported by enfacing the first publication of a relevant work with the date of its creation together with the symbol ©.

Moral rights provide that the author of a copyright literary, dramatic, musical or artistic work, and the director of a copyright film, has the right to be identified as the author or director but no third party shall have infringed this right unless the right has been asserted either generally or in relation to any specified act or description of act whether by reference to assignment or in relation to public exhibition of an artistic work.

However, the right to be identified as author or director is not applicable in relation to a computer program, the design of a type face or any computer-generated work nor in respect of a bundle of further exceptions to the right being basically where the author has consented to publication under any of these exceptions.

The Copyright Ordinance further provides for a right of an author or director to object to derogatory treatment of his or her work as specifically provided for in the Ordinance.

ii Registered Designs Ordinance

The Registered Designs Ordinance provides that a person who creates a design or, if there are two or more such persons, each of those persons, may, when a design is new, apply as the owner to register it in respect of any article or set of articles specified in the application. Computer programs and protected layout designs (topographies) are not registrable under this Ordinance.

Note that for the purposes of this Ordinance, 'design' means features of shape, configuration, pattern or ornament applied to an article by any industrial process, being features in which the finished article appeals to and are judged by the eye but expressly does not include a method or principle of construction or any feature of the shape or configuration of an article that is dictated solely by the function that the article has to perform or is dependent upon the appearance of another article of which the article is intended by the designer to form an integral part.

'Designer', in the case of a computer-aided design of a layout design (topography) means the person who made the arrangements for the creation of the layout design (topography).

Where a design is created in pursuance of a commission for money, the person commissioning the design shall, subject to any contrary agreement between the parties, be treated as the original owner of the design and where the design is created by an employee in the course of his or her employment, the employer shall, subject to any contrary agreement between the parties, be treated as the original owner of the design.

Registration of a registered design gives the exclusive right to the registered owner to make in or import into Hong Kong for sale or hire or for use for the purposes of trade or business or to sell, hire or offer or expose for sale or hire in Hong Kong, any article in respect of which the design is registered.

The period of registration of a design shall be for an initial period of five years, extendable for additional periods of five years, up to a maximum of 25 years and six months in the aggregate.

iii Resale rights

Hong Kong law does not provide for any droit de suite or resale rights and the Copyright Ordinance expressly provides that moral rights are not assignable.

VII TRUSTS, FOUNDATIONS AND ESTATES

It is possible for a collector to settle all or part of his or her collection:

a inter vivos to trustees establishing a trust for them to hold the settled collection assets on trust for designated beneficiaries; or

b by will, effectively creating the executors of the estate as the trustees for designated beneficiaries either for a life interest or as an absolute gift.

The Trustee Ordinance was amended to exclude the former rule against perpetuities and, accordingly, the effective life of a trust is unlimited.

Very often in establishing a trust it is common practice for the collector or settlor to leave either with the trustees of an inter vivos trust or with the executors of a will trust a letter of wishes that is expressed to be not binding on the trustees or executors but nonetheless expresses guidance to the wishes that the collector settlor or testator wishes to put into effect.

There is no current Hong Kong case law on the effective establishment of either inter vivos trusts or will trusts of art assets that are accordingly effective and binding.

VIII OUTLOOK AND CONCLUSIONS

The use of the internet for online auctions – either exclusively or as an optional alternative to physically bidding in the room or telephone bidding – is fast becoming a staple mode of audience response to an e-invitation from auction houses.

Quite apart from auction houses, art galleries are making available full details of available works of art for purchase and art fairs are providing individual links to separate dealers to provide the purchasing public with direct access to each dealer's listed artworks, and this appears to be a use of the internet that is well supported, efficient and accordingly likely to grow exponentially.

Chapter 18

INDIA

Kamala Naganand[1]

I INTRODUCTION

India has been synonymous with its arts in various forms. From the time of our earliest civilisation in the Indus valley, the subcontinent has been known to have artisans of extraordinary skill and creativity. Each invader brought with them local traditions and design elements that local artisans assimilated and amalgamated into elements of design that we see as the style synonymous with the Indian subcontinent today.

The Indian art market is a US$2 billion industry, which includes artisans, weavers, tribal and contemporary artists. Sixty per cent of the work artisans create is for the domestic market, while 40 per cent of the art is exported around the world. Most artisans work with designers and buying houses to export their products and have very little say in terms of pricing. In the past few years, we have seen huge interest in artisan art from the domestic market. Brands have started to work on reviving old and dying crafts.

For paintings and fine arts, there are established galleries dealing in masters, modern art, photography, etc., in all major cities, and these hold regular events, including those of an educational nature, for their patrons. In the past five years we have seen auction houses becoming popular sources for procuring artworks. These auction houses have regular sales and curate their events around festive seasons. 2020 has seen exclusive online auctions with enthusiastic turnout and strong sales.

India has been very mindful of protecting the various traditional art forms and ensuring that it supports artisans in the remote corners of the country. Each state has a handicrafts emporium that procures works from artisans local to the state and sells it in their retail outlets. These handicraft emporiums are popular with both locals and tourists. They procure ethically sourced works and have fixed prices to protect artisans' interests.

II THE YEAR IN REVIEW

2020 will be remembered as the year that brought technology into the art world. From being a highly tactile industry, it moved to a touchless system, which took some out-of-the-box thinking and creativity. Artists, artisans, galleries and auction houses moved seamlessly online and saw benefits from using technology. Artisans also understood how they could reach buyers and audiences with the help of various social media platforms, such as Instagram, Pinterest and WhatsApp. This year saw the India Art Fair go ahead, but the Kochi Biennial was cancelled. These are the largest art events in the country.

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The most notable contribution to the development of the art world in India is the setting up of private art galleries. The Kiran Nadar Museum of Art,[2] which was set up in 2010, saw how private patronage and encouragement could enhance the art ecosystem. Similar initiatives by the Piramal Museum of Art[3] through its artist-in-residence programme have generated great interest among up-and-coming artists.

III ART DISPUTES

i Title in art

Art and antiquity have wide meanings and interpretation. The connotation extends to various articles, such as paintings, books, statues, sculptures, manuscripts, objects and heritage sites as contained in Section 2(1)(a) of the Antiquities and Art Treasures Act 1972 (the Antiquities Act). The law under the Antiquities Act not only examines the 'buyer' of an art or antique object or item, but also recognises those who are in possession, by ownership, possession or inheritance.

The transfer of title in an antiquity or art item by means of an auction or a private sale is accompanied by requirements such as registration under Section 14 of the Antiquities Act. This registration is mandated in a time-bound manner of three months for a person who owns, controls or possesses such antiquity, from the date on which such item is declared an 'antiquity' by the central government through a notification. For all other persons, registration is mandated within a period of 15 days of the person owning, controlling or possessing such antiquity.

The transfer of title through purchase or by gift, and licensing, entails necessary scrutiny by the person accepting the art or antiquity in respect of its authenticity, source, origin, registration, licence and all such determinants indicating its nature and origin. The lack of necessary licence or registration will result in criminal prosecution under the Antiquities Act.

The ancient Buddha statue displayed at the High Commission of India in London is a notable instance of title claims being put forth and considered favourably in India's art heritage. In this instance a claim was put forth to the UK government and the arbitration award was in favour of the Indian government.[4]

ii Limitation periods

The limitation periods for bringing about civil claims in India is governed by the Limitation Act 1963, which contemplates a period of three years from the date of accrual of cause of action to sue as the statutory period within which a claim or suit shall be preferred. There is a fine distinction drawn between the 'date of first accrual of the right to sue' versus the 'date of accrual of the right to sue'. Article 113 of the Limitation Act prescribes the limitation period for suits or claims not falling under any specific category of the said statute to be three years from the date on which the right to sue accrues, unlike in other articles of the Limitation Act, which refer to the first instance of the accrual of the right to sue. This distinction has been

2 www.knma.in.

3 www.piramalmuseum.com.

4 'FM hands over restituted 12th Century Buddha statue to Shri Prahalad Sing Patel, Culture Minister,' Ministry of Finance, India, Press Release, 17 September 2019, https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1585346.

analysed in various cases.[5] Under Article 113, the period of limitation would be computed depending upon the last day of the cause of action arising.[6] However, while considering the limitation period for 'declarations' (title, ownership, etc.), it shall commence from the date on which the right to sue 'first' arises.[7]

Therefore, the facts and claims set out in a case will determine the applicable period of limitation in civil cases.

With respect to criminal action, the limitation for any crime punishable with imprisonment above seven years shall be while the accused is alive, and, in the case of multiple accused, while all or any one of accused is alive.

The Antiquities Act stipulates a maximum imprisonment of three years for any contravention of Section 3. Because the penal provision is less than seven years, the limitation period to initiate criminal action is three years under Sections 468 and 469 of the Criminal Procedure Code 1973, commencing from (1) the date of the offence; (2) where commission of the offence was not known to the aggrieved, the first date on which such offence comes to the knowledge of such person or any police officer (whichever is earlier); or (3) where it is not known by whom the offence was committed, the first day on which the identity of the offender is known to the aggrieved or a police officer (whichever is earlier).

Contracts for sale or purchase of art or antiquities may be in writing through contract, or merely evidenced through invoices, and in some cases only contain a record of payment in support of the sale. Agreements containing governing law clauses with Indian law as the chosen law are bound by the three-year limitation period to initiate proceedings. Arbitration clauses are said to survive the termination of the underlying contract, entitling the parties to invoke and initiate arbitration within a period of three years from the date on which it is commenced as per Section 21 of the Arbitration and Conciliation Act 1996 (the Arbitration Act).

iii Alternative dispute resolution

The Indian art industry is flooded with legal ambiguities. The consistent growth in the strata of high-net-worth individuals or families (HNIs) in India and the increased frequency and magnitude of online and other auctions has contributed to the growth of the Indian art market.

In an arbitral award passed in December 2014, the arbitrator considered the claims of auction house Bid & Hammer seeking payment of its dues towards a Ravi Verma painting, bid for and purchased by Kiran Nadar. Ms Nadar had disputed the authenticity of the 120-year-old painting. The tribunal observed that the respondent's expert himself was not sure of the authenticity of the painting in question and that a suspicion could never partake in character of a proof in a court of law. Therefore, the tribunal held the painting to be genuine.[8] This decision was perhaps the first of its kind in India where a dispute in relation to the authenticity of art was brought before a legal forum. There is clearly a need for judicial precedent in the Indian art framework setting out some of the best

5 *Shakti Bhog Food Industries Ltd. v. The Central Bank of India and Anr*, (2) RLW 1417 (SC).

6 *Union of India & Ors. v. West Coast Paper Mills Ltd. & Anr.*, 2004 (2) SCR 642.

7 *Khatri Hotels Private Limited & Anr. v. Union of India & Anr.* (2011) 9 SCC 126.

8 'Auction House Successful in Recovery Suit Against Kiran Nadar Museum of Art Founder', Cision PR Newswire, 18 December 2014, www.prnewswire.com/in/news-releases/auction-house-successful-in-recovery-suit-against-kiran-nadar-museum-of-art-founder-286200361.html.

practices in the authentication process during sale offerings. Although arbitral awards do not carry precedential value, this case can certainly be said to be a small yet significant step in encouraging legal intervention and exposing vested interests in the art market.

There are questions as to the maintainability and enforcement of awards passed by such institutions owing to the statutory restrictions placed under the Arbitration Act. Sections 34 and 48 particularly render an award arising out of an 'inarbitrable' dispute, such as title, fraud and copyright, unenforceable in India. It has been established that art disputes arising from testamentary or succession matters are inarbitrable in India.[9] Cases of art-related fraud are dependent upon the specific facts of each case, with judicial precedents indicating arbitrability in cases involving internal affairs of parties.[10]

There is also a possibility of parties subsequently executing agreements to negotiate or arbitrate disputes that arise in respect of such art or antiquity. Arbitration and private mediation appear to be preferred means of resolution due to their time-efficient and confidential nature.

The Antiquities Act stipulates that the Archaeological Survey of India (ASI) shall be the determining authority for classification of an item as an 'art' or 'antiquity'. Parties must be afforded the opportunity to appoint experts who are conversant with the standards and parameters of the art market to make determinations as to age, authenticity, etc., of the art object. Although the Arbitration Act recognises and permits the parties and the tribunal to appoint an expert under Section 26, in instances where the tribunal fails to refer the question of authenticity to the ASI or disregards the ASI's opinion, there is a possibility that the award passed may succumb to a Section 34 challenge.

The Supreme Court of India has ruled that in the case of a conflict, the provisions of the Antiquities Act will override the provisions of a general enactment covering the same aspect.[11] There is much to be explored in this area as such precedence is likely to create new problems. For instance, the right to engage experts under Section 26 of the Arbitration Act will stand to be overridden by Section 24 of the Antiquities Act, which is likely to affect the analysis as to the age of the artwork. This puts the potential award at a risk of challenge at the stage of a Section 34 petition, for possibly being 'contrary to the public policy of India'. Much remains to be explored on the conflict of law aspect of this discussion; however, the recent developments point to a growing enquiry into these concepts.

IV FAKES, FORGERIES AND AUTHENTICATION

There has been a rise in fakes and forgeries of artworks in the country.

i Fake and forged artworks laws

Indian Contract Act 1872

The Indian Contract Act stipulates that for a contract of sale to be valid, consent to enter into the contract must be obtained freely and must not be induced by coercion, undue influence, fraud, misrepresentation or mistake.[12] Therefore, it will be the responsibility of

9 *Booz-Allen & Hamilton Inc v. Sbi Home Finance Ltd. & Ors* (2011) 5 SCC 532.

10 *A Ayyasamy v. A Paramasivam & Ors*, 4 October 2016, (2016) 10 SCC 386.

11 *Department of Customs v. Sharad Gandhi* 2019 (3) SCALE 447.

12 Section 14, Indian Contract Act 1872.

art houses to ensure that the contract of sale of the artwork does not amount to fraud or misrepresentation. 'Misrepresentation' under the Contract Act includes use of unwarranted and untrue statements, breach of duty by misleading the other party and inducing mistake as to the substance of the subject matter of the contract. Therefore, where a seller induces a buyer to believe that the artwork is true, when it is actually fake, this would amount to misrepresentation and the buyer may void the contract. In India, artists, including Anjolie Ela Menon,[13] have themselves filed cases[14] against people selling their forged paintings.[15] Such acts will also attract the provisions of the law of torts.

The liability of dealers and auction houses under the Contract Act

In their contracts for sale, most art houses, with a view to absolving themselves of any liability, inter alia, for fakes, state that they are only agents of the sellers of the artwork and the actual transaction is a bipartite agreement between the buyer and the seller. The laws governing principal–agent relationships are given under the Contract Act. Ordinarily, an agent is not liable for the acts done by him or her on behalf of the principal, or, where the act he or she does is ratified by the principal. Further, he or she is not personally bound by the contract that he or she enters into on behalf of the principal, nor can he or she personally enforce such a contract, except as provided below.

The agent will be held personally liable:

a when the seller or buyer of the goods resides abroad;

b when the name of the principal is not disclosed by the agent; and

c when the principal is disclosed but cannot be sued.

However, this liability has evolved over time and will depend upon the facts of a case; for example, when the agent plays fraud on the parties.[16] If the contract between the seller and the agent specifically imposes a liability on the agent, the third party may also sue the agent.

Indian Penal Code 1808

The laws in India criminally penalise the act of faking or forging documents under the provisions of Indian Penal Code 1808 (IPC). The form or the substance of the document is immaterial for the laws to be applicable.[17]

13 An artist honoured with one of India's highest awards, the Padma Shri.

14 'Anjolie Assistant in fake net', *The Telegraph*, July 2004, www.telegraphindia.com/india/anjolie-assistant-in-fake-net/cid/730487#:~:text=New%20Delhi%2C%20July%2022%3A%20Anjolie,and%20selling%20the%20artist's%20paintings.&text=He%20has%20given%20us%20the%20fake%20painting%2C%E2%80%9D%20said%20Bhatt.

15 Vandana Kalra, 'Two Coats of Paint: Welcome to the dark world of art fakes', *The Indian Express*, 6 July 2014, https://indianexpress.com/article/lifestyle/two-coats-of-paint-welcome-to-the-dark-world-of-art-fakes/.

16 *Link International and Ors. v. Mandya National Paper Mills Ltd.*, AIR 2005 SC 1417.

17 Section 29, Explanation 1, Indian Penal Code (IPC).

Under the IPC:

> *Whoever makes any false documents or false electronic record or part of a document or electronic record, with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.*[18]

Therefore, a dealer or an art house will commit forgery if it tries to sell a fake or forged artwork, to enter into a contract or to defraud a person. The person committing forgery will be penalised with imprisonment for a term of up to two years, or a fine, or both. Further, if any person uses a forged document as genuine, he or she would be punishable under the IPC in the same manner as if he or she had forged the document.

Forgery committed for the purpose of cheating somebody is punished with imprisonment for seven years and a fine.[19] Forgery for the purpose of harming a person's reputation is punishable with imprisonment of a maximum of three years and a fine. One such incident in India was the *Sheetal Mafatlal* case, where Mafatlal faced criminal charges for filing fake cases regarding fake paintings, and the Court ordered her to pay 700,000 rupees as a fine for filing false complaints.[20]

The IPC also penalises 'cheating' as a criminal offence. A dealer, art house or seller that, with the intention of cheating the buyer, sells forged artwork as genuine will be liable and can be imprisoned for one year, or fined, or both, if found guilty.[21] Any person who commits cheating with the knowledge that such an act will cause wrongful loss to the opposite party, whose interest he or she is supposed to protect, either by law or contract, will be punishable by imprisonment for a maximum period of three years, or a fine, or both.[22]

The IPC also penalises cheating when it leads to delivery of the property by the deceived person to any third party.[23] Therefore, if an art house or a private person selling artwork was cheated when they acquired the work, and goes on to sell the work as a genuine work of art, the party that had originally cheated the seller will be punishable with seven years of imprisonment and a fine. The art dealer, auction house or art gallery will also be criminally liable for conspiracy to sell fake artworks, and a criminal breach of trust, under the IPC.

ii Consumer protection laws

The rights of consumers in India are protected by the Consumer Protection Act 2019 (COPRA). Art dealers, auction houses, art galleries and online art sellers will be liable for selling defective goods under the COPRA. They may also be sued for deficiency in their services of providing proper services.

18 id., Section 463.

19 id., Section 468.

20 Swati Deshpande, 'Fake paintings: Sheetal Mafatlal faces prosecution', *The Times of India*, 11 September 2014, https://timesofindia.indiatimes.com/city/mumbai/Fake-paintings-Sheetal-Mafatlal-faces-prosecution/articleshow/42290983.cms.

21 Section 417, IPC.

22 id., Section 418.

23 id., Section 420.

A 'defect' under the COPRA encompasses:

> *any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force or under any contract, express or implied or as is claimed by the trader in any manner whatsoever in relation to any goods or product and the expression 'defective' shall be construed accordingly.*

Further, 'deficiency' includes any shortcoming, negligence, omission or the deliberate holding back of important information, by a service provider, which may amount to loss to the person seeking their service. Therefore, a buyer who seeks the services of an art dealer, art gallery, auction house or online art platform for buying art will be entitled to a remedy under the COPRA.

iii Warranties laws

The laws related to warranty are covered under the Sale of Goods Act 1930 (SOGA). According to the SOGA, 'a warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated'.[24] There will be no implied warranties applicable to the quality or fitness for purpose of goods, unless the buyer makes known to the seller the particular purpose for which goods are required or the other conditions stipulated in Section 16 of SOGA are met.[25]

In the case of breach of warranty, the buyer may, in addition to rejection of the goods, 'set up against the seller the breach of warranty in diminution or extinction of the price, or sue the seller for damages'.[26]

iv Role of experts, art foundations and catalogues raisonnés

Experts in art can help one understand the importance of the art that they are buying. They will help the buyer and the seller to differentiate between a fake and an authentic artwork, and how much an artwork is really worth. The expert will usually look for distinguishing features of the art by the artist, any famous strokes, colour palette, patterns, etc., to prima facie evaluate the painting. They will also know the market trends, whether the painting will fetch the desired amount, and what could be its future prospects.

Art foundations and experts will usually advise art buyers to keep a track of an artist's artworks using a catalogue raisonné.[27] This will help the buyer in understanding the type of paintings the particular artist creates, and will be able to differentiate between a fake work and an authentic work, more easily. These catalogues have been compiled by eminent art historians who have studied works of art and are available in many reputable galleries.

Art foundations and galleries in India have helped to provide a platform for up-and-coming artists. Art foundations, such as the India Foundation for the Arts, have documented

24 Section 12(3), Sale of Goods Act.

25 id., Section 16.

26 id., Section 59.

27 Kennith Rosario, 'The art of deception', *The Hindu*, 25 March 2017, www.thehindu.com/entertainment/art/the-art-of-deception/article17657893.ece.

the works of various artists to encourage talent and highlight the rich cultural milieu India has. These foundations are usually not-for-profit organisations that not only provide a platform for the budding artists, but also invest in art research, art planning and other projects.

V ART TRANSACTIONS

i Private sales and auctions

Several auction houses have conducted online auctions during the coronavirus pandemic.

General considerations when buying art through online auction are the following.

a Terms and conditions: auction houses put the terms and conditions applicable to all their online auctions on their websites, and these must be closely scrutinised before taking part in the bidding process.

b The role of the auction house: the art house will sell the artwork with an authenticity certificate. The bidder must also conduct a thorough due diligence about the artist and the artwork they intend to buy.

c Registration: a bidder must register with the auction house before he or she can bid. Some auction houses ask for a minimum deposit registration along with details of how the payment will be made post auction.

d Buyers' premium: auction houses generally charge a buyers' premium to cover their administrative charges. This premium varies between auction houses.

e Payment: another important aspect that a bidder must understand is the terms of payment for a successful bid. Once a bid is placed by the bidder, the auction house will either generate the invoice immediately and email it to them, or a representative will contact the bidder by telephone to convey the payment details.

f Delivery: the auction house will be liable to take back the artwork if there is any damage during the transportation of the painting.

In terms of legislative considerations, the provisions relating to auctions and sale of goods in India are governed under the Contract Act and the SOGA. E-auctions have been recognised as a valid mode of conducting business in India.

The COPRA defines e-commerce 'as an activity that encourages buying or selling of goods/services including digital products over the digital/electronic network'. An electronic service provider means 'a person who provides technologies/processes to enable a product seller to engage in advertising/selling goods/services to customer and includes online market place'.

Another important piece of legislation that governs online platforms includes the Information Technology Act 2000 (the IT Act). The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011 ensure that portals and platforms safeguard buyers' personal information, such as passwords and biometric information. These Rules also impose a duty on portals collecting sensitive information to have a consumer privacy policy that is available on their website. Auction houses will have the liability and responsibility to store and record all the information related to their sales and bidders in compliance with the above rules.

Another important piece of legislation that guides art houses in conducting e-auctions and private sales is the Information Technology (Intermediary Guidelines) Rules 2011. The IT Act defines an 'intermediary' in terms of a particular electronic record as 'any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record'. This definition expressly includes online auction sites within its ambit.

ii Art loans

Loaning of antiques and art treasures in India is governed by the Guidelines for Lending Art/Antiquity to Institutions/Museums Abroad and Within the Country, provided by the Ministry of Culture. The Guidelines contain procedures for temporarily loaning art to foreign and national institutions and museums. Art may be loaned to international institutions or museums for three years, which is extendable by two years, on approval of the Inter-Ministerial Committee for Exhibition, headed by the Culture Secretary. Further, art may be sent outside India, for exhibitions, for a maximum of six months, which is extendable by an additional six months. Art may be loaned nationally, to government museums or institutions only. This loan may be long term (for 10 years, extendable by five years) or short term (for one year, further extendable by one year). These loans are extendable only on the approval of the Director General of the ASI or by the institution loaning the artwork. There is also a cooling-off period of three years between works being loaned to museums and institutions abroad.

Private collectors loan works to art museums in India. This is undertaken by parties through an agreement or contract.

iii Cross-border transactions

India is party to almost all major international treaties, including the 1970 UNESCO Convention, the Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, the Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the Convention concerning the Protection of the World Cultural and Natural Heritage and the Convention for the Safeguarding of the Intangible Cultural Heritage.

Export–import licensing

Under the Foreign Trade (Development and Regulation) Act 1992, a person can only export or import a property if they are granted the export–import code number by the Director General, or the officer authorised by such Director General. Contravention of these export–import licensing provisions will attract penalties under both the Antiquities Act and the Customs Act 1962.[28]

Choice of law

The number of cases related to the choice of law in India is particularly low. However, according to the rules of the Court of Arbitration for Art, the laws of the jurisdiction of the principal location of the seller will be applicable as substantial law or, if the dispute does not involve sale, the jurisdiction pertaining to the place where the dispute arises will apply. If such laws are applicable for cross-border disputes, the decree or award passed thereof will be executable in India.[29]

28 *Department of Customs v. Sharad Gandhi* (footnote 12).

29 *Abraaj Investment Management v. Neville Tuli*, 2015 (6) ABR 555.

Special regulations for cultural property

The laws governing transactions and movement of cultural property in India are the Antiquities Act and the Antiquities and Art Treasures Rules 1973, falling within the purview of the ASI and the Ministry of Culture.

Tax considerations for art acquired internationally

Taxation in India is governed under the goods and services tax (GST), which became applicable in 2018. According to the GST Act, goods classified as 'paintings, decoratives & sculptures', which include 'hand paintings drawings and pastels (including Mysore painting, Rajasthan painting, Tanjore painting, Palm leaf painting, basoli etc)' and 'paintings, drawings and pastels, executed entirely by hand, other than drawings of heading 4906 and other than hand-painted or hand decorated manufactured articles; collages and similar decorative plaques' are taxed at the rate of 12 per cent.

According to the Customs Tariff Act 1975, the customs duty applicable on import of 'paintings, decoratives and sculptures', especially 'paintings, drawings and pastels, executed entirely by hand, other than drawings of heading 4906 and other hand-painted or hand decorated manufactured articles; collages and similar decorative plaques', is 10 per cent per unit (in kilograms).

Further, the customs duty on the import of 'works of art created abroad – by Indian artists and sculptors, whether imported on the return of such artists or sculptors to India or imported by such artists or sculptors subsequent to their return to India', is exempt from customs duty under the Customs Tariff Act.

iv Art finance

There is no art financing in India. Most HNIs and private collectors buy art for the love of art and use private wealth. These collections are made up of a combination of international artists and Indian artists.

Banks and financial institutions do not provide financing for art in India. There have been a few art funds set up in India: the Osian Art Fund was set up in 2010; Kotak Mahindra Bank set up an art fund; and the Yatra Art Fund was set up in 2015.[30] The Securities and Exchange Board of India (SEBI), however, ruled that these had to be wound up and asked the companies to return investor money. Phillip Hoffman in England also set up an Indian fine art fund.[31] SEBI has strictly regulated matters involving funds being set up and the usage of retail investors' money.

The Prevention of Money Laundering Act 2002 (PMLA), which is the principal legislation dealing with the framework of anti-money laundering in India, has the concept of reporting entities (REs).[32] It empowers the government of India to notify any business or

30 Reena Zachariah, 'Sebi directs Yatra Art Fund to refund investors' money', *The Economic Times*, 6 November 2015, https://economictimes.indiatimes.com/sebi-directs-yatra-art-fund-to-refund-investors-money/articleshow/49691377.cms.

31 Vivek Sinha, 'Hoffman raises $25 mn Indian Fine Art Fund', *The Economic Times*, 17 January 2008, https://economictimes.indiatimes.com/wealth/personal-finance-news/hoffman-raises-25-mn-indian-fine-art-fund/articleshow/2706254.cms.

32 Section 12, Prevention of Money Laundering Act 2002.

profession that is required to maintain certain records.[33] Although individuals dealing with art and art objects are not currently categorised as REs under the PMLA, the possibility cannot be precluded in the future.

VI ARTIST RIGHTS

i Moral rights

The Indian Copyright Act 1957 recognises the existence of moral rights in original copyrightable works, under Section 57. Relying on the moral rights contemplated in the Berne Convention, it has been held that the author is entitled to seek appropriate legal remedies if the moral right of attribution and integrity in his or her work is violated; and further that the author holds 'moral rights' even after he or she has parted with his or her economic rights to the work.[34]

Section 57 of the Copyright Act grants the following special rights to the author compared to the owner of a general copyright:[35]

a to claim authorship of the work; and

b to restrain or claim damages in respect of:
- any distortion, mutilation or other modification in the work; or
- any other action in relation to the work that would be prejudicial to his or her honour or reputation.

The idea of the Section is that harm to an author's integrity is different from infringement of the work itself.

Further, through Section 57 of the Copyright Act, the author of a work has the right to assert the authorship of the work even after assignment of the copyright to the work; he or she has a right to limit the distortion or mutilation of his or her work or to seek damages for the distortion. For a contract of assignment to be valid, it has to be made in compliance with the moral rights of the author of work granted to it under Section 57 of the Copyright Act.

ii Resale rights

The concept of resale rights, provided under Article 14 of the Berne Convention, which grants 'droit de suite' in works of art and manuscripts by granting the author the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work, has been incorporated in the Copyright Act.

Section 53A of the Copyright Act grants to the first owner of the right or his or her legal heir at the time of resale of a copyright work, the right to a share of the proceeds of resale. Such share will be fixed by the Copyright Board, and shall not exceed 10 per cent.

iii Economic rights

Section 14 of the Copyright Act grants certain rights to the owner of the copyright for complete enjoyment of its right. In an artistic work, the artist has copyright over distinct activities that are set out in Section 14(c)(i) to (vi) of the Copyright Act.

33 id., Section 2(1)(a)(iii).

34 *Amar Nath Sehgal v. Union of India*, 2005 (30) PTC 253 (Del).

35 Section 57, Copyright Act.

The copyright owner has a private right and has the freedom to exclude others from replicating his or her work. If someone performs an act referred to in Section 14 of the Copyright Act, the copyright owner can institute a suit for violation of his or her copyright against that person. However, if an artist produces any art as part of a contract for his or her services, he or she will assign his or her rights to his or her employer and will not be able to hold the legal and equitable title to such work of art.[36]

VII TRUSTS, FOUNDATIONS AND ESTATES

i Trusts and foundations

Section 3 of the Indian Trusts Act 1882 defines trust as 'an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him for the benefit of another, or of another and the owner'. As per Section 4, a trust may be formed for any lawful purpose. There are two main kinds of trusts: charitable and religious. Any religious trust involved in charitable activities is a charitable religious trust. These trusts are registered under the Indian Trusts Act as private and public trusts. A private trust is created primarily for the benefit of one or more individuals as its beneficiary, and for public trusts, beneficiaries are the general public or a class as a whole.

Foundations are usually companies with charitable purposes registered under Section 8 of the Companies Act 2013 for the promotion of social causes, including the promotion of art. Art collections may be held and administered through trusts or foundations.

Presently in India, wealth tax is not levied on the holding of assets. Therefore, assets can be held in individual names and in the names of trusts, foundations and private companies.

When a work of art is sold by an individual, trust or foundation, the seller (in the case of a trust, the trustee is deemed to be the representative assessee under Sections 160–164 of the Income Tax Act 1961 (ITA)) will incur a tax liability on the profits generated as capital gains, since art is included under the definition of capital assets under Section 2(14) of the ITA. This tax is calculated based on the period of holding. The amount is computed as the difference between the cost of acquisition and the sale proceeds. The cost of acquisition has to be brought up to present value by multiplying the cost of acquisition and any capital expenditure on restoration or repairing the artwork based on the cost inflation index.

For public and private trusts and foundations involved in 'charitable purposes' as defined under Section 2(15) of the ITA, including the preservation of objects of artistic or historic interest, benefit can be availed under Section 11(1) and 11(1A), whereby reinvestment in art can also lead to an exemption of capital gains tax liability.

ii Estates

In India, there are two kinds of succession: intestate and testamentary. Testamentary succession is when the testator leaves behind a will clearly indicating who is to inherit the work in question, and intestate succession is when there is no will made.

Succession is governed by different personal laws that are applicable to different religious communities. In the case of Muslim intestate succession, the Muslim Personal Law (Shariat) Application Act 1937 is applicable. In the case of testamentary succession, the inheritance is governed under the relevant Muslim Sharia law as applicable to Shias and Sunnis. For

36 *Godrej Soaps (P) Ltd v. Dora Cosmetics Co.*, (2001) DLT 504.

Hindus, Buddhists, Jainas and Sikhs, the Hindu Succession Act 1956 is applicable. For anyone other than a Hindu, Muhammadan, Buddhist, Sikh or Jain, the Indian Succession Act 1925 is applicable. Based on the conditions prescribed and the respective personal laws, when a lawfully executable will is in existence, the legatees will inherit title in property as per the conditions set forth in the will.

There is no tax on inheritance of capital assets. However, once an artwork is inherited, the person inheriting it is the owner and has to declare it in his or her returns. In the case of intestate succession, it is not clear who will inherit the artwork and how it will be divided equally among all heirs.

As legal title of the assets passes to the trustee when the trusts are settled, there is subsequently no change of ownership on death, thus avoiding the need for probate of a will in respect of trust assets.

VIII OUTLOOK AND CONCLUSIONS

Developments in art law are inevitable as private museums and individuals collect more art. The courts will step in to help fill the current gaps in the law. With a sizable number of auction houses now regularly holding exhibitions and selling online, there is growing interest in collecting art. Disputes in this space will also grow.

The use of blockchain in cataloguing and creating provenance will help in the authentication of artwork and will build provenance for works that have always existed in private hands. Technology and its benefits will be seen in the long term on the art market.

India will enact a law on data privacy and this will impact the collection and dissemination of an individual's data. This will transform how data is collected and processed, and will influence how private galleries and auction houses manage and store customers' data.

Chapter 19

ISRAEL

Meir Heller, Keren Abelow, Talila Devir and Niv Goldberg[1]

I INTRODUCTION

The world of art and culture occupies a central place in Israel. One indication of this is the fact that Israel has the most museums per capita in the world,[2] including the Israel Museum, one of the leading encyclopedic museums in the world.[3]

Most of Israel's art is traded in auctions and through galleries, though there is no database of the volume of transactions. Many of the galleries represent living Israeli artists and concentrate on twentieth and twenty-first century art.

Christie's and Sotheby's have representative offices in Israel, which facilitate transactions for Israeli and international clients and do not hold auctions in Israel. Prominent Israeli auction houses are Kedem, Tiroche and Ishtar. Contemporary Israeli artists have achieved international success, including Michal Rovner, Sigalit Landau, Yael Bartana, Zibi Geva and Gal Weinstein. Prominent private collectors based in Israel include the publisher Amos Schocken, Zvi Meitar, Doron Sebbag and Igal Ahouvi. The late shipping tycoon Sammy Ofer was also a prominent collector.[4] There are important corporate collections of Israeli art, such as those of the Phoenix Insurance Corporation and the Israel Discount Bank.

No specific legislation regulates art transactions,[5] and so the general contract and sales laws apply, as discussed herein. Legal disputes over transactions are adjudicated in arbitration

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2 '10 of Israel's best museums', CNN Travel (2017), at https://edition.cnn.com/travel/article/best-israel-museums/index.html (last accessed 6 October 2020). In the past decade, Yad Vashem was twice rated by tripadvisor.com in the top five and top 25 museums in the world.

3 Fifty-eight of more than 200 museums are recognised according to the definition of the Museums Law, 5743-1983, SH 1084 p. 113 (as amended). See also Reshimat Hamozeonim Hamukarim Al Pi Chok (List of Museums Recognized by Law) Israeli government, at www.gov.il/he/departments/general/list_of_museums_recognized_by_law (in Hebrew) (last accessed 6 October 2020). Welcome to the Israel Museum, Jerusalem, at www.imj.org.il/en/content/welcome-museum (last accessed 8 October 2020). See also 'The Largest Art Museums In The World', WorldAtlas, at www.worldatlas.com/articles/the-largest-art-museums-in-the-world.html (last accessed 8 October 2020).

4 Holder of one of the largest Chagall collections, with estimated total value of more than US$500 million.

5 Except for transfer of copyright, which requires a written document.

or in court. The relevant court is primarily determined according to the financial value of the matter and location of the transaction or defendant.[6] The sale of items from museum collections is regulated by law,[7] which sets conditions for such sales.[8]

A recent trend in art transactions is the growing market of Israeli auction houses using online services,[9] as well as galleries transitioning into online auction houses. These changes were necessitated following the coronavirus pandemic, which resulted in restrictions on foreign visitors to Israel, and have allowed international collectors greater access to the local market.[10]

II THE YEAR IN REVIEW

A particularly notable development in recent years concerns the tension between private and public ownership of culturally significant assets. Primarily two laws regulate ownership of cultural property: the Antiquities Law 5738-1978[11] and the Archives Law 5717-1955.[12] Whereas the Antiquities Law radically limits private ownership of the types of items it regulates,[13] the Archives Law provides for limited restrictions on the handling and export of publicly significant writings and other type of records.[14]

In a series of recent rulings, the state took a position of limiting private ownership of certain disputed cultural properties, on one occasion even taking action to deprive a dealer of ownership of manuscripts put up for auction, preventing its sale.[15] The grounds for action were that the properties in question have a value that transcends the boundaries of the individual, and is of great value to the entire nation – mainly because of their importance in preserving collective memory and identity.

The courts acknowledged the role of the state as a homeland and, therefore, a cultural centre for the entire Jewish people, to justify rulings preferring public ownership to private ownership.

6 Courts Law (Consolidated Version), 5744-1984, § 40 51, SH 1123 (as amended), p. 198.

7 Museums Regulations, 5745-1984, KT 4638 p. 397; Antiquities Law, 5738-1978, SH No. 885 (as amended), p. 76.

8 The conditions are: obtaining the museum's management's approval for sale, drafting a written sale agreement, and using the proceeds of the sale solely for the purpose of purchasing another exhibit (unless the museum management decides otherwise); see Museum Regulations (footnote 7, above), § 12. If the sale concerns antiquities, the museum is further required to notify the Antiquities Authority; see Antiquities Law (footnote 7, above), § 26.

9 e.g., Invaluable and Bidspirit.

10 Although hard data for 2020 is not yet available, anecdotal evidence and the online auction scene globally indicate that this internationally accessible market has seen intensified growth as a consequence of the covid-19 pandemic.

11 Antiquities Law (footnote 7, above).

12 Archives Law, 5715-1955, SH No. 171 (as amended), p. 14.

13 Antiquities Law (footnote 7, above), § 2.

14 Although the State Archivist is entitled to demand a review any archival material (but not take possession over them), she is allowed to photocopy the material, only subject to its owner's consent; see Archives Law (footnote 12, above), § 9.

15 See Opening Motion (Jerusalem District Court) 34193-07-20 *Attorney General v. Bidspirit et al.* (filed July 2020), NetHamishpat Court Database (in Hebrew).

This principle was introduced in 2015 in the *Vienna* case[16] regarding the ownership of archival material that documented 300 years of history of the Vienna Jewish community. The Jewish community that remained in Vienna after the Second World War transferred the materials to the Central Archives for the History of the Jewish People (CAHJP), in Jerusalem, as the community was not able to preserve them at the time. After 66 years, the community leadership requested their return, but was refused, and thus turned to court. The court ruled in favour of the CAHJP, holding that in certain circumstances the importance of maintaining cultural objects and making them accessible to the public takes precedence over formal questions of property ownership.[17]

This innovative approach was used again in 2019 in a dispute about drafts of Israel's Declaration of Independence, dated 1948. After 70 years, the drafters' heirs put them up for sale at auction, but the state sued for ownership, and was denied owing to the doctrine of laches.[18] On appeal, the Supreme Court ruled that there is a superior public interest in having the drafts in the hands of the state, emphasising the importance of cultural properties when conflicted with the general property law. By doing so, the Supreme Court created a formal distinction between private property and cultural property.[19]

This approach culminated in the case of the Damascus Crowns,[20] a dispute about nine ancient codices of the Bible (Crowns) salvaged by the Mossad from the synagogues of the devastated Jewish community in Syria. The court favoured the position of the National Library of Israel, classifying the Crowns as 'treasures of the Jewish People' and concluding that the most appropriate place for them is the National Library – despite the claims of various groups of Damascene Jews and their last Rabbi, who had helped to salvage the Crowns.[21] The court clarified, once again, that cultural assets have a distinct status from ordinary property in a manner that justifies their transfer to public ownership. An additional prominent case in this context regards the literary inheritance of Franz Kafka and Max Brod,[22] in which the Supreme Court of Israel recognised the National Library, over several other claimants, as the appropriate body to house this literary legacy, considering its wide cultural importance.[23]

16 C.A. (Supreme Court) 9366/12, *Israelitische Kultusgemeinde Wien v. Central Archives for the History of the Jewish People* (24 September 2015), Nevo Legal Database (by subscription, in Hebrew).

17 Guy Pessach, 'The Court and the Politics of Memory: Following 9336/12 *Israelitische Kultusgemeinde Wien v. Central Archives for The History of The Jewish People* (2018) 48 Mishpatim 91, 92.

18 Civil Appeal (Supreme Court) 8323/17 *State of Israel v. Beham* (20 May 2019), Nevo Legal Database (by subscription, in Hebrew).

19 id., at para. 2 of Justice Hendel's decision.

20 Civil Case (Jerusalem District Court) 17135-12-14, *National Library of Israel v. Ministry of Justice* (17 August 2020), Nevo Legal Database (by subscription, in Hebrew).

21 The case was covered by the international press; see, e.g., 'Israeli court: Damascus Bibles to stay in National Library, *Washington Post*, at www.washingtonpost.com/world/middle_east/israeli-court-damascus-bibles-to-stay-in-national-library/2020/08/18/a2a20c68-e187-11ea-82d8-5e55d47e90ca_story.html (last accessed 4 October 2020).

22 Family Appeal (Supreme Court) 6251/15, *Eva Dorit Hoffe v. Shmulik Kasuto* (7 August 2016), Nevo Legal Database (by subscription, in Hebrew).

23 These legal proceedings have attracted the attention of the media outside Israel, too; see, e.g., 'A Yearslong Battle Over Kafka's Legacy Ends in Jerusalem', *New York Times*, at www.nytimes.com/2019/08/07/books/kafka-archive-jerusalem-israel.html (last accessed 4 October 2020) and 'Unseen Kafka works may soon be revealed after Kafkaesque trial', *The Guardian*, at www.theguardian.com/books/2019/apr/17/unseen-kafka-works-may-soon-be-revealed-after-kafkaesque-trial (last accessed October 4 2020).

An additional development stems from traditional and religious elements in the character of Israel.[24] In this respect, an interesting change has been taking place in the state's attitude towards freedom of artistic expression, when this conflicts with religious sentiments. The heritage of the Jewish people and democracy, both as general concepts, were long ago introduced as a norm in Israel's Basic Laws.[25] This juxtaposition reflects the decades-long friction between liberal and traditional values in all realms of government and law.

Despite many legislative attempts to grant protection for the freedom of expression under a distinct Basic Law, this has been established to date only in case law. Several bills aiming to grant statutory protection have not passed.[26] Nevertheless, the Supreme Court has repeatedly ruled that freedom of expression enjoys 'legal supremacy' over other basic rights.[27] Religious sentiments, in contrast, are protected under the Penal Law,[28] which imposes penalties for expressions likely to offend the faith or the religious sentiments of others.[29] And yet, when required to balance the two rights, the courts have repeatedly given precedence to freedom of expression over any other right and have ruled that it should be restricted only in the case of gross and profound violations of religious sentiments.[30]

Recent events raise questions of an about-face. The incumbent Minister of Culture in 2017 announced her intention to cut the budget of the Israel Festival[31] because of performances that included nudity, perceiving them as 'detrimental to the basic values of . . . Israel as a Jewish and democratic state'.[32] This position was reiterated by the Minister in 2019[33] when she threatened to cut the budget of a museum displaying a sculpture perceived as sacrilegious by many in Israel's Christian community.[34] The Association for Civil Rights in Israel petitioned the Administrative Court to instruct the mayor to refrain from interfering in the content of works of cultural institutions owned by the municipality. The petition[35] and the appeal against it[36] were rejected for procedural reasons, but a precedent was set: although

24 The Jewish nature of the state was first defined within the Declaration of Independence of 1948 – see www.knesset.gov.il/docs/eng/megilat_eng.htm (last accessed 7 October 2020).

25 This is emphasised in Section 1A of Basic Law: Human Rights and Dignity. In addition, Section 1 of the Judicial Principles Law, 5740-1980, prescribes a link between Israeli Law and Jewish heritage, stipulating that when a court fails to find an answer to a legal question in the statutes or case law or by analogy, it shall decide it in the light of principles that are part of the Jewish heritage. See also discussion regarding Basic Law: Israel – the Nation State of the Jewish People, in this chapter.

26 The most recent bill was discussed by the Knesset on 15 June 2020; see Protocol No. 41 of the 23rd Knesset.

27 High Court of Justice 806/88, *Universal City Studios Inc v. The Film and Play Review Council* (15 August 1989) pp. 831 to 832, Nevo Legal Database (by subscription, in Hebrew).

28 The Penal Law, 5737-1977, § 173, SH No. 894 (as amended), p. 226.

29 Jewish and non-Jewish.

30 *Universal City Studios* (footnote 27, above), at para. 8 of Justice Shamgar's decision.

31 'Israeli festival faces state funding cuts over nudity', *Jerusalem Post* at www.jpost.com/israel-news/culture/israeli-festival-faces-state-funding-cuts-over-nudity-494500 (last accessed 1 October 2020).

32 Based on the fact that modesty is a key value for Orthodox Jews; see Modesty (Tzniut) My Jewish Learning, at www.myjewishlearning.com/article/modesty-tzniut/ (last accessed 7 October 2020).

33 See 'Israeli museum to remove McJesus sculpture after protests', The Guardian, at www.theguardian.com/world/2019/jan/17/israeli-museum-remove-mcjesus-sculpture-after-violence-protests-haifa (last accessed 2 October 2020).

34 Importantly, it should be noted that the Ministry of Justice disagreed with the Minister's authority to do so.

35 Civil Case (Haifa District Court) 67938-01-19, *The Association for Civil Rights in Israel v. Mayor of Haifa* (10 February 2019), Nevo Legal Database (by subscription, in Hebrew).

36 Administrative Appeal (Supreme Court) 2211/19, *The Association for Civil Rights in Israel v. Mayor of Haifa* (11 November 2020), Nevo Legal Database (by subscription, in Hebrew).

the authority authorised to determine museum content is the professional body (the curator), it must take into account the feelings of the public; concurrently, the mayor has the authority, and duty, to act to prevent harm to these feelings.

In 2020, the Jerusalem Municipality cancelled an exhibition in an illustration festival because of nudity presented in the illustrations, on the grounds that it displayed 'contents that might offend the feelings of some of the public'.[37]

These decisions to restrict artistic freedom based on the concern for offending feelings, represent a different position than that dictated by the Supreme Court to date, according to which only an actual gross and profound injury to religious sentiments justifies the restriction of creative freedom.

i Trends in art law

In 1968, the Knesset legislated the Attorney General's (AG) special standing, enabling the AG to intervene in a proceeding that may affect a public interest.[38] Until recently, this standing had never been exercised in the context of cultural assets.

The first occurrence was in the *Damascus* case, when the AG intervened on his own initiative and submitted an opinion siding with the National Library,[39] in which he emphasised the importance of the Crowns to the entire Jewish people and not just a particular community, and supported the National Library's petition to establish a charitable trust that will be the legal entity entitled to hold and safeguard the Crowns.

In August 2020, in a step that can be considered unprecedented, the AG himself initiated an action concerning the public auction of rare manuscripts from the Bergen-Belsen concentration camp.[40] The AG requested the court to have them transferred to a charitable trust, which the court was asked to establish, claiming they were a 'distinct public asset'. Consequently, the defendant, the owner of the manuscripts, donated them to Yad Vashem,[41] thus pre-empting the legal discussion. Nonetheless, the action filed by the AG paves the way for future claims of public ownership over privately held cultural assets, and to a possible restriction on their trade altogether.

These two disputes highlight another innovative trend in the field of cultural property: the establishment of a charitable trust requires, by law, the execution of a written deed by

37 The Jerusalem Municipality has Ordered the Exclusion of an Exhibition it Commissioned for a Festival. The Reason: Nude Illustrations (in Hebrew) *Haaretz*, at www.haaretz.co.il/gallery/art/.premium-1.9025214 (last accessed 2 October 2020).

38 Legal Procedure Ordinance (Appearance of the Attorney General) (New Version), § 1, LSI No. 11 p. 282.

39 Filed on 15 October 2016.

40 Minutes of a Rabbinical Court established in the Bergen-Belsen Displaced Persons camp immediately after the Second World War, which documented the decisions regarding remarriage of men and women whose spouses' fate was unknown (a very complex issue in the Jewish religious law since remarrying is forbidden unless officially divorced or if the spouse is proven to be dead; whereas if no evidence exists, the marriage is forbidden, a predicament that became very common, naturally, in the circumstances). The manuscripts are a first-hand and authentic testimony, in close proximity to events, not only about the fate of Holocaust victims and the story of the survivors, in the days when documentation and collection of such information only began, but also of the activities of an official Jewish religious tribunal dealing with one of the most important issues in the Jewish world.

41 A statutory authority and Israel's official memorial to the victims of the Holocaust.

the owner of the donated property;[42] however, in the case of the Crowns, the court declared a charitable trust despite the absence of a deed or a known owner, and also determined the identity of the trustees' electing entities[43] and the terms of the trust.[44] By so doing, the court created a new form of ownership for cultural property, neither private nor state-appropriated, but owned by a charitable trust managed by representatives of the general public. This precedent opened the door to the AG's claim to declare the Bergen-Belsen manuscripts a charitable trust, albeit in that case, a self-proclaimed owner was present, and it will not be surprising if the use of charitable trusts as a legal form of ownership becomes more common in the context of cultural assets.

ii Notable art-related transactions, litigation and legal changes

Art-related transactions in Israel have significantly declined in 2020 mainly due to the fact that the buyers are tourists and foreign residents, who have been prevented from entering Israel following the coronavirus pandemic.[45] However, the turnover of auction houses (operating online) has actually increased slightly. As for private galleries, some have switched to online auctioning, which has enabled them to maintain a certain level of sales; however, most galleries have suffered from very limited activity and some have closed down altogether.[46]

There were historically significant transactions in 2018 and 2019 by the Israel Museum, which sold 152 artworks from its collection, in support of its acquisitions fund, in a series of seven auctions, generating a total of US$10,476,822.[47]

In litigation, the most significant cases are those discussed above regarding private ownership over cultural property.

42 Trust Law, 5739-1979, § 17, SH No. 941 p. 128. In the deed of a charitable trust, the creator of the charitable trust expresses his or her intention to create a charitable trust and determines its objectives, its assets and its terms.

43 The court appointed an array of public non-government entities, each with a right to appoint one or more trustees.

44 The Crowns, codices aged from several hundred years to 1,000 years, were created in various locations in medieval Europe and found their way to Damascus, where they were safeguarded by the Jewish community for hundreds of years.

45 'The Status of Artists in Israel is Difficult, but Stable' (in Hebrew), *Haaretz*, at www.haaretz.co.il/gallery/art/.premium-1.8871385 (last accessed 1 October 2020).

46 Information courtesy of Kedem Auction House.

47 Sale 16823: 'Selections from the Israel Museum, Jerusalem Sold to Benefit the Acquisitions Fund', Christie's, at https://onlineonly.christies.com/s/selections-israel-museum-jerusalem-sold-benefit-acquisitions-fund/lots/439 (last accessed 1 October 2020); Sale 15979: 'Impressionist and Modern Art Day Sale', Christie's, at www.christies.com/SaleLanding/index.aspx?intsaleid=27593&lid=1&saletitle=&pg=all&action=paging (last accessed 1 October 2020); Sale 16169: 'Post-War and Contemporary Art, Paris, Day Sale', Christie's, at www.christies.com/salelanding/index.aspx?intsaleid=27702&lid=1&saletitle=&pg=all&action=paging (last accessed 1 October 2020); Sale 15480: 'Modern British Art Day Sale', Christie's, at www.christies.com/modern-british-art-day-27402.aspx?saletitle= (last accessed 1 October 2020); Sale 15581: 'Latin American Art', Christie's, at www.christies.com/latin-american-art-27452.aspx?saletitle= (last accessed 1 October 2020); Sale 17692: 'Art Moderne', Christie's, at www.christies.com/art-moderne-28327.aspx?lid=1&saletitle= (last accessed 1 October 2020).

The most significant recent legislation is the Basic Law: Israel – the Nation State of the Jewish People, enacted in 2018,[48] declaring Israel as the national home of the Jewish people, in which they fulfil, inter alia, their cultural right for self-determination[49] and affirming that the state shall act to preserve their culture.[50]

III ART DISPUTES

i Title in art

With few exceptions, Israeli law has no designated legislation regulating title in artworks or their transactions. A main difference between auctions and private sales (when the private sale is not conducted through a dealer) is the application to consumer protection laws and 'market overt' rule. The general legislation governing contracts, mainly the Contracts Law[51] and the Sale Law,[52] apply equally.

Contracts are formed by offer and acceptance.[53] 'Consideration' is not a condition for their formation,[54] albeit payment of consideration is relevant to the application of the 'market overt' rule (as below). Title of ownership transfers to the buyer when the sold movable is physically delivered, unless the seller and buyer have agreed otherwise.[55] Unless otherwise specifically prescribed, contracts may be oral or by any other means.[56] Thus, transactions involving tangible artworks are not subject to any formalisms,[57] as opposed to immovables or intellectual property rights.[58]

The obligation of parties to act in good faith is imposed by the Contracts Law, throughout the entire life of the contract (from negotiation to performance and enforcement).[59] However, good faith, per se, is not presumed or necessary for transfer of title. Lack of good faith does not void the transaction, but may entitle the injured party to remedies, such as compensation, enforcement or the cancellation of the contract, the latter resulting in cancellation of the title transfer.[60]

48 Basic Law: Israel – The Nation State of the Jewish People (2018).

49 id., at § 5.

50 id., at § 6c.

51 Contracts (General Part) Law, 5733-1973, SH No. 694 (as amended), p. 118; Contracts (Remedies for Breach of Contract) Law, 5731-1970, SH No. 610, p. 16.

52 Sale Law, 5728-1968, SH No. 529 (as amended), p. 98.

53 Contracts Law (footnote 51, above), at § 1.

54 Gabriela Shalev and Efi Zemach, *The Law of Contract*, 28, 147 (4th ed., 2019).

55 Sale Law (footnote 52, above), at § 33.

56 Contracts Law (footnote 51, above), at § 23.

57 One caveat is due – an undertaking to make a future gift (donation included) requires a written document. Hence, if one wishes to undertake an obligation to gift an artwork, one must do so in writing; see Gift Law, 5728-1968, § 5(a), SH No. 509, p. 102. However, for a bequest (including of an artwork), a plain written undertaking will not suffice, and a properly executed will is required; see Inheritance Law 5725-1965, § 8, SH No. 446 (as amended), p. 63.

58 Land Law, 5729-1969, § 8, SH No. 575 (as amended), p. 259. Though, in some exceptional cases, the courts have used the principle of good faith to approve agreements relating to immovables that were not made in writing. Copyright Law, 5768-2007, § 37(c), SH No. 2119 (as amended), p. 38.

59 As per § 12 and § 39 to the Contracts Law (footnote 51, above). The obligation to act in good faith is enshrined also in the Sale Law (footnote 52, above), at § 6.

60 The rules concerning remedies of contracting parties are assembled in the Remedies Law (footnote 51, above).

Although buyers may obtain title over movables (such as artworks) despite the lack of good faith, market overt protection for the buyer may be incomplete if the buyer lacks good faith.[61] The market overt rule provides protection to a bona fide purchaser, when purchasing from an art dealer or at auction, by clearing the buyer's title to the purchase from prior ownership or other adverse right.[62]

The market overt rule is conditional on payment of a consideration and receipt into possession being performed in good faith.[63] In a seminal case,[64] the Supreme Court discussed the application of this rule regarding a claim to restitute artworks sold in a flea market, which were afterwards discovered to be stolen, of high value and painted by an important artist. The Court ruled that to meet the 'consideration' requirement, a substantial consideration is due, applying an objective standard. Hence, consideration must correlate to the real value of the chattel, regardless of whether the parties to the sale contract both believed, in good faith, that it was of a significantly lesser value. Thus, a gross error regarding a work's value is a mistake of fact. The Supreme Court ruled, that in relation to these artworks,[65] the original owner, who was not a party to the contract, may sue for rescission based on the legal rule of 'tracing'. In contrast, insubstantial errors will not provide for rescission.[66]

The good faith requirement has been determined by case law to be judged according to a subjective standard; thus, the buyer must show that, in the circumstances,[67] he or she was unaware that the seller was not entitled to sell the chattel.[68] Hence, whereas a buyer who turned a blind eye will not be entitled to this defence, mere negligence does not deprive the buyer of title.[69]

Good faith and consideration may protect the buyer's title also in situations of 'adverse transactions',[70] which may occur more frequently in a private sale. Generally, when a person undertakes to sell a chattel to buyer A, and prior to its delivery sells it to buyer B, the first buyer will prevail. However, if the second buyer receives the chattel or the rights in it in good faith and for consideration, this buyer will prevail.

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61 Sale Law (footnote 52, above), at § 34.

62 Eyal Zamir, 'Market Overt in the Sale of Goods: Israeli Law in a Comparative Perspective', 24 *Israel Law Review* 82, 83 to 84 (1989).

63 Those conditions are stipulated in the Sale Law (footnote 52, above), at § 34: 'Where any movable property is sold by a person who carries on the sale of property of the kind of the thing sold, and the sale is made in the ordinary course of his business, ownership passes to the buyer free of every charge, attachment or other right in the thing sold even if the seller is not the owner thereof or is not entitled to transfer it as aforesaid, provided that the buyer buys and takes possession of it in good faith.'; see also Avi Weinroth, *Property Law* (2016), 247 to 253.

64 The case was discussed by the Supreme Court for the first time in Civil Appeal (Supreme Court) 5664/93 *Canaan v. United State of America* (13 April 1997), Nevo Legal Database (by subscription, in Hebrew), and again, by an extended panel of judges, in Further Hearing (Supreme Court) 2568/97 *Canaan v. United State of America* (20 February 2002), Nevo Legal Database (by subscription, in Hebrew).

65 *Canaan v. United State of America* (2568/97), at paras. 27 to 35 of Justice Or's decision (footnote 64, above).

66 *Halstock v. Ben Ami*, the Magistrate Court of Tel-Aviv – Jaffa, 86495/00 (30 January 2003).

67 Civil Appeal (Haifa District Court) 41802-05-15, *Dakduki v. Progress D.S. (Investments & Finance 1992) Ltd* (6 December 2015), Nevo Legal Database (by subscription, in Hebrew), at para. 36.

68 Weinroth (footnote 63, above), at pp. 249 to 250; Civil Appeal (Haifa District Court) 3495/06 *Taliah v. Migdal Insurance Company Ltd* (4 September 2007), Nevo Legal Database (by subscription, in Hebrew) at para. 14.

69 Weinroth (footnote 63, above), pp. 249 to 250.

70 Movable Property Law, 5731-1971, § 12, SH No. 636, p. 184.

Defects in the making of contracts,[71] among them 'mistakes',[72] can invalidate title transfer and result in rescission. A contract based on a mistake of fact, or law, but not on how worthwhile the transaction is,[73] can be grounds for rescission, if the contract would not have been concluded were it not for the mistake, and if the other party knew or should have known of the mistake.[74] When the mistake is mutual, rescission can be applied for through the court,[75] and if granted, damages may be ruled for the defendant.[76]

Purchasers have no formal duty to enquire into title (subject to the deprivation of market overt defence when turning a blind eye). The Museums Regulations require the registration of exhibits, [77] including how an exhibit came to a museum. Although certain legal experts interpret this as requiring provenance research, this has not yet been adjudicated.

In March 2014, the Museums Council of the Ministry of Culture approved a draft of a code of ethics, containing a section entitled 'Stolen Property', which effectively adopts the due diligence obligation of the International Council of Museums' Code of Ethics for Museums,[78] but this has yet to be approved by the Ministry of Justice.

ii Nazi-looted art and cultural property

In the years immediately following the Holocaust, many cultural items arrived in Israel, a large proportion of them to museums.[79] The most significant concentration of looted art in Israel is the Jewish Restitution Successor Organization (JRSO) Collection.[80] When the collection was distributed after the second world war, hundreds of artworks and items of Judaica[81] were deposited with the Israel Museum.[82] Despite the magnitude of artworks in the museum's possession that are known to be looted, only a few, some of them well known, have been restituted.[83]

71 Contracts Law (footnote 51, above), at Ch. 2.

72 id., at § 14.

73 id., at § 14(d).

74 id., at § 14(a).

75 id., at § 14(b).

76 id.

77 See Museum Regulations (footnote 7, above), at § 6.

78 International Council of Museums, Code of Ethics for Museums (as amended), at https://icom.museum/wp-content/uploads/2018/07/ICOM-code-En-web.pdf (last accessed 13 October 2020), at para. 2.3.

79 Wesley A Fisher and Ruth Weinberger, 'Holocaust-Era Looted Art: A Current World-Wide Review' (Conference on Jewish Material Claims Against Germany and World Jewish Restitution Organization, 2014), at http://art.claimscon.org/wp-content/uploads/2014/11/Worldwide-Overview.pdf (last accessed 12 October 2020), pp. 28 to 29.

80 A collection composed of about 1,200 artworks and Judaica looted by the Nazis during the Holocaust, collected by the Jewish Restitution Successor Organization and the Jewish Cultural Reconstruction.

81 Including works by Max Liebermann, Egon Schiele and Alfred Sisley.

82 At the time, named the Bezalel National Museum.

83 The restituted works include Liebermann's *Garden at Wannsee* and Pissaro's *Boulevard Montmartre: Spring*. For the former, see News, 'Israel Museum restitutes Impressionist masterpiece by German-Jewish artist Max Liebermann', lootedart.com: The Central Registry of Information on Looted Cultural Property 1933-1945, at www.lootedart.com/news.php?r=Q2VHRB636761 (last accessed 8 October 2020); for the latter, see *Boulevard Montmartre, Spring* – Camille Pissarro, Google Arts & Culture, at https://artsandculture.google.com/asset/boulevard-montmartre-spring/GQFQaBkcnONwiQ?hl=en-GB

One significant restitution claim was resolved by the Tel Aviv Museum of Art, regarding the Josef Israëls painting *From Darkness to Light*.[84] A significant unresolved claim has been lodged with the Israel Museum regarding the ancient Birds' Head Haggadah.[85]

Although Israel endorsed both the 1998 Washington Principles and the 2009 Terezin Declaration, there is no legislation incorporating these principles. There is only one Israeli law, from 2006, regarding restitution,[86] the main purpose of which was to establish the Hashava Company.[87] As this law did not specifically mention art or cultural property,[88] these issues have been addressed only secondarily.[89] One of the Hashava Company's unfulfilled goals, in this context, was to implement legislative change that would impose a duty on Israeli museums and cultural institutions to conduct provenance research on their collections.[90] The State Comptroller pointed to the lack of this obligation as a possible cause for the scarce restitution from the JRSO Collection.[91] Not a single claim has ever been brought before the courts.

The Hashava Company operated for a restricted period, dissolving in 2017.[92] Several private initiatives have since been established in an attempt to replace it and continue its work, such as the Hashava Foundation,[93] which works to promote legislative change in the field of Nazi-looted art and cultural property.

(last accessed 8 October 2020). See also 'A Race Against Time: The Story of Artworks Looted during the Holocaust' (in Hebrew), ynet, at www.ynet.co.il/articles/0,7340,L-4951480,00.html (last accessed 8 October 2020).

84 See, generally, 'How a Nazi-looted painting entered an Israeli museum', *The Art Newspaper*, at www.theartnewspaper.com/news/how-a-nazi-looted-painting-entered-an-israeli-museum (last accessed 9 October 2020).

85 For more information, see 'Jewish Family Fights for Ownership of the Israel Museum's Prized Passover Haggadah', artnet News, at https://news.artnet.com/art-world/jewish-family-birds-head-haggadah-921581 (last accessed 7 October 2020).

86 Assets of Holocaust Victims Law (Restitution to Heirs and Dedication to Aid and Commemoration) 5766-2006, SH No. 2049 (as amended), p. 202. Prior to this law, these types of issues were indirectly addressed by the Administrator General Law, 5738-1978, SH No. 883 (as amended), p. 61.

87 The Company for Location and Restitution of Holocaust Victims' Assets, Ltd.

88 Controversy arose regarding the Hashava Company's authority to handle art and cultural properties; see Ministry of Finance, The Company for Locating and Restoring the Assets of Holocaust Victims Ltd, State Comptroller's Annual Report 67A, 115, at www.mevaker.gov.il/he/Reports/Report_552/17acedcf-d600-4531-abff-781f7d96dc7d/401-ozar-shoa.pdf (last accessed 9 October 2020), at p. 131.

89 Based on a summary report issued by the company; see Summary 2007-2017 (in Hebrew), The Company for Locating and Restoring the Assets of Holocaust Victims Ltd, at www.hashava.org.il/download/files/%D7%A1%D7%99%D7%9B%D7%95%D7%9D_%D7%A4%D7%A2%D7%99%D7%9C%D7%95%D7%AA_2007-2017.pdf (last accessed 9 October 2020).

90 id., at p. 32.

91 State Comptroller's Report 67A (footnote 88, above), at 115 to 116.

92 With the dissolution of the company, its various powers and functions were distributed between the Custodian General under the Ministry of Justice, the Authority for the Rights of Holocaust Survivors under the Ministry of Finance and the Ministry for Social Equality.

93 Hashava Foundation: Restituting Justice, at https://en.hashava.org/ (last accessed 6 October 2020). The authors of this chapter are affiliated to the Hashava Foundation.

One development is the Jerusalem Declaration,[94] announced at the 2018 Conference on the Future of Looted Art,[95] and officially adopted by the Education and Culture Committee of the Knesset.[96] One significant aspect of the Jerusalem Declaration is its call to museums to take their heirless art collections out of their storerooms and to display them in public as a memorial to the unprecedented Nazi looting of art and culture.

iii Limitation periods

The Prescription Law regulates the Israeli limitations of actions in civil claims,[97] and stipulates a period of seven years for any claim that is not related to land.[98] The limitation period starts on the day on which the cause of action accrued.[99] However, the Prescription Law provides for exceptions in which the period of limitation shall be postponed or prolonged,[100] for example when there is delay in discovering the facts that establish the cause.[101]

Alongside the limitation periods, the Prescription Law acknowledges applicability of the rule of laches (delay).[102] A defence based on laches may be accepted even if the limitation period has not expired.[103] In contrast to the statutory periods of limitation, courts have wide discretionary power in exercising pleas of laches.[104]

When special limitation periods may apply

Although there are a few exceptions to the statutory periods, the law does not address looted art claims or special related limitation periods. However, the rules of limitation of civil proceedings in Israel are classified as procedural, rather than substantive, and therefore do not annul the rights themselves, but might only bar the plaintiff from receiving remedies from the courts.[105] Therefore, if a possessor were to relinquish his or her right to plead limitation, the claim could proceed to adjudication.

In this regard, a claim brought against the Claims Conference, Inc[106] challenged its refusal to award the claimants a grant on the ground that the claim was time-barred. The claimants responded, raising a 'moral' claim that it is inappropriate to plead prescription

94 'The Jerusalem Declaration on the Future of Looted Art', in 'Conference on the Future of Looted Art: A Summary', Jerusalem, October 2018, at pp. 18 to 19, at https://drive.google.com/file/d/1xjPMS7qO6G1ZvWbFaQlywlK0xYSP1VwR/view (last accessed 12 October 2020).

95 The conference was sponsored by The Center Organizations of Holocaust Survivors in Israel.

96 Protocol No. 711 of the Education, Culture and Sports Committee of the Knesset, 7 November 2018.

97 Prescription Law, 5718-1958, SH. No. 251 p. 112. Though, it should be noted that as per Article 29(d) of the Prescription Law, 'the period of prescription shall not be shorter than it was before the coming into force of this Law'.

98 id., at § 5(1).

99 id., at § 6.

100 id., at §§ 7 to 8 and 10 to 18b.

101 id., at § 8.

102 id., at § 27.

103 id.; see Civil Appeal (Supreme Court) 9839/17, *Habitat Ltd. v. CAFOM* (17 December 2018), Nevo Legal Database (by subscription, in Hebrew).

104 Civil Appeal (Supreme Court) 2919/07, *The State of Israel – the Atomic Energy Commission v. Guy-Lipel* (19 September 2010), Nevo Legal Database (by subscription, in Hebrew), at para. 96 to Justice Amit's decision.

105 Prescription Law (footnote 97, above), at § 2; Tal Havkin, *Limitation of Actions*, 14 (2014).

106 Civil Case (Tel-Aviv District Court) 1296/02, *Mariana Rodstein, et al. v. Claims Conference* (1 June 2008), Nevo Legal Database (by subscription, in Hebrew).

when dealing with Holocaust-related claims. Although the court expressed its dissatisfaction with the defendant relying on limitation rather than addressing the substantive claims, it ruled that the court is obliged to consider this defence under law[107] and the claim was barred. Thus, even in this very particular and sensitive context, Israeli courts have not disregarded the statute of limitation.[108] The court remarked that the claim was not filed against the German government holding the stolen property, but against the Claims Conference in its capacity as a conduit for handling claims (alleging negligence in lawsuits against the German government). From this remark it can be learned that in lawsuits filed directly against an entity holding looted property, the said moral argument may be accepted.

A 2004 bill was proposed to amend the Prescription Law, recognising that civil proceedings relating to Holocaust-related damages require unique treatment.[109] However, this bill (which did not pass) did not specifically address claims for restitution of looted art or cultural property.[110] A similar proposal is incorporated in a draft of the codex that is under consideration to replace substantial portions of Israeli civil law.[111]

It has been suggested that museums and cultural institutions ought to be perceived as custodians or trustees.[112] Israeli case law dictates that the date of accrual of a claim based on a violation of the trustee's duty begins, inter alia, upon the trustee's denial of his status. Thus, arguably, if a restitution claim is filed against a museum, the cause of action will accrue only if the museum denies its status as a trustee of the work. This interpretation coincides with a perception, based on proclamations and the experience to date, that an Israeli cultural institution will not object to restitution based merely on a time-bar argument.

Recent cases or litigation that address time limitation issues

In the 2019 Supreme Court decision concerning the drafts of Israel's Declaration of Independence (aforementioned),[113] the laches defence was dismissed, inter alia, in light of the public interest in restituting these drafts to the state. Moreover, it was stated that the application of laches in such circumstances should be examined from the perspective of cultural property law, weighing the duty of restitution of cultural property.[114]

107 id., at pp. 14 to 15.

108 See also Civil Case (Tel-Aviv District Court) 18277-07-13, *Linden Kristina v. Conference on Jewish Material Claims Against Germany* (18 May 2017), Nevo Legal Database (by subscription, in Hebrew), at pp. 4 to 6.

109 Though, not referring specifically to claims of restitution of cultural property.

110 See discussion concerning the Bill: Protocol No. 529 of the Constitution, Law and Justice Committee, of the 17th Knesset (17 April 2008).

111 Draft Bill The Civil Code Law, 5771-2011, § 996(b), HH (Gov.) No. 595 p. 1111.

112 See Meir Heller, Keren Barth-Abelow and Talila Devir, 'Claims for the Return of Cultural Heritage: The Israeli Perspective', in 25(2) *Art Antiquity and Law* (July 2020), 119, 124. Based on the notion of 'constructive trust'. The Israel Museum, for instance, defines its possession over the looted art it holds, as 'custodianship'; see WWII Provenance Research JRSO | The Israel Museum, Jerusalem, at http://museum.imj.org.il/imagine/irso/en (last accessed 14 October 2020).

113 See Section II, above.

114 *State of Israel v. Beham* (8323/17) (footnote 18, above), at paras. 33 to 35 of Justice Mintz's decision.

In 2015, a revolutionary amendment to the Prescription Law was legislated, stipulating the suspension of the limitation period in circumstances in which the plaintiff was misled,[115] where 'misleading' also includes 'knowing non-disclosure of any of the facts that constitute the cause of action'.[116] Thus, this amendment gives more weight to the defendant's misconduct.[117]

iv Alternative dispute resolution

There are no specific alternative dispute resolution regulations or organisations for art disputes in Israel, and as set forth herein, there are few known disputes that were mediated privately. A dispute regarding art will be heard as any other civil claim in the competent court, as previously noted.

The new civil procedure regulations, which take effect as of 1 January 2021,[118] apply a mechanism of mandatory preliminary mediation meetings[119] to all magistrates' courts in the country and to civil lawsuits with a value exceeding 40,000 shekels. Arbitration, however, is conditional on all parties to the conflict agreeing to it.[120] Unless the parties have agreed to refer the dispute to mediation or arbitration, disputes regarding art will be heard as any other civil claim in the competent court, as previously noted.

In Israel, there is a system of private tribunals to which a dispute can be referred with the parties' consent (e.g., religious court, financial court). Due to the fact that art and Judaica purchases are often made anonymously (for tax evasion or money laundering reasons), in practice many such disputes are referred to a Rabbinical tribunal, whose principles include confidentiality. These tribunals hear disputes behind closed doors and the details of the parties and the case are not disclosed.

Regarding dispute resolutions involving looted art, the Restitution Law provides a particular evidence-based mechanism for determining the ownership of Holocaust victims' property, as articulated in the law, transferred to the Hashava Company.[121] In practice, there is no evidence that cultural property was ever transferred to the now-defunct company and therefore no mechanism is known to have been used in this regard.

Following discussions held at the Ministry of Justice regarding the responsibility for conducting provenance research in Israel, the Hashava Company drafted a policy document regarding the special status of looted art and cultural assets in Israel,[122] recommending, inter alia, that when heirs claim ownership, their claims should be heard by the institutions

115 Or someone else on the defendant's behalf.

116 Prescription Law, 5718-1958, Amendment No. 5 (2015), SH No. 2497 p. 217.

117 Bill Prescription Law (Amendment No. 5) (Postponing the Limitation Period), 5775-2015, HH (Par.) No. 600 p. 125; Additional Civil Appeal (Supreme Court) 6938/19, *Dani Ilani v. Pier Baruch* (20 August 2020), Nevo Legal Database (by subscription, in Hebrew).

118 Pending any unforeseen delays. Implementation of the updated regulations has been delayed several times since their adoption in 2017.

119 Civil Procedure Regulations, 5778-2018, §§ 37 to 39.

120 Arbitration Law, 5728-1968, §§ 1 tp 3, SH No. 535, p. 184.

121 Assets of Holocaust Victims Law (footnote 86, above), at §§ 2 to 22. A mechanism (§ 11 of the Law) has also been established before the courts in the event of a dispute as to whether an asset is the property of a Holocaust survivor or not.

122 Company Policy – Locate and Recover Holocaust Victims' Assets Regarding the Unique Status of Holocaust-Looted Cultural Assets Located in Israel (27 April 2015), at www.hashava.org.il/download/files/%D7%94%D7%9E%D7%A2%D7%9E%D7%93%20%D7%%D7%99%D7%99%D7%97%D7%95%D7%93%D7%99%20%D7%A9%D7%9C%20 (last accessed 12 October 2020).

holding the property in accordance with the mechanism to be determined, on the basis of the Washington Principles and the Terezín Declaration.[123] However, to date this has not been codified in legislation. The Hashava Foundation has recently begun working to amend this lacuna, and one of its goals is to advance legislation to establish an objective and independent decision-making mechanism for deciding the claims of heirs in the matter of looted art.[124]

There have been two notable disputes relating to art and cultural property involving alternative resolution.[125] One was the controversy over Max Liebermann's *The Basket Weavers*, which was resolved through a mediation process,[126] at the end of which the work was returned to the original owners' heirs.

The second case was in respect of the Bruno Schulz frescoes.[127] A diplomatic resolution was reached, in which further to a joint declaration by Israel and Ukraine, a protocol was executed between the governments of the two countries,[128] recognising the frescoes as the property and cultural wealth of Ukraine, and establishing a 20-year renewable loan to Israel.[129]

IV FAKES, FORGERIES AND AUTHENTICATION

Israeli law does not distinguish between art and other forms of movable property in providing relief against fakes, forgeries and inauthenticity. Breach of contract can be remedied via enforcement or termination (and restitution), with the possibility of recovering damages in either case. Illegal or unconscionable contracts are void.

The sale of a fake or forgery can be either a result of a mutual mistake or misrepresentation by the seller; both situations can be resolved under contracts law through rescission, discussed in Section III.[130]

In addition to remedies through contracts law, tort claims to recover damages can also be lodged if the representation of the item is negligent or fraudulent.[131] In assessing negligence, the defendant's actions are compared to those of a 'reasonable and intelligent person'.[132] In the case of professional conduct, the 'reasonable and intelligent person' is one

123 id., at para. 1.2.

124 See Heller, et al. (footnote 112, above).

125 Interestingly, both require dispute resolution of an international nature.

126 Conducted by Adv. Meir Heller. For further reading, see 'Artwork Nazis stole in WWII returning to Jewish owner's heir', Ynetnews, at www.ynetnews.com/articles/0,7340,L-4946706,00.html (last accessed 7 October 2020).

127 Three Holocaust-era wall murals by the Galician Polish-Jewish artist Bruno Schulz, who was murdered by the Nazis. For further reading, see 'Behind Fairy Tale Drawings, Walls Talk of Unspeakable Cruelty', *New York Times*, at www.nytimes.com/2009/02/28/arts/design/28wall.html (last accessed 7 October 2020).

128 The Ukrainian Ministry of Culture and the Israeli Ministry of Foreign Affairs.

129 Protocol Between the Ministry of Culture and Tourism of Ukraine and the Ministry of Foreign Affairs of the State of Israel on the Temporary Loan of Wall Paintings of Bruno Schulz, Isr.-Ukr., 28 February 2008.

130 See Section III.i, above.

131 Tort Ordinance (New Version), § 35-36, DMI No. 10 p. 266 (as amended); id., at §§ 56, 63 (breach of statutory obligation).

132 id., at § 35.

who shares the same level of expertise in the relevant field.[133] Thus, experienced dealers and other experts must overcome a higher threshold to avoid a finding of negligence. In addition, deceitfully selling a fake or forged item intentionally is a criminal offence.[134]

i Rules and regulations governing warranties

Dealers, as commercial entities, are required to represent their merchandise faithfully.[135] As part of this obligation, the seller must not mislead a consumer in any material matter in the transaction. A 'material interest' is defined, inter alia, as a fact relating to the nature, substance and type of the goods sold; the identity of its creator; the place of production; the acceptable price for it; and the previous use made of it. If a dealer, actively or passively, misrepresented the nature of the merchandise, the purchaser may cancel the transaction within a reasonable time from the discovery of the misrepresentation.[136] This type of action by a dealer is also tortious.[137] Conspiracy to defraud, including, for instance, a conspiracy to deceitfully influence the market price of goods sold in a public auction, is also a criminal offence.[138]

ii Role of experts, artist foundations and catalogues raisoneés

Case law regarding the role of experts in questions of art, specifically artist foundations and catalogue raisoneés, is limited. In one case, a buyer lost his legal right to claim non-conformity in the work and to cancel the transaction after purchasing it at auction, because he received an expert opinion on it before the purchase,[139] and was denied remedy.[140] In another case, the opinion of an expert, who was the author of an artist's catalogue raisonné, was sufficient for the court to declare the work inauthentic.[141]

133 id.

134 Penal Law (footnote 28, above), at § 415; see also id., at §§ 418 and 420, which criminalise, respectively, the making and use of forged documents, for example forging provenance documents.

135 Consumer Protection Law 5741-1981, §§ 2(a)(1), 2(a)(6), 2(a)(8), 2(a)(9), 2(a)13 2(a)(14), 2(a)(15), SH No. 1023 (as amended), p. 248.

136 id., at § 32.

137 id., at § 31.

138 Penal Law (footnote 28, above), at § 440.

139 Prior to the private purchase of an artwork, the buyer had it assessed at Sotheby's. The court ruled that this fulfilled the requirements of Section 14 of the Sale Law, which excludes a claim of unsuitability if the buyer has checked the item and has not immediately declared its unsuitability.

140 Civil Case (Tel-Aviv Magistrates Court) 27303/06, *Leibitz v. Zach* (24 July 2007), Nevo Legal Database (by subscription, in Hebrew).

141 Civil Case (Tel-Aviv Magistrates Court) 60503/05, *Stieglitz v. Feld* (31 August 2008), Nevo Legal Database (by subscription, in Hebrew). The witness's status as author of the catalogue raisonné was the predominant factor in the court recognising her as an expert witness.

V ART TRANSACTIONS

i Private sales and auctions

Private or auction sales of works of art are not specifically regulated in Israeli law, and the ordinary contracts and sale laws apply.[142] Certain restrictions apply to sales of exhibits by museums.[143]

Contrary to the usual rule of 'when the hammer comes down' a sale agreement is executed, the courts have recognised that this rule cannot apply to a good faith purchase at auction, in a manner that prevents the buyer from returning a work that turned out not to be as it was presented.[144] The seller is obliged to give the buyer an adequate opportunity to inspect the purchase immediately on receipt, when the buyer is responsible for examining it and for promptly notifying any non-conforming discrepancies to the seller.[145] A non-conformity is very broadly defined in the law.[146]

The discovery of a non-conformity gives the buyer the right to rescind the purchase.[147] In the event of an undisclosed non-conformity that the seller knew or should have known about, but did not disclose to the buyer, the buyer will be entitled to rely on it; this is true even if the buyer failed to inspect the purchase on receipt and despite any agreement between the parties. These provisions place an increased responsibility on the seller, and even more so for auction houses, who are presumed to know, or should know, the true nature of items they sell.

As in many other parts of the world, Israeli auction houses have formed a practice of 'terms and conditions' (T&C),[148] restricting their responsibility for the information provided about items for sale. Although some provisions of the Sales Law are dispositive, this is not the case for the provision concerning a non-conformity that is not disclosed by a seller.

The level of responsibility to which auction houses commit in practice regarding the information they present to potential buyers varies from broad to very partial, but most undertake to allow cancellation and refund if information they have presented turns out to be erroneous. Some auction houses remove all responsibility from themselves and make it clear that the sale is 'as seen',[149] but most clarify that the buyer will be refunded on discovery of inauthenticity.

142 See Section III.i, above.

143 See Museum Regulations (footnote 7, above), at § 12: the sale is conditional on the approval of the museum's management, and the consideration must be used only to purchase other exhibits for the collection.

144 Civil Case (Tel-Aviv Magistrates Court) 34948/00, *Barin v. Vengrowich* (17 December 2002), Nevo Legal Database (by subscription, in Hebrew).

145 Sale Law (footnote 52, above), at §§ 11 to 16. The buyer's failure to disclose the non-conformity to the seller will bar his or her reliance on it and his or her right to rescind the purchase.

146 Inter alia, as a breach of the seller's obligation by delivering property of a different type than agreed, or in terms of type, description, quality or features different from what was presented to the buyer, or one that does not otherwise match what was agreed between the parties.

147 As well as a hidden non-conformity, defined as one that cannot be detected by a reasonable examination.

148 Participation is subject to agreement to the terms and conditions.

149 See, e.g., the following terms and conditions: Kedem Auction House, at www.kedem-auctions.com/11028-2/ (last accessed 12 October 2020); Tiroche Auction House, at www.tiroche.co.il/howItWorks?lang=english (last accessed 13 October 2020); Matsart Auctioneers and Appraisers, at www.matsartauctioneers.co.il/termsandconditions.asp (last accessed 12 October 2020).

All auction houses seem to clarify within their T&C that they are operating only as agents of the sellers and, therefore, are not responsible for inaccuracies. However,[150] this will not exempt them from the application of the Consumer Protection Law, which is not dispositive, and imposes an extensive duty of disclosure on a practitioner to disclose to the buyer any defect or inferior quality or other characteristic known to him or her that significantly reduces the value of the item.[151]

The amount of time given to the buyer for the purpose of inspection and notification of non-conformity (and, as a result, rescission) is usually limited in the T&C to 30 days. This practice is in line with court rulings that 'hammering' only creates a conditional sale, followed by a period during which the buyer may inspect the property.[152]

Online transactions are subject to special regulations in the Consumer Protection Law that provide enhanced protection to the buyer, such as the buyer's right to cancel the transaction within 14 days of receipt of purchase, without cause.[153] Regulations regarding distance selling for online sales do not specifically apply to auctions or art, and most auction houses clarify in their T&Cs that only the auction house has the right to cancel a sale.

ii Art loans

The Loan of Cultural Objects Law was enacted against the backdrop of perceived reluctance by foreign institutions to enter loan agreements with Israeli entities, out of concern of being sued by Holocaust survivors or their heirs.[154] When the bill was introduced in the Knesset,[155] the debate reflected the tension between the reluctance to 'reward' holders of looted art and the alternative of not having cultural properties displayed in Israel.[156]

The provisions of the Law echo the balance that has been found, which is intended to address the aforementioned tension: Article 1 emphasises that the law enables the loan without prejudicing the Jewish people's claims in respect of looted art; Article 3 provides for the protection afforded by a decree granted by the Minister of Justice to the loaned property;[157] and Articles 4 to 6 stipulate the Minister's obligation to publish the decree in such a way as to allow objections before it is granted, and to specify the conditions under which the Minister must refrain from issuing such a decree.[158]

150 As detailed relating to warranties – see Section IV.

151 Consumer Protection Law 5741-1981 (footnote 135, above), at § 4(a)(1). In addition, a practitioner is forbidden to sell or hold for commercial purposes, an asset that is deceiving (§ 2(b)).

152 See *Barin v. Vengrowich* (footnote 144, above).

153 Consumer Protection Law (footnote 135, above), at § 14C(c)(1). There are rulings condemning unfair systematic intervention in online sales through the engagement of fictitious participants, e.g., Civil Appeal (Supreme Court) 5378/11, *Arthur Frank v. Olsale* (22 September 2014), Nevo Legal Database (by subscription, in Hebrew). However, this has not yet been discussed in the context of art auction sales.

154 Loan of Cultural Objects (Restrictions of Jurisdiction) Law, 5767-2007, SH 2085 (as amended), p. 137.

155 See Protocol of Meeting No. 231 of the 16th Knesset (8 March 2005).

156 For further discussion on this issue, see Heller, et al. (footnote 112, above), at pp. 132 to 135.

157 As long as the loaned work is in Israel by virtue of the loan agreement: (1) the Israeli courts will not have jurisdiction over suits concerning the right of ownership, possession or any right contravening the right of the lender in the property, and (2) the Israeli courts will not render decisions that will prevent the property being returned to the lender on expiry of the loan period.

158 The Minister is required to verify the existence of an alternative judicial instance where claims concerning the cultural property included in the decree can be determined. Article 6 of the Loan of Cultural Objects Law strictly prohibits the Minister from issuing a decree when he is convinced that prima facie evidence exists that the party opposing the decree does possess rights in the property.

iii Cross-border transactions

Although there are no restrictions on exports of art, any removal of an antiquity from Israel is forbidden unless the relevant authority has given its approval.[159] The Archives Law also sets restrictions on archival materials leaving Israel[160] and requires confirmation that the State Archivist has been given the opportunity to make a copy. Violation of this law constitutes a criminal offence punishable by a fine.

Israel is a party to one of the international conventions that impose limitations on illicit trafficking of cultural properties.[161]

Tax considerations

As a general rule, no imports of art into Israel are subject to customs duties. However, value added tax (VAT) applies to all art imported to Israel.[162] Original works of art imported by a museum or educational institution, or which are imported by a tourist, an immigrant or a returning resident, are exempt from VAT but must be declared on entry to Israel.[163] VAT is applied to the auction house's commission and if the purchase is an import, the VAT for the import is paid by the buyer. As for commercial sales of used art, VAT will only apply to the difference between the purchase price and sale price, and not the item's full sale price.[164] The import of personal items by immigrants to Israel (or returning residents) can be facilitated VAT-free, allowing private art collections to be brought into the country, with certain restrictions (the collection must be from the importer's household, the item cannot be sold within six years of its arrival in Israel, etc.).[165]

iv Art finance

There is no form of art finance in Israel. However, there is some renting of artworks, allowing owners to profit from their collection and giving renters an option to enjoy art at an affordable price or for a specific event.[166]

159 Defined in Article 1 of the Antiquities Law (footnote 7, above) as an asset (whether detached or connected), made by a person before 1700 CE, including anything added to it afterwards and being an integral part thereof; or an asset, as stated in paragraph (1), made by a person on or after 1700 CE, and is of historical value and the Minister has declared it an antiquity; or it constitutes ancient zoological or botanical remains from before 1300 CE.

160 This includes any writing, recording and the like that is held with a government body, or is interesting for a study of the past, the people, the state or society or is relating to the legacy or life work of prominent individuals.

161 Prominent conventions include: Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954 (the Hague Convention); the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property; UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995, Rome); Convention for the Safeguarding of the Intangible Cultural Heritage, Paris, 17 October 2003. Israel is a party only to the Hague Convention.

162 As of October 2020, at the rate of 17 per cent.

163 Value Added Tax Law, 5736-1975, § 32(4), SH No. 792 (as amended), p. 52.

164 id., at § 5(a); Taxation Decision 5289/17 (20 March 2017), Nevo Legal Database (by subscription, in Hebrew).

165 See www.gov.il/he/departments/guides/guide-for-immigrants-and-foreign-residents (last accessed 2 December 2020).

166 In some cases, the renter has the option to purchase the work while receiving a credit for the rent.

There is no legislation in Israel that is relevant to transparency that specifically affects transactions in art. However, the main anti-money laundering legislation, the Prohibition on Money Laundering Law,[167] prohibits money laundering through the sale or purchase of certain assets, including art. In 2017, the definition of assets was expanded to include any and all types of assets.

Other relevant pieces of legislation[168] include the Law for Reducing the Use of Cash 2018[169] (which, since it came into effect on 1 January 2019, has resulted in a reduction in the volume of sales of expensive art items) and the Counter-Terrorism Law, 5776-2016, as well as several prohibitory regulations.[170]

Customer due diligence requirements are regulated by the Sales Law defining the scope of deficiency and related remedies, and by the Consumer Protection Law, discussed in Sections IV and V.i, above.

VI ARTIST RIGHTS

i Moral rights

Moral rights are governed by the Copyright Law[171] and comprised the right to authorship and to preservation of the integrity of a work. Any act that compromises these rights is considered an infringement of moral rights under the Copyright Law, and generally entitles the artist to statutory damages of up to 100,000 shekels for each infringement.

An amendment to the Copyright Law that entered into force in September 2019 allows for the use of 'orphan works' under certain conditions, namely that the user conducts a diligent search to find the creator of the work; states clearly that use of the work is in accordance with the Copyright Law and publishes contact information so that anyone may send the user details of the identity of the creator; and, in the case of commercial use, is required to publish advance notice of the intention to use the work.[172] Any use of a work complying with the above conditions will not be deemed a breach of the creator's moral rights.

ii Resale rights

This is not applicable in Israeli law.

iii Economic rights

The Copyright Law governs economic rights in artistic works and stipulates that the copyright holder in a work has the exclusive right to economic exploitation thereof, including copying, publication, public performance or broadcasting, making the work available to the public over the internet, creating derivative works, and offering works for rent when applicable.

The term of protection for copyright in artistic works is 70 years from the death of the artist. The artist is generally the first owner of the copyright in a work. An employer owns

167 The Prohibition on Money Laundering Law, 5760-2000, SH No. 1753 (as amended), p. 293.

168 For the full list, see the Israel Money Laundering and Terror Financing Prohibition Authority website, at www.justice.gov.il/En/Units/IMPA/Legistlation/Pages/default.aspx (last accessed 13 October 2020).

169 Purchases of more than 50,000 shekels may no longer be made in cash.

170 The Counter-Terrorism Law, 5776-2016, SH No. 2556 p. 898; Prohibition on Money Laundering (Financial Sanction) 5762-2001, KT 5762 No. 1 p. 248.

171 The Copyright Law (footnote 58, above).

172 Publication can be on the internet or in a daily newspaper.

rights in an artistic work created by an employee in the course of employment unless agreed otherwise. In the case of commissioned works, the artist will own the rights unless implicitly or explicitly agreed otherwise with the client.[173]

The Copyright Law provides for a range of permitted uses in copyright-protected works, including a 'fair use' provision. Infringement of copyright in artistic works entitles the artist to statutory damages of up to 100,000 shekels per infringement (the court can award higher compensation with proof of damage). Copying an infringing work for commercial sale, or importing an infringing work into Israel, as well as sale or distribution of infringing copies, are criminal offences under the Copyright Law.

The aforementioned 2019 amendment introduced measures to protect works against online piracy, authorising courts to issue orders to internet providers instructing them to block access to infringing content available on the internet, and provided copyright owners with a cause of action to obtain identifying information about a party whose actions allegedly infringe their copyright.[174]

VII TRUSTS, FOUNDATIONS AND ESTATES

There is no practice in Israel of holding property (including works of art) through locally formed trusts and foundations. Since estate tax does not apply in Israel, it is not known to be used as a tool for Israeli tax planning. However, the practice of using foreign trusts and foundations or offshore entities does exist.

Donations to public institutions holding the requisite tax accreditation (museums and cultural institutions in Israel are mostly public institutions accredited for tax purposes) entitle the donor under certain conditions to tax benefits, and the institution receiving the donation does not pay tax on the donation. Many public institutions are affiliated to a foreign tax entity, entitling foreign-based donors to local tax benefit from a donation.[175]

VIII OUTLOOK AND CONCLUSIONS

As discussed in detail in Section III.ii on Nazi-looted art, the Hashava Foundation is advancing legislation to establish a decision-making mechanism for adjudicating the claims of heirs in the matter of looted art. We anticipate that in the coming years there will be developments in this field, as well as in applying the duty to conduct provenance research to institutions holding looted art and cultural property. The Ministry of Justice is preparing a bill endeavouring to regulate significant issues in matters of restitution, including statute of limitations, burdens of proof and ways of resolving disputes.

Another phenomenon has surfaced recently, regarding the economic situation of cultural institutions that, in the normal course of events, are supported mainly by private donations and contributions from the state's budget, and also by ticket sales. A continuing political

173 The exception to this rule is when the commissioned work is a portrait or a photograph from a private event, in which case the client will own rights in the work, unless agreed otherwise.

174 While relevant for all works, this amendment was initiated by producers and distributors of cinematic works who wished to crack down on illegal streaming sites.

175 Typically, the entity would be a US 'Friends' organisation, which is a tax-exempt organisation under § 501(c)(3) of the United States Internal Revenue Code and is eligible to receive charitable contributions of cash, objects and stocks.

and budgetary crisis, exacerbated as a result of covid-19, which has dramatically decreased revenues from ticket sales, has led to an unusual and unfamiliar situation in the annals of Israeli museums. Against this background, it is not surprising that the global phenomenon of deaccessioning has not skipped over Israel. At the time of writing, a legal and public battle is taking place following an attempt by the LA Mayer Museum for Islamic Art to sell hundreds of exhibits from its collection, through the Sotheby's auction house. On 12 November 2020, the Hashava Foundation filed a petition (by the authors of this chapter) with the High Court of Justice, to prevent the sale that was planned for 26 November 2020.[176] The primary grounds for the petition were that the decision-making process regarding the sale of the exhibits was neither consistent with the provisions of Regulation 12 of the Museums Regulations[177] nor with the provision of Section 26 of the Antiquities Law (which prescribes the manner in which a collection from museum collections may be sold, transferred or liquidated). At a hearing before the Supreme Court on 18 November 2020, the parties agreed to negotiate towards a limited sale of agreed items, and that no sale will take place before the Supreme Court rules on the petition. Indeed, following the petition, Sotheby's has cancelled the sale and negotiations on this matter are ongoing.

This state of affairs has prompted a public discussion and rethink of the museum regulations in respect of the sale of exhibits.[178]

176 High Court of Justice 7847/20, *Hashava Foundation v. The Minister of Culture and Sports* (12 November 2020), Nevo Legal Database (by subscription, in Hebrew).

177 See footnotes 7 and 143, above.

178 As discussed in Section V.i, above.

Chapter 20

ITALY

Giuseppe Calabi[1]

I INTRODUCTION

The pattern of Italian art law is heterogeneous and appears as a complex medley of several subjects, autonomously regulated by different laws. First, the civil law definition of artwork is, to a broader standpoint, the one of movable goods. The Civil Code (CC) provides two general categories: 'simple' and registered movable goods.[2] Artworks fall under the definition of simple movable goods. In other words, no public register of artworks exists.[3] Thus, regardless of their value, artwork can be sold without formalities of any kind, and the transaction would be valid. Moreover, even if the CC sets remedies in favour of the good faith buyer against forgeries, when a dispute over the attribution or authenticity of a work arises, difficulties emerge in determining in a civil trial whether the claim is grounded (see Section IV). Second, under administrative law, when artworks have specific characteristics (see Section III), they are subject to special rules: when deemed cultural goods, artworks receive recognition for their inherent cultural value within national cultural heritage (regardless of whether their owners are private persons, businesses or public bodies).

The recent reform of the Cultural Heritage Law (CHL)[4] has shown a softened approach towards the international circulation of art, raising the time threshold for deeming a work a cultural good (see Section III). However, the practical implementation of the reform is still pending, and the consequences are illustrated further below (Section VIII). Under copyright, artworks are carriers of rights for the artist, with different scope and duration (see Section VI). The latest jurisprudence on this matter has given an interesting perspective on the protected subject matter and the relationship between artists' estates and moral rights. However, the lack of specific rules for artworks (e.g., regarding Nazi-looted art, immunity from seizure and alternative dispute resolution) raises the possibility of uncertainties in dealing with art. This chapter illustrates the recent developments in the field of art transactions and legal disputes in art, and concludes that the current framework of art law in Italy is not efficient, notwithstanding the enormous number of rules that regulate the different subjects.[5]

1 Giuseppe Calabi is managing partner at CBM & Partners – Studio Legale.

2 Articles 812 and 815, Civil Code (CC).

3 Apart from specific lists, such as the Carabinieri Art Squad database, which relates to lost or stolen items.

4 Legislative Decree No. 42 of 22 January 2004.

5 Reference to primary sources refers to Italian sources, unless otherwise stated.

II THE YEAR IN REVIEW

In addition to specific themes discussed in this chapter, the covid-19 outbreak has impacted the art market's functioning, causing the market to turn to digital transactions. This has led to a peculiar effect from the legal perspective related to the fulfilment of obligations in terms of compliance with e-commerce regulation and the necessary slowdown of the administrative procedures related to the export of artworks (see Section III.ii), which has impaired the operators' responsiveness to the needs of the market.

III ART DISPUTES

i Title in art

The Italian system sets a difference between 'simple' artworks and artworks of cultural interest under the CHL. Generally, the title of ownership to artworks, when simple movable goods, passes from seller to buyer through the agreement upon the sale. When a delay on the payment or a payment via instalments is agreed, the parties can subject the transfer of ownership to the full payment through a retention of title, which implies that, whereas the title is transferred to the buyer only upon the payment of the price in full, the risks concerning the goods pass on to the buyer upon consignment under Article 1523 of the CC. This is an exception to the general rule of *res perit domino*[6] under Article 1465 of the CC. The retention of title is customary in the art market.

Another relevant issue concerns the good faith of the buyer in the case of purchase from the non-owner (see Section III.ii) and its relationship with adverse possession. In the Italian jurisdiction, adverse possession[7] might happen in three different ways. The general rule on possession of movable goods is that the buyer from the non-owner receives title to the item immediately upon consignment, if he or she is in good faith at the consignment and obtains a theoretically valid entitlement to ownership.[8] Good faith shall be interpreted as unawareness (without gross negligence) of infringing others' rights under Article 1147 of the CC. If the possessor or buyer was in good faith upon the acquisition but has no theoretically valid title (or cannot prove such title), he or she acquires ownership after a 10-year continued possession.[9] Finally, if the buyer had no title and was in bad faith, he or she becomes the owner after a 20-year possession under Article 1161(2) of the CC. For the application of adverse possession under Article 1161, possession shall comply with specific requirements during the term, such as consistency and publicity, and shall be undisturbed, uninterrupted and acquired in a non-clandestine and non-violent fashion. The Supreme Court recently stated that non-clandestineness and publicity refer to the public exercise of possession emphasising that, concerning artworks, a way to get to such a result is through exhibitions and publications regarding the artwork involved in the dispute.[10] This case also shows that, in

6 That is, all the risks concerning an item (including perishment) belong to the owner of the item itself.

7 Article 1140 et seq., CC.

8 Article 1153(1), CC.

9 Article 1161(1), CC.

10 Supreme Court, No. 16059 of 14 June 2019.

successions, the heir shall give evidence of the good faith of the deceased buyer (from whom he or she inherited the item), and that lacking this evidence, the presumption of good faith under Article 1147(3) of the CC might not apply in specific historical circumstances.[11]

The case of cultural goods is more articulated. The sale of cultural goods is subject to a specific procedure, which also refers to privately owned goods. The sale of publicly owned cultural goods is subject to prior verification of the cultural importance of the items, under Article 12 of the CHL. Only if the result of such verification is in the negative, can the sale take place. Otherwise, any sale lacking prior verification is deemed void. Indeed, the principle of good faith outlined above does not apply to goods either stolen or illegally removed from collections belonging to the state or other public entities: no one can ever acquire the ownership of an asset that is part of the state's (or other public entities') patrimony and that was either stolen or otherwise illicitly disposed of by a public officer. The same exception applies to art, antiques or collectibles belonging to ecclesiastical entities,[12] as these receive the same treatment as publicly owned goods under Article 10(1) of the CHL. In a case regarding two church-owned paintings being illegally sold by the priest in charge of the church to a dealer who then resold them to a third party in good faith, the Supreme Court held that the final buyer could not legitimately claim that he had acquired the ownership of the paintings because of the lack of title to the artworks in the first sale.[13]

On the other hand, privately owned cultural goods can be sold, but the state has the right of pre-emption. Thus, the seller must notify the Ministry of Cultural Heritage of the sale within 30 days of it taking place, according to Article 59 of the CHL, and the state has a 60-day term from this notification to exercise the pre-emption right.[14] During this period, the sale is conditionally suspended and the item cannot be consigned (and the title does not pass) to the buyer. Failing to comply with such provision voids the sale of the item.

ii Nazi-looted art and cultural property

Nazi-looted art

Italy has no specific provision on Nazi-looted goods. Nevertheless, it participates in several international instruments on restitution of Nazi-looted goods, which have recently been applied implicitly by the jurisprudence.[15]

Cultural property

In 2017, the CHL was subject to important reforms involving (1) the time threshold over which an item can be deemed culturally important, which has changed from 50 to 70 years after creation by a non-living artist, and (2) the introduction of a minimum monetary threshold. Since 2017, privately owned goods that were either made more than 70 years previously by a non-living artist or that have a monetary value of less than €13,500 may be exported on a permanent basis from Italy if the competent Export Office of the Ministry of Cultural Heritage[16] grants an export permit. These goods do not need any export permit

11 The case in question referred to a Nazi-looted artwork inherited by the possessor from his father.

12 Article 828, CC.

13 Supreme Court, No. 4260 of 7 April 1992.

14 Article 61(1), CHL.

15 See Section III.i, Ruling of the Supreme Court No. 16059 (see footnote 10).

16 Export of cultural goods is monitored and authorised at a local level by the export offices located throughout Italy.

(however, see below on works created between 50 and 70 years previously by a non-living artist), but if they are exported, they must be accompanied by a unilateral declaration by the exporter detailing their characteristics, the author and the year of creation. The export declaration must be filed through the online system available on the website of the Ministry to the competent export office, which shall acknowledge receipt of the declaration by applying a stamp and delivering the original to the interested party.

Goods over the thresholds undergo a complex export procedure, should their owners be willing to export them. When released for circulation within the EU, the export permit is named a 'free circulation certificate'.[17] If the goods need to be exported outside the EU, in addition to the free circulation certificate, the export office must issue an export licence.[18] If the export licence is missing, the item could be seized at the border by the competent customs authority. The interested party shall file an export permit request, containing, among other details, the value of the item under scrutiny, and physically deliver the item to the export office to allow its inspection. After this examination, the export office will either release the export permit, or deny it if the export office deems the item to have particular cultural importance. In some cases, the export office might propose to the Ministry that it exercise the right of mandatory purchase under Article 70 of the CHL, thus obliging the private owner to sell at the value indicated in the export permit request (unless the owner withdraws the request of export permit before the Ministry has exercised the right of mandatory purchase).[19] On 6 December 2017, under Ministerial Decree No. 537, the Ministry set forth the criteria that shall be applied by the export offices while evaluating whether to grant an export permit. These criteria refer to the aesthetic quality of the goods, their rarity, their provenance from a relevant collection and their historic relevance, and their formulation allows wide discretion to the export offices. The proceeding shall be concluded within 40 days of presentation of the item to the export office. However, this time frame is not mandatory.

If the export permit is about to be denied, the interested party receives a preliminary communication of denial by the export office, and is entitled to file observations that might persuade the export office to release the permit.[20] If the export office issues a denial, the private party is entitled to file a petition within 30 days of the denial to the Ministry's General Director, under Article 69 of the CHL. Otherwise, the private party has the right to appeal the denial before the competent administrative court, within 60 days of the denial. The party has the same appeal right against the decision of the Director under Article 69 of the CHL.[21] The administrative court does not assess whether the goods have particular cultural significance, but whether the public administration correctly applied the law and made appropriate use of its discretionary power (e.g., by providing adequate motivation to the export denial, based on thorough art history research).

In the case of goods created between 50 and 70 years previously by a non-living artist, for which a self-declaration is filed, the export office might retain them as having exceptional cultural significance for the completeness and integrity of Italy's cultural heritage. The export office can request that the General Director of the Ministry classifies the artwork as cultural property and, consequently, ban the export of that artwork.

17 Article 68, Italian Cultural Heritage Code.

18 id., Article 74.

19 Article 70(2), CHL.

20 Under Article 10 *bis* of Law No. 241 of 7 August 1990.

21 For instance, in the case of confirmation of the denial of the export permit.

Another reform entailed the export process, specifically relating to monetary thresholds. Indeed, this provision's operativity was suspended by the Ministerial Decree of the Ministry of Cultural Heritage of 17 May 2018. The Ministerial Decree of the Ministry of Cultural Heritage of 31 July 2020 amending the Ministerial Decree of 17 May 2018 allows the application of the minimum monetary threshold of €13,500 and facilitates the enacting of e-passports for artworks, which were both introduced by Law No. 124 of 4 August 2017.[22]

In terms of contracts involving cultural property and public administration, in a ruling of the Administrative Court of Lazio (Rome),[23] the Court ascertained the right to unilaterally rescind the contract between the public administration (the Ministry of Cultural Heritage) and a private party under Article 11 of Law No. 241/1990 regarding cultural goods for reasons of public interest, with the obligation on the public party to refund the private party for the costs incurred in entering into the agreement.

iii Limitation periods

The ordinary term set forth by Article 2946 of the CC is 10 years. No special statute of limitation applies to art disputes, even for art misappropriated during the Nazi era.

iv Alternative dispute resolution

In recent years, some forms of alternative dispute resolution were made compulsory prior to starting a proceeding before the civil court in specific subjects. Among these, claims over title to goods fall under the scope of applicability of mandatory mediation under Article 5(1) *bis* of Legislative Decree No. 28 of 4 March 2010.

Arbitration has recently become a useful tool in art disputes. However, Article 33(1)(t) of Legislative Decree No. 206 of 6 September 2006[24] prevents professionals from establishing a standard clause on arbitration while negotiating with a consumer, unless they can show in court that the consumer negotiated and agreed upon that clause. Thus, generally, the presumption on the abusive nature of the arbitration clause narrows the scope of the application of arbitration to art transactions, where a consumer is involved.[25]

IV FAKES, FORGERIES AND AUTHENTICATION

Under Article 1477 of the CC, the seller must warrant to the buyer that the item has not suffered any wrongdoing able to sensibly decrement the value of the item. The jurisprudence applies this principle to the sale of artworks.

If the buyer discovers that the art, antique or collectible is a forgery, the following claims and remedies are available.

a Termination of the contract because the asset sold is different from the asset that was promised in the contract.[26] The claim is time-barred for 10 years after the sale.

22 Pending registration, by the Italian Court of Auditors, at the time of writing.

23 Administrative Court of Lazio (Rome), No. 3402 of 14 March 2019.

24 The Consumer Code.

25 However, recent initiatives have been carried out on alternative dispute resolutions in the art sector where transactions between professionals are involved.

26 Article 1453, CC; see Court of Cassation, 27 November 2018, No. 30713.

b Termination of the contract based on alleged wrongdoing to the purchased item;[27] the claim is time-barred if the defect was not communicated to the seller within eight days of its discovery and within one year of delivery of the item to the buyer.

c Termination of the contract based on alleged lack of promised or essential qualities;[28] the claim is time-barred if the wrongdoing was not communicated to the seller within eight days of its discovery and within one year of the delivery of the item to the buyer, provided that the absence of the required quality exceeds usual tolerance limits.

d Cancellation of the contract based on mutual mistake or wilful misconduct.[29] The claim is subject to a five-year limitation period, starting from the date the mistake or the wilful misconduct is discovered by the claimant.

All the above remedies are likely to include damages.

Art market operators shall provide to the buyer a certificate of authenticity and provenance under Article 64 of the CHL.

The role of artists' estates and experts in discovering forgeries (or deeming works authentic) is debated. As far as their opinion is grounded on a diligent activity of analysis, the result of their scrutiny is free due to the constitutional right of opinion,[30] and these entities cannot be obliged to convene on the attribution of a work or to publish a work in a publication (e.g., a catalogue raisonné).[31] Moreover, the recent *Dadamaino* case[32] illustrates the difficulties in striking the balance between expert witnesses' opinions and artists' estates' opinion of authenticity.

V ART TRANSACTIONS

i Private sales and auctions

The European Anti-Money Laundering (AML) Directive[33] explicitly includes art galleries and auction houses among the entities obliged to carry out anti-money laundering controls. Thus, art galleries and auction houses involved in transactions (single or multiple) whose values amount to €10,000 or more are subject to anti-money laundering legislation, as are the persons who either preserve or trade in works of art or act as intermediaries in the trade of works of art, when such activity is carried out within freeports and the value of the transaction (even if divided) or of any related transactions is equal to or greater than €10,000.[34] Legislative Decree No. 125 of 4 October 2019 implemented the AML Directive into the national jurisdiction.

27 Article 1490 et seq., CC.

28 id., Article 1497.

29 id., Articles 1429 and 1439.

30 Article 21, Italian Constitution.

31 Court of Milan, 15 February 2018, No. 4754.

32 Court of Milan, 15 July 2020, No. 5070.

33 Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018.

34 Article 3, Paragraph 5(c), EU Anti-Money Laundering Directive.

ii Art loans

Art loans are subject to authorisation by the Ministry of Cultural Heritage if the work of art is of cultural interest, under Article 48 of the CHL. Art-backed loans can only be granted by intermediaries authorised by the Bank of Italy and are subject to supervisory controls.

No special rule relates to immunity from seizure, notwithstanding several bills of law that have been proposed in recent years (the last of which, DLL S.358, was presented to the Senate on 18 May 2018).[35]

iii Cross-border transactions

Regulation (EU) 2019/880 sets forth the conditions for the introduction of cultural goods within the EU territory and the conditions and procedures for their import, to protect cultural heritage against illicit trade in cultural goods, specifically when aimed at financing terrorism. The Regulation foresees a system of import licences for specific categories of cultural goods and importer statements for other categories of cultural goods.

Cultural goods either created or discovered in the customs territory of the EU (covered by Directive 2014/60/EU) fall outside the scope of the Regulation. The import licensing system provided for by EU Regulation 2019/880 will enter into force at the date on which the electronic system referred to in Article 8 of the same Regulation becomes operational or at the latest from 28 June 2025.

Finally, the UNIDROIT Convention of 1995 on stolen or illegally exported cultural objects has been ratified by Italy by Law No. 213/1999 and is currently in force. When applicable, it obliges the possessor of a stolen cultural object to return it to its rightful owner, entitling the good faith acquirer to a compensation.[36] The acquirer has to prove his or her good faith.[37]

Regarding recent legal developments in cross-border transactions of cultural property, see Section III.ii.

iv Art finance

Non-possessory liens

Law No. 119 of 30 June 2016 introduced the possibility for professional dealers to create non-possessory liens to secure credits related to their business activity (which are not private loans). These can only be granted over movable property intended for their business activity. This lien must be registered in the online register managed by the Revenue Agency of the Ministry of Economy and Finance.

VAT regime

The Internal Revenue Service (IRS) recently affirmed that sculptures created with 3D printers are not subject to the special 10 per cent VAT regime that benefits artworks. According to the IRS, since 3D sculptures are not cast entirely by the artist's hand, they cannot be considered artworks, giving a narrow interpretation of the definition of artwork stipulated in Law Decree No. 410 of 23 February 1995.

35 www.senato.it/leg/18/BGT/Schede/Ddliter/49597.htm (accessed on 17 September 2020).

36 Law No. 213/1999, Article 4, Paragraph 1.

37 id., Article 4, Paragraph 2.

Anti-money laundering

Under the AML Directive, art galleries and auction houses have specific transparency obligations involving clients and art transactions. These include an obligation to carry out adequate verification on clients when transaction values total €10,000 or more (even in the case of multiple related transactions) and signal any suspicious activity to the Bank of Italy (the controlling authority).

VI ARTIST RIGHTS

i Moral rights

Under Articles 20 to 24 of Law No. 633 of 22 April 1941 (the Copyright Law (CL)), moral rights vest in the author from the creation of the work. Moral rights under Italian law are perpetual, non-waivable and unassignable. The rights might be enforced by the next-of-kin of the author following the hierarchy[38] outlined by Article 23 of the CL, after the author's death. The enforcement of moral rights after the author's death might not be assigned or transferred to any third party, including artists' estates, nor through a specific disposal of the author in his or her will. However, as the Supreme Court recognised,[39] even if the artist's estate has no moral rights, it has and can enforce its own reputational right, defined as the reputation in a specific social context of the estate, connected with the protection of the artist and diffusion of the correct knowledge of his or her work.

The right of attribution under Article 20 of the CL might be enforced in the positive or in the negative, as a right to refuse the attribution of a specific work,[40] as well as by the subject indicated in Article 23 of the CL.[41] Recently, the Court of Rome[42] affirmed that the right to claim against false attribution might be enforced by the heirs only through the personal right to name under Article 8 of the CC, and not through the claim for declaratory judgment related to the false attribution under copyright law.

Article 20(2) of the CL finally provides a specific author's right regime for works of architecture. While authors of architectural works may not oppose amendments carried out during the realisation of the project or incurred on the completed physical structure, they are entitled to the study and enaction of such amendments, in the case of acknowledgment of the important artistic value by the competent governmental authority.

ii Resale rights

In 2019, the Italian Society of Authors and Publishers (SIAE), which is in charge of the collection and distribution of resale rights in Italy, published guidelines on resale rights directed towards art market operators and artists. The document aims to clarify the operativity of resale rights and the definition of 'first sale' for the purposes of the application of the law.[43]

38 Court of Milan, 14 July 2011.

39 Supreme Court, 26 January 2018, No. 2039.

40 Court of Rome, 8 March 2012.

41 Court of Turin, 26 February 2010.

42 Court of Rome, 26 June 2019, No. 13461. See Court of Milan, 15 February 2018, No. 4754, whose stake is the opposite, stating that the claim of a declaratory judgment of authenticity is possible if grounded on indisputable factual and scientific elements.

43 SIAE – *Sezione OLAF, Diritto di seguito – Vademecum*, version dated 28 April 2020; available in Italian at www.siae.it/sites/default/files/SIAE_OLAF_Vademecum_DDS.pdf (accessed on 22 September 2020).

Indeed, the applicability of resale rights in the primary market was previously unclear; for example, in the case of consignment by the artist to a professional seller with no agency.[44] The guidelines affirm that if, in a consignment without agency, the consignee pays an instalment to the consignor prior to the sale to a third party, the transaction between the professional and the third party is subject to the application of resale right, since the transaction between the consignor and the consignee voids the consignment agreement and is considered as a proper sale from the artist to the professional, even if the operation as a whole was meant to be the first sale of the work from the artist to the third party.[45]

An interesting aspect involves the interpretation of 'design' in the field of artists' resale rights. Indeed, it is debated whether a design product might have artistic value for the purpose of copyright protection (see Section VI.iii), and this reflects on its protection under resale rights. The strongest opinion is in the sense that design works might not be subject to resale right (alternatively, the project might be subject to this right as it could qualify as a figurative work drafted by the author).[46] However, because Article 145(2) of the CL provides that copies of works might be protected under resale right if the copies are unique pieces or few in number, numbered, signed or otherwise authorised by the author, other authors[47] have stated, when the object fulfils the requirement, they could be considered works covered by resale right. The matter is still unresolved, but the SIAE seems to follow the second interpretation.

iii Copyright

Exceptions and limitations to copyright

Under Article 15 of Law No. 37 of 3 May 2019, amending Article 71 *bis* of the CL, the acts of reproduction, communication and making available to the public, distribution and lending of copyrighted works are free for persons who are blind, visually impaired or otherwise print disabled, subject to their adaption in an accessible format copy.

Digital Single Market Directive

The national implementation of Directive No. 790/2019 (the Digital Single Market Directive) is still pending. Article 14 of the Directive obliges Member States to ban copyright protection for material reproductions of works in the public domain where the reproduction is not original in the sense that it is the author's own intellectual creation.

44 This is a frequent scenario in the primary market. This wording refers to the case of consignment with no power to act in the name of the consignor under Article 1705, CC.

45 See SIAE (footnote 43), p. 20.

46 Rosaria Romano, 'L'Opera e l'Esemplare nel Diritto della Proprietà intellettuale' (2001), in *Pubblicazioni dell'Istituto di diritto privato dell'Università di Roma*, 60, p. 39.

47 Luigi Carlo Ubertazzi, *Commentario Breve alle Leggi su Proprietà Intellettuale e Concorrenza* (Wolters Kluwer, Milan, 2019), p. 2255.

Jurisprudence

The sale of the physical single object does not entail the transfer of copyright, which requires an express act of the copyright holder,[48] which should be proven in writing.[49] Accordingly, the Court of Milan[50] recently stated that the production of gadgets in an exhibition organised by a museum representing artworks under copyright requires such prior written consent by the rights holder.

Moreover, the jurisprudence of recent years has shown keen attention on copyright in relation to artworks. The general requirement of protection of artworks under Italian copyright is their originality, meaning the nature of the 'author's own intellectual creation'.[51] Italian courts have set some specific requirements that apply to artworks, interpreting the concept of originality. In a preliminary ruling of 15 June 2017, the Court of Milan interestingly asserted that the evaluation of the artistic value shall be carried out in reference to objective parameters of the perception of the work within specific cultural environments, such as the public and institutional recognition of aesthetic and artistic qualities, the public exposition, the publication in specialised journals and the awarding of prizes. All these factors do not attribute per se artistic value but show the recognition of the work as an artistic work protectable by copyright. More recently, the Court of Bologna[52] applied a similar reasoning to design objects, stating that to deem a design object protected subject matter under Article 2, No. 10 of the CL, the artistic value[53] could be acknowledged through objective parameters such as the recognition of aesthetic and artistic qualities by specific cultural and institutional environments, the exhibition in museums, the publication in specialised journals, the awarding of prizes, the acquisition of an unexpected market value that overcomes functionality, or the creation by a famous artist.

In Ruling No. 2039 of 26 January 2018,[54] the Supreme Court listed some specific criteria to be applied to ascertain whether a subsequent artwork constituted plagiarism of a former one with specific focus on abstract and contemporary art. The Court emphasised the following criteria:

a the creative originality, even if just minimal, of the original artwork;

b that the judgment shall rely upon a complex and synthetic (not analytical) evaluation of the works, comparing the essential elements of the works themselves, to evaluate the holistic result, or the effect as a whole;

c the fact that plagiarism should be excluded if two works originating from the same idea have different essential traits, which characterise the expressive form; and

d plagiarism subsists if a work does not show any semantic gap providing a different and proper artistic meaning, copying the creative elements, since mere contrasting details with respect to the original would not suffice.

48 Article 109, CL.

49 id., Article 110.

50 Court of Milan, 15 January 2019, *obiter dictum*.

51 European Court of Justice, 7. *Infopaq International A/S v. Danske Dagbaldes Forening*, Case C-5/08.

52 Court of Bologna, 20 February 2019, No. 457.

53 Which is required by Article 2, No. 10, CL to deem a design work protected.

54 See footnote 39.

VII TRUSTS, FOUNDATIONS AND ESTATES

Artists' estates usually exercise their functions as non-profit legal entities, namely associations and foundations. Legislative Decree No. 117 of 3 July 2017 (the Code of the Third Sector) has introduced some fiscal advantages towards non-profit legal entities with a general interest (including cultural) purpose. Moreover, while associations and foundations are normally barred from carrying out pre-eminent commercial activity, third-sector entities may carry out such activity without incurring a heavier fiscal burden.

The CHL prescribes that cultural goods, over 70 years after their creation by a non-living artist, as described by Article 10(1) and 10(5), belonging to non-profit private entities are subject to the same conditions as publicly owned goods. Thus, when an artwork created more than 70 years ago[55] by a non-living artist belongs to an association or a foundation it is automatically considered a cultural good.[56]

For the recognition of estates' rights concerning reputation and moral rights of the artists, see Section VI.

VIII OUTLOOK AND CONCLUSIONS

Finally, to summarise, several unresolved issues are at stake. On one hand, the large discretionary power of the administration, whose best example lies in the non-mandatory term for delivery of the free circulation certificate, and the delay in the implementation of the reform of 2017,[57] has raised uncertainties on the application of the administrative law concerning cultural goods. Indeed, the circulation of artworks suffers delays due to the lack of a mandatory term (and there is no compensation for the private party that bears the consequences of a delay by the public office), and the long-lasting absence of a general rule of law implementing the reform of 2017 has generated different interpretations by offices, increasing the confusion of art owners and market operators on the scope of the form. On the other hand, the lack of a specific provision of law on seizure of artwork in specific situations (such as in the case of Nazi-looted artwork) generates criticality in the interpretation of the principles of civil law (such as possession *vaut titre* or the good faith of the third-party buyer). The above-mentioned examples illustrate that, despite artworks generally being considered as common items from a civil law viewpoint, they happen to be subject to a peculiar application of the law, mostly when their cultural value is at stake. On the other hand, Italian copyright law often needs a specific interpretation by the court, to adapt to the peculiarity of artworks (and single genres) among other copyright-protected subject matter.

In conclusion, it could be questioned whether a holistic reform of the art law sector in Italy could be an effective solution to the lack of certainty that, unfortunately, affects the interpretation of the law for these special (unless common) goods.

55 Or 50 years if the work shows an exceptional degree of interest for the integrity and completeness of the Italian cultural heritage (Article 10(5), CHL).

56 See Articles 13 and 14, CHL, describing the procedure of declaration for goods belonging to private entities (listed in Article 10(3), CHL) and Article 12, CHL, foreseeing the procedure of verification of cultural interest for goods belonging to public entities and non-profit private entities.

57 Law No. 124/2017.

Chapter 21

JAPAN

Makoto Shimada and Taku Tomita[1]

I INTRODUCTION

The Japanese art market consists of the antiquities market, the modern arts market and the contemporary arts market. Products traded in the antiquities market are Japanese, Chinese and Korean antiques and traditional artworks. There are plenty of antique dealers who have expertise in a particular type of traditional art, such as Ukiyo-e, lacquerware, swords and tools for tea ceremonies, and each of these has regular customers. Arts traded in the modern arts market are Japanese and western-style paintings by past and present artists. Generally, artists of traditional and modern arts in Japan belong to one of the artists' circles, which regularly hold publicly sponsored exhibitions. There are over 100 artists' circles, each of which has close relationships with particular dealers, such as prestigious galleries located in Tokyo and national department stores. Most works are sold to regular customers of those dealers by private sale. Auction sales are not popular in Japan.[2] Such close relationship between dealers and customers operates to stabilise the art business and market; however, it is often criticised for preventing the art market from growing and globalising. Art Tokyo Association, the organiser of Art Fair Tokyo, estimates that in 2018 the value of sales of antiquities and of modern arts was ¥104.3 billion and ¥103.9 billion, respectively, with the sales value of each market accounting for approximately 40 per cent of total art market sales (¥258 billion).[3]

In this century, a number of young artists, willing to create contemporary artworks freely, choose not to belong to a traditional circle. The number of contemporary art lovers is also increasing. Contemporary art accounts for approximately ¥45.8 billion in value, which is less than 20 per cent of the total sales in the art market.[4]

1 Makoto Shimada and Taku Tomita are partners at SAH & Co.

2 Art Tokyo Association, Japanese Art Industry Market Research 2019, 9 (which shows that the volume of auction sales accounted for only 6 per cent of total domestic sales in 2018).

3 ibid, 8.

4 ibid. The above figures are estimates provided by Art Tokyo Association based on its survey of individuals. Japanese companies also purchase high quantities of artworks, including from relatively unknown contemporary artists, to support them as part of their corporate social responsibility activities. The volume of these transactions is likely to be significant.

II THE YEAR IN REVIEW

i Amendment to the Civil Code

On 1 April 2020, amendments to several aspects of Japanese contract law, which affects art transactions, came into force by way of an amendment to the Civil Code.[5] In the past, the right to claim payment under a sales or consignment contract was extinct by prescription if the seller did not claim this within two years of the right being exercisable. However, under the new Civil Code, this right continues for 10 years after it becomes exercisable.[6] The Civil Code also provides that terms of a standard contract prepared by one party are enforceable against another party if the former party manifests the intention to apply such terms in advance.[7] This provision determines the enforceability of terms and conditions prepared by auction houses against bidders in an auction.

ii Government policy towards the arts

In recent years, the government of Japan has changed its policy towards the arts, focusing on its power to develop and activate the economy and industry. In 2017, the Basic Act for the Promotion of Culture and the Arts, the law for the promotion of the arts and culture, was amended (and renamed the Basic Act on Culture and the Arts) to provide a role for the private sector to enhance and utilise the arts to activate the economy and international cultural exchange in cooperation with the government, and to clarify the government's duty to take legislative, financial and taxation measures necessary for such purpose.[8] In 2018, the Act on Protection of Cultural Property (the PCP Act) was also amended in line with this new policy.[9] While the old Act was structured to protect selected valuable arts by the government, under the new PCP Act, local cities and towns play a leading role in the protection and utilisation of arts and other cultural properties in their respective regions. The PCP Act expects each city to draw up a plan and projects for practical use and preservation of regional arts following consultation with a group of people supporting such arts, obtain the government's approval, and then carry out the projects under the supervision of the relevant prefectural governor.[10] By this amendment, the objective of the PCP Act is changed drastically from 'the protection of cultural properties by the government' to 'the practical use of arts by regional communities for activation of the economy'. It is expected that the measures taken under the new PCP Act will facilitate the development of the art industry.

5 Civil Code (Law No. 89 of 1896) amended by Law No. 44 of 2017.

6 ibid, Article 166(1).

7 ibid, Article 548-2(1).

8 Law No. 148 of 2001 amended by Law No. 73 of 2017, Articles 5-3 and 6.

9 Law No. 214 of 1950 amended by Law No. 42 of 2018.

10 ibid, Article 183-3.

III ART DISPUTES

i Title in art

Private sale and auction

Under the Civil Code, a buyer acquires title to property from the seller when a contract of sale is entered into unless otherwise agreed between the parties.[11] In the case of auction sales, most auction terms prepared by auction houses include a title retention clause, providing that title will transfer from the consignor to the buyer when the artwork is delivered to the buyer after the auction house confirms receipt of the purchase price and commission from the buyer.

Title acquisition by good faith purchaser

A person who acquires the possession of an artwork from its previous possessor by any transaction, including sale, gift and exchange, in good faith will obtain title to such artwork even if the previous possessor is not the title holder.[12] A transaction is presumed to be in good faith so long as it is carried out under the usual circumstances.[13]

A purchaser who owes a duty to inquire into title but has failed to do so shall not be in good faith. Whether a purchaser owes such duty or not depends on the attribute of the goods, knowledge or skill of the parties and other circumstances. In a recent case, the court held that a donee of a cultural artefact registered under the PCP Act owes a duty to inquire into the donor's title.[14] In this case, the claimant and the defendant were both Buddhist temples, and the property concerned was a Buddhism statue. The statue was stolen from the defendant's temple, handed over through several traders and donated to the claimant's temple. The claimant claimed title on the ground that the statue was gifted in good faith. However, the court refused the assertion, based on the fact that the statue was registered in the defendant's name, not the donor's. Under the PCP Act, the owner of an important cultural property shall register the owner's name with the government. The PCP Act also requires the owner not to sell such property to a third party unless the owner first contacts the government to confirm whether it will exercise the right of first refusal.[15] Taking account of such legislative restriction on sale, the court held that the claimant should have inquired into title of the donor who was not the registered owner of the artefact.

ii Nazi-looted art and cultural property

In Japan, there is no legislation or case law related to Nazi-looted art. Cultural properties are often stolen. As at 2018, there were 115 reported cases concerning stolen national treasures and cultural properties, and the majority of these have not yet been restituted.

The most famous cultural property stolen and unreturned at present is the ancient Buddhist statue, which is an important cultural property designated by the government under the PCP Act. The statue was stolen by Korean thieves from Kannonji Temple in Tsushima Island, Nagasaki in 2012. The following year, the thieves were arrested in South Korea and the statue was seized by the South Korean government. However, it was not returned to Kannonji because a South Korean temple claimed that the statue had been stolen

11 Civil Code, Articles 176 and 555.

12 ibid, Article 192.

13 Judgment of Tokyo District Court of 24 January 2012, LLI/DB.

14 Judgment of Otsu District Court of 25 January 2019, LLI/DB.

15 PCP Act (n 9), Articles 32, 33 and 46.

from it in the fourteenth century. The Korean temple brought a lawsuit against the South Korean government before the South Korean court, seeking restitution of the statue. In 2017, the court ruled that the statue should be given to the claimant on the ground that it had been looted by Japanese pirates around 600 years ago.[16] The South Korean government, the defendant of the lawsuit, appealed this decision and the Korean appeal court commenced hearing in April 2020.

iii Limitation periods

Under the Civil Code, a person who possesses any property of another person for 20 years shall be entitled to acquire the ownership under the right of acquisitive prescription.[17] By virtue of this right, the possessor of a stolen artwork may assert its ownership against anyone including its original owner if the possessor shows that the work was in his or her possession at two different points in time, one of which is more than 20 years ago and the other is 20 years later than the first point in time.[18] For the original owner to contest the possessor's ownership, he or she must prove that: (1) the work was delivered to the possessor under an arrangement that was not purported to transfer title, such as a contract of deposit, loan for use or lease;[19] (2) the possessor lost possession at any time in that 20-year period; or (3) at any time after the possessor had acquired the possession, the possessor manifested by words or conduct that the property was not his or her belonging.[20]

iv Alternative dispute resolution

An arbitration clause is often provided for in a contract for cross-border art transactions. If Japan is the seat of arbitration, the rules of the Japan Commercial Arbitration Association (JCAA) are chosen as the procedural rules. Since 2019, the JCAA has offered a set of new rules for commercial dispute resolutions as alternative to the ordinary rules. Under the new rules, the arbitral tribunal is obliged to communicate to the parties its temporary view with regard to the case and the parties' allegations.[21] This interactive manner of proceedings would enhance the parties' ability to predict the outcome and encourage them to settle the case by agreement before the award. The system seems to be suitable for settlement of disputes between art traders wishing to maintain long-term business relationships.

Mediation is another commonly used method for dispute resolution. In Japan, the system of mediation has been incorporated into the court system for many years and, even in the case of litigation, judges are expected to act as mediator before rendering a judgment.[22] In respect of international commercial transactions, the system is gaining popularity as a prerequisite for commencing arbitration.

16 Choe Sang-Hun, 'South Korea Can Keep Buddhist Statue Stolen From Japan, Court Says,' *New York Times*, 26 January 2017.

17 Civil Code, Articles 162(1) and 145.

18 ibid, Articles 162(1) and 186(1) and (2).

19 Judgment of Tokyo District Court of 31 July 2006, LLI/DB.

20 Judgment of Hiroshima High Court of 23 May 2012, LLI/DB.

21 JCAA Interactive Arbitration Rules, Article 56.

22 Civil Conciliation Act (Law No. 222 of 1951); Code of Civil Procedure (Law No. 109 of 1996), Article 89.

IV FAKES, FORGERIES AND AUTHENTICATION

i Private sales

A person who purchased a fake, believing it to be genuine, may rescind the contract and demand the seller to return the price on the ground of mistake if the purchaser took the authenticity of the work as the basis of the contract, and it has been indicated that the authenticity was so taken.[23]

Recently, the court has tended to reject assertions of mistake by professional buyers. For example, in the case where a UK antique dealer purchased a Chinese vase from a Japanese dealer, the price was agreed on the basis of the parties' understanding that the vase was an antique produced during the Qing dynasty (eighteenth century); however, after the transaction, the buyer obtained Christie's and Sotheby's opinions that it was likely to be a twentieth century product. The Japanese court denied the buyer's claim for return of the purchase price, taking into account that both parties were antique dealers with expertise in Chinese arts and, accordingly, were aware of the difficulty in determining the ages of antiquities.[24]

To the contrary, the court inclines to invalidate a sales contract on the ground of mistake asserted by an amateur collector purchasing a fake from a professional art dealer.[25] A professional dealer may also be in breach of a duty owed to general customers to act in good faith, including a duty to disclose important information that would affect the customer's reasonable decision to purchase the artwork. The court so held in the case of a company with no expertise in arts purchasing Leonard Foujita and Renoir paintings from an art gallery. As is customary practice in the Japanese art market, a Foujita painting that is not accompanied by its authenticity certificate issued by the Tokyo Art Club and a Renoir painting that is not included in the Wildenstein Institute's catalogue raisonné are traded at substantially lower prices than if they were proved to be genuine. In this case, the buyer, who did not know of the above market practice, purchased the Foujita without a certificate and the unlisted Renoir. The court held that the art gallery should have informed the buyer of the practice before the sale, and ruled that the gallery should indemnify the buyer's damages on the ground of a breach of its duty to act in good faith.

ii Auction sales

In relation to auction sales, most auction terms and conditions prepared by auction houses contain either a warranty clause or non-warranty clause concerning the authenticity of works. If the auction house or the seller warrants the authenticity, a buyer who purchased a fake may demand return of the purchase price and the commission, provided that the buyer instigates this procedure within the time limit set out in the terms. If the buyer did not take the required steps, the price would neither be returned under the warranty nor be recovered on the basis of mistake.[26] If the terms expressly provide that the seller gives no warranty as to authenticity, the seller and the auction house will not be liable for repayment of the price or for compensating damages other than those caused by gross negligence.[27]

23 Civil Code, Article 95.

24 Judgment of Tokyo District Court of 30 September 2013, LEX/DB.

25 Judgment of Tokyo District Court of 26 July 2012, *Hanrei Jiho*, Vol. 2162, p. 86.

26 Judgment of Tokyo District Court of 19 July 2017, LEX/DB.

27 Consumer Contract Act (Law No. 62 of 2000), Article 8(1).

V ART TRANSACTIONS

i Private sales and auctions

In Japan, arts are mainly traded through private sales involving art dealers as consignee. Under customary practice, a consignment sale by an art dealer proceeds in the following manner. First, the owner consigns the work to the dealer to sell and designates the amount that he or she would like to receive from the sale (the designated amount). After the dealer accepts such consignment and receives the artwork from the owner, the dealer seeks and finds a potential buyer, and negotiates and sells the work to the buyer as if the dealer were the seller as principal. The work is deemed to be purchased by the dealer from the owner at the same time as it is sold by the dealer to the buyer. After the dealer receives the sales price from the buyer, the dealer pays the designated amount to the owner, and the balance between the sales price and the designated amount is the dealer's profit.

In the above transaction, it is the obligation of the dealer to pay the designated amount to the owner when the dealer sells the work and receives the sales price. A question is whether or not such obligation exists before the dealer sells the work. In a recent case, the court ruled that a conditional liability to pay the designated amount shall be accrued when the owner consigns and delivers the work to the dealer, although such liability becomes actionable when the work is sold to a particular buyer.[28] The decision confirms that a contractual relationship between the owner and the dealer starts when the dealer accepts the sales consignment and receives the artwork. Taking account of this, the dealer shall also be under the duties of a consignee under the statutes, including a duty of care, fiduciary duty and duty to account, from the date the dealer receives the consigned work.[29]

ii Art loans

Borrower's duty of care in art loan

Art lending in Japan is always based on a contract between the lender and the borrower. A gratuitous loan is also a contract. A person who takes any goods on loan, either gratuitously or for consideration, shall exercise the utmost care (similar to a prudent manager) unless otherwise agreed with the lender.[30] Moreover, upon completion of the loan, the borrower is obliged to return the object in the same state as it was in at the time it was delivered to the borrower. If the object on loan is lost or damaged, the borrower shall restore it to its original condition or compensate for damages, unless it was caused by force majeure (i.e., factors not attributable to the borrower).[31] Ordinary wear and tear resulting from deterioration over time is excluded from this obligation.[32]

28 Judgment of Tokyo District Court of 28 November 2016, LLI/DB.

29 Civil Code, Articles 108 and 643–647; Commercial Code, Article 552(2).

30 Civil Code, Article 400.

31 ibid, Articles 599 and 621.

32 Judgment of Nagoya High Court of 17 July 2007, *Hanrei Jiho*, Vol. 2025, p. 37.

Immunity from seizure for artworks on loan

Japan has a special scheme to protect loaned artworks from seizure and attachment during the period of loan for exhibition.[33] Under the scheme, a foreign artwork to be borrowed for exhibition is protected from seizure, distress and attachment by a third party such as a creditor of the lender or a party who alleges ownership if such work is designated by the government.[34] Such designation is made if the government considers that such work is highly necessary for the facilitation of the exhibition in Japan and it is not intended for sale in Japan.[35] After the designation, the government shall give public notice of the matters with regard to the work and the exhibition.[36] In 2019, over 400 pieces of art were borrowed from overseas museums under the scheme, including from the National Gallery, London and the Courtauld Institute of Art.

Apart from the above scheme, works owned by a foreign nation, its agency or state are protected from seizure, etc., by the Sovereign Immunity Act.[37] If a foreign nation, for example, requires a letter of confirmation concerning the sovereign immunity from the Japanese government as a condition to lending its work, the organiser of the exhibition may request the government to issue a certificate confirming that such nation is immune from civil jurisdictions with regard to the work to be loaned.

iii Cross-border transactions

Export of cultural objects

An artwork designated as an important cultural property under the PCP Act cannot be exported unless it is specifically permitted by the government.[38] The permission is granted only when its export is necessary for international cultural exchange or other relevant purposes. Because of this export restriction, at the time of export of any cultural artworks, the exporter must obtain from the relevant governmental agency a written certificate confirming that the object is not an important cultural property under the PCP Act.[39]

Taxation on acquired arts

Japanese companies tend to collect inexpensive contemporary artworks. This trend is the effect of a taxation policy that was adopted in 2015. According to the new tax policy, any fine art purchased after January 2015 at a price of less than one million Japanese yen may be treated as a depreciable asset for the purpose of corporate tax. This means that the acquisition cost of the artwork may be subtracted from the company's income as a depreciation cost over the course of eight years following its purchase.[40]

33 Act on Facilitation for Exhibiting Overseas Works of Art, etc. to the Public in Japan (Law No. 15 of 2011).

34 ibid, Article 3.

35 Order for Enforcement of the Act on Facilitation for Exhibiting Overseas Works of Art, etc. to the Public in Japan (Cabinet Order No. 288 of 2011), Article 2.

36 Act on Facilitation for Exhibiting Overseas Works of Art, etc. to the Public in Japan, Article 3(4).

37 Law No. 24 of 2009.

38 PCP Act, Article 44; Export Trade Control Ordinance (Cabinet Order No. 64 of 1949), Article 2.

39 Customs Act (Law No. 61 of 1954 as amended), Article 70.

40 Fundamental directives of corporate tax 7-1-1.

iv Art finance

Regulation of art finance

There is no legislation that regulates art finance and related business, except for private trusts for art investment. Such business can be carried out only by an enterprise that obtains a trust business licence from the government.[41]

Anti-money laundering regulation

The anti-money laundering legislation in Japan is the Act on Prevention of Transfer of Criminal Proceeds. The Act imposes on certain specified business entities the duties to: (1) check the identity of customers and beneficial owners of corporate customers; (2) make and keep records of transactions; and (3) report anything suspicious relating to money laundering in respect of transactions to the relevant governmental agencies.[42] The specified business entities regulated under the Act include dealers of jewellery and precious metals; however, art dealers and art-based transactions are exempt from the regulation. Japan's anti-money laundering regulation is often criticised for having loopholes, including the above.

VI ARTIST RIGHTS

i Moral rights

The Copyright Act provides the right of disclosure, the right to authorship and the right of integrity as the moral rights.[43] While the issues regarding the right of integrity are often argued in court cases, there have been few remarkable ones in recent years.

ii Resale rights

There are no provisions of resale right in the Copyright Act at present. In 2019, the International Confederation of Societies of Authors and Composers, the international network of authors' societies, held its Regional Asia-Pacific Committee meeting in Tokyo. It resolved to call upon the government of Japan to promote the resale right and introduce the right in the Copyright Act and support international discussions within the World Intellectual Property Organization on the global recognition and implementation of the resale right throughout the world. However, there have been no significant developments in legislating resale rights. Considerable discussion will be necessary for legislation in view of the closed nature of the Japanese market where people put importance on the confidentiality of trade information.

iii Copyright

2018 Amendments to the Copyright Act

In 2018, a few important amendments were made to the Copyright Act that affect the operation of art businesses and museums.

By the amendments of laws as a result of the Trans-Pacific Partnership Agreement, on 30 December 2018 the period of protection for copyright was extended from 50 years after the

41 Trust Business Act (Law No. 154 of 2004), Article 3.

42 Law No. 22 of 2007, Articles 4 and 6–8.

43 Law No. 48 of 1970, Articles 18–20.

author's death to 70 years after the author's death, in principle.[44] Under the Bern Convention, copyright of a foreign artist's work is also protected for the same period unless the copyright law of the artist's country provides a shorter period for protection.[45] This means that works of nationals of the Allied Powers of the Second World War (Australia, Canada, France, the United Kingdom and the United States) are protected for 80 years *post mortem auctoris* because, under the Treaty of Peace with Japan, agreed in San Francisco in 1951, the period between 7 December 1941 and the Treaty coming into force (28 April 1952; 3,794 days) is added to the period of protection. However, copyright for works whose protection period had expired by 29 December 2018 will not be revived by this amendment.

Another amendment in 2018 granted museums and other exhibitors of artworks to the public the rights:

a to give an on-screen presentation or transmit an automatic public transmission to the extent necessary for the purpose of explaining or introducing the exhibited work;

b to reproduce the exhibited work to the extent necessary to give an on-screen presentation or transmit an automatic public transmission; and

c to reproduce or make a transmission to the public to the extent necessary to provide information as to the location of exhibited works to the public.[46]

Under the previous Copyright Act, a person who publicly exhibits artworks could reproduce and print a copy of the exhibits only in a booklet or pamphlet (print media) for the purpose of explaining or introducing them to visitors; however, utilisation of digital media for the same purpose was not allowed without obtaining consent of the copyright holder. Such law has been amended to cope with the needs of the digital society. As a result, it is possible to present a moving picture for explanation of the exhibited work on screen and make digital data of exhibited works accessible on tablet devices in art museums. Also, a museum may post images of the exhibited works on its website. However, a museum shall abide by the guidelines for utilisation of digital image, established jointly by organisations including Japan Artists Association, Inc and the Japanese Council of Art Museums, which provide, inter alia, that (1) the digital image may be made accessible only when the exhibited work is in the possession of the museum, and (2) if a digital image is to be made accessible outside the museum, the number of pixels shall be 32,400 or less.[47]

Applied art

Applied arts (i.e., art for everyday use) hold a prominent position in the Japanese art world and market. However, the extent to which such art is protected by the Copyright Act is uncertain, as there are no specific provisions for applied art in the Act. According to case law, it is generally considered that 'artwork' protected by the Copyright Act means, in principle, 'fine arts' for appreciation, and, with regard to 'applied arts', only that with sufficient aesthetic qualities can be protected. However, in a recent case concerning the copyrightability of a baby chair, the Intellectual Property High Court (the IP Court of Appeal) took a different

44 ibid, Article 51.

45 ibid, Article 58.

46 ibid, Article 47(1), (2) and (3).

47 Guidelines concerning reproduction, etc. of artworks for exhibition under Article 47 of the Copyright Act (22 January 2019) of Japan Artists Association, Inc, the Japanese Council of Art Museums, etc.

view.[48] The Court held that the copyrightability is determined based on whether or not a specific work contains an element that shows the creator's or designer's individuality and that the aesthetic should not be a criterion because it is too subjective. While the IP Court of Appeal suggests a change of criteria for the copyrightability of applied arts,[49] some subsequent judgments did not follow this suggestion, but decided on the basis of the aesthetic quality of the works concerned.[50] We await a decision of the Supreme Court to ascertain the definite view of the Court on this issue.

VII TRUSTS, FOUNDATIONS AND ESTATES

In February 2019, the Legislative Council of the Ministry of Justice proposed substantial amendments to the charitable trust system by a draft summary of the bill of the reformed Charitable Trust Act. This bill is planned to be submitted to the Diet during the next session. Under the existing system, a charitable trust can be used solely for payment of money for charitable purposes, and only trust banks licensed by the government can be trustees. However, a charitable trust under the new system will be allowed to carry out a business for promotion of the arts, such as operation of a museum, including the collection of admission fees and the sale of exhibition catalogues and other goods in a museum shop, and an institution or individual that is capable of proper management of such business may act as a trustee.[51] It is likely that a new charitable trust will provide practical means for the maintenance and management of artworks owned by companies that are willing to use their collections in the course of their corporate social responsibility activities.

VIII OUTLOOK AND CONCLUSIONS

During the past 100 years, several catastrophic incidents, including the Great Depression, defeat in the Second World War and multiple powerful earthquakes, have had a devastating impact on the world of arts and culture. However, on every occasion, the arts world recovered even faster than the economy and provided comfort and encouragement to the victims of the disasters. In 2020, the coronavirus pandemic has damaged people's lives and the economy, as well as arts and culture. Since April 2020, most exhibitions and other cultural events have been cancelled or carried out with strict restrictions. However, at the same time, other forms of art events, such as online exhibitions, have expanded. We trust that the arts will recover quickly and will play its part in encouraging and supporting people to recover from the existing difficulties, as it has done in the past.

48 Judgment of IP Court of Appeal of 14 April 2015, *Hanrei Jiho*, Vol. 2267, p. 91.

49 Judgment of IP Court of Appeal of 21 December 2016, *Hanrei Jiho*, Vol. 2340, p. 88 also seems to have relied upon the same criterion.

50 Judgments of Tokyo District Court of 27 April 2016 and IP Court of Appeal of 13 October 2016; judgment of Tokyo District Court of 21 April 2016, *Hanrei Jiho*, Vol. 2340, p. 104.

51 Ministry of Justice, 2018, Draft Summary on Review of Public Interest Trust Act, Sections 2-2, 4-1 and 9-3(3).

Chapter 22

NETHERLANDS

Gert Jan van den Bergh, Martha Visser and Auke van Hoek[1]

I INTRODUCTION

The Netherlands has traditionally been able to punch above its weight in the international cultural world. When last measured, in 2016, the country registered 14,925 cross-border activities, by some 4,000 Dutch makers and organisations, including performances, exhibitions, lectures, presentations and publications.[2]

Last year, the National Opera in Amsterdam was proclaimed the best opera company in the world. Two Dutchmen won the 2017 International Architecture Awards. Year after year, the Concertgebouw Orchestra has been placed in the top three by experts worldwide. The European Fine Art Fair in Maastricht (known as TEFAF Maastricht) is widely regarded as the world's premier fair for fine art, antiques and design.

The importance of the Dutch art world goes hand in hand with the importance of the proper legal organisation of the protection of cultural heritage and the recognition of restitution claims. The year 2020 has brought several – according to some, long overdue – initiatives. A government appointed committee has held in-depth discussions with interested parties and critics of the current Dutch Nazi-looted art restitution policy. Restitution of colonial looted art was on the agenda of the Gonçalves Committee, which issued its groundbreaking and far-reaching advice to the government in early October this year. Previously, yet another governmental committee had considered the question of how far the Netherlands should go in protecting Dutch cultural heritage against its possible removal abroad.

This chapter will concentrate on a wide range of subject matter, covering questions such as the issues surrounding Nazi-looted art, colonial art, title in art, limitation periods, authentication, art transactions, artist rights and art finance.

II THE YEAR IN REVIEW

i Designated cultural goods

During the past decades, according to many, the legal protection of national cultural heritage did not receive the attention it deserved. This all changed after a royal scandal in 2019, involving the auctioning of a multimillion-euro drawing by Peter Paul Rubens, which

1 Gert Jan van den Bergh is a partner and founding member, and Martha Visser and Auke van Hoek are associates, at Bergh Stoop & Sanders.

2 Buitengaats, the database in which DutchCulture collects data on the international activities of artists and cultural organisations in the Netherlands, has kept track://dutchculture.nl/nl/overzicht-nederlandse-cultuurexport-2016.

underscored the realisation that our list of protection-worthy cultural property needed an update. The Netherlands, like most other countries, has enacted legal provisions protecting cultural heritage against export, but so far the regulations have been less strict than in, for instance, France and Italy.

Based on the Dutch Heritage Act, it is possible to list artworks in the register of designated cultural goods,[3] to prevent their departure to museums or private destinations outside the Netherlands. Works listed in the register may subsequently only be exported abroad with the permission of the Minister of Education, Culture and Science, on the understanding that a designated object must first be offered for sale to Dutch cultural organisations within a period of six weeks.[4] The Dutch state, however, can claim a three-month window of opportunity to make an offer after an owner announces its intention to sell an artwork. If necessary, legal proceedings can be started at the District Court in The Hague to have works valued with the help of experts.[5]

Given that the aforementioned Rubens drawing had not been designated as protected heritage, the seller, a Dutch princess, could proceed with the sale without having to worry about the rules of the Heritage Act. However, an 'expedited procedure' for designation may have resulted in having the artwork included on the aforementioned list.[6]

The list of protected objects has been rather static for the past few decades. Protected cultural goods in private possession now amount to 723 objects. The total list of protected works (including museum collections) currently consists of 6,000 art objects.

The aforementioned incident provided new momentum in 2019 to the initiative of the Dutch Minister of Culture to appoint an advisory committee with the task of examining the current protection policy.

In September 2019, former politician and auctioneer Alexander Pechtold presented the report 'How to adequately protect cultural goods and collections under the Heritage Act: from reticent to involved'.[7] The report underpins the notion that the government should be more active in designating protected works. Accordingly, the Netherlands aims to ensure dynamic protection of Dutch cultural property by means of a policy requiring the government to adopt a proactive attitude.

In the face of these developments, the trade is particularly worried. Who dares to buy the work of a Dutch master when sales options are easily restricted afterwards? Dutch traders may expediently move important but as yet undesignated cultural goods abroad before these works are subject to new and possibly stricter rules.[8]

3 See: www.collectienederland.nl.

4 Article 4.4 and 4.10, Dutch Heritage Law.

5 Article 4.14, Dutch Heritage Law.

6 Article 3.8, Dutch Heritage Law.

7 Advisory Committee Protection Cultural Property of the Council for Culture, 'Hoe cultuurgoederen en verzamelingen onder de Erfgoedwet adequaat te beschermen: van terughoudend naar betrokken' (translation: 'How to adequately protect cultural goods and collections under the Heritage Act: from reticent to involved') as issued on 30 September 2020.

8 According to the Minister, the Cultural Heritage Act does not apply to cultural goods located outside the Netherlands. Cultural goods that have been lawfully brought outside the Netherlands cannot be designated at a later date. See also: Report of the Advisory Committee on the Protection of Cultural Property, pp. 11 and 47.

ii Restitution of Nazi-looted art

Since 2001, the Dutch Restitutions Committee has assessed claims regarding the restitution of Nazi-looted art. To date, 586 works have been returned to the rightful owners or their heirs.

In December 2019, the Dutch government issued a request for advice on the evaluation of the policy for the restitution of Nazi-looted art. The subsequently appointed Committee for Evaluation of Dutch Looted Art Restitutions Practice is headed by legal expert Jacob Kohnstamm, a former state secretary and director of the Resistance Museum in Amsterdam. On 24 November 2020, just before the publication of the evaluation report, it was announced that Alfred Hammerstein, the chairman of the Dutch Restitutions Committee, would resign on 1 December 2020. The Ministry of Education and Culture refrained from giving any comment on his decision. Since the central government changed its policy on looted art in 2015, the interests of museums have been given more priority in the allocation process. This is causing increasing disbelief, discussion and disappointment.

In 2018, the Dutch Restitutions Committee ruled against the Lewenstein heirs arguing that, inter alia, notwithstanding that the sale of a Kandinsky painting had to be seen in the context of the war circumstances, the balance of interest test should be applied in favour of the Stedelijk Museum in Amsterdam, which stressed the importance of the work for the museum's collection and the public interest.

iii Colonial collections

As a result of its colonial past, the Netherlands amassed a staggering 270,000 artefacts over a period of several centuries. Until recently the need for restitution was not on the agenda and official policy was to hold off as much as possible. Now, amid an increasing struggle by museums to address their colonial history, a Dutch governmental committee headed by lawyer and activist Lilian Gonçalves-Ho Kang You is asking for the unconditional return of objects to their countries of origin, reaching out beyond legal semantics.

International legal instruments offered only limited solace. The various UNESCO conventions indeed stress the principle that cultural objects deserve protection, that destruction and looting must be prevented, that illegal trade must be combated, that illegally imported heritage must be returned and that, in the event of restitution, the current good-faith owners must be compensated, but they do not offer a solution for returning objects. Moreover, colonial wars were mainly considered internal affairs instead of interstate wars. Furthermore, the common denominator of these treaties is that they have no retroactive effect. They therefore do not apply to objects that were looted from the colonies before the implementation of these treaties.

While President Macron seemed to take the initiative in 2017 when commissioning two academics to advise the French government regarding its dealings with the looting of colonial art, the Netherlands now places itself at the forefront of the discussions with the recently published report on 'Colonial Collections and Recognition of Injustice'. The Dutch governmental committee – named after Lilian Gonçalves-Ho Kang You and composed of 10 people, from a variety of disciplines and geographical backgrounds – now asks in the report of 7 October 2020 for the unconditional return of cultural goods to the countries where the Netherlands exercised colonial authority (Indonesia, Suriname and the Caribbean islands), insofar as involuntary loss of possession 'can be demonstrated with a reasonable degree of certainty'. Local governments, institutions and private individuals are encouraged to take responsibility. If necessary, the Minister should provide for financial arrangements to compensate private owners for the colonial cultural goods they have acquired in good faith.

It is noteworthy that in the absence of evidence of involuntary loss of possession, the Commission advises the return of cultural goods when they represent 'a particular cultural, historical or religious interest'. Restitution to the country of origin should then be weighed against other relevant interests in a reasonable and fair manner. Likewise application for the restitution of cultural goods in Dutch national collections, where countries other than the Netherlands were the colonisers, will be held against the same measure of reasonableness. In an initial reaction, the Dutch Minister of Culture confirmed the intention to follow and implement the advice of the Gonçalves committee. The Dutch museum world, including the Rijksmuseum, stresses the importance of the report and also commits to its execution, notwithstanding the challenges envisaged.

iv Art law-related litigation

Two of the more eye-catching recent international art law disputes litigated before the Dutch courts concern the return of national cultural heritage.

a Since 2014, Ukraine has been involved in a widely debated dispute with four Crimean museums and the Allard Pierson Museum in Amsterdam, with geopolitical interests in the background. Shortly after the opening of the exhibition 'Crimea: Gold and Secrets of the Black Sea' at the Allard Pierson Museum, Russia annexed the Crimean peninsula, violating basic rules of international law. The Amsterdam District Court initially ruled that Ukraine was entitled to restitution of its cultural heritage in accordance with the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the 1970 UNESCO Convention).[9] In the meantime, the Crimean museums have submitted the matter to the Court of Appeals in Amsterdam, where the process received a remarkable follow up, especially in light of the successful recusal award against the acting president of the Amsterdam Court of Appeal.[10]

b As part of its cultural policy, China is making a point of retrieving what it considers to be lost cultural heritage. The Dutch art dealer Oscar van Overeem had bought a Song dynasty statue of a monk from an acquaintance based in the Philippines. After restoration, the statue turned out to contain the mummy of a monk. When the story broke, the villages Yangchun and Dong Pu, from which the mummy was allegedly stolen in 1995, started legal proceedings in the Netherlands for its return. Numerous legal challenges arose: the 1970 UNESCO Convention could not be invoked as it had not yet entered into force in the Netherlands in 1995 and the claim was most likely time-barred, whereas the buyer seemed to have a serious good-faith argument. By the end of 2018, the proceedings had ended on a sour note for the villages since it was found that the 'village committees' had no legal standing and the claim was dismissed. It is said that the parties subsequently returned to the negotiating table.[11]

9 Amsterdam District Court, 14 December 2016, ECLI:NL:RBAMS:2016:8264.

10 Interlocutory Judgment in appeal: Amsterdam Court of Appeal, 16 July 2019, ECLI:NL:GHAMS:2019:2427.

11 Amsterdam District Court, 12 December 2018, ECLI:NL:RBAMS:2018:8919; E. Smit, Follow The Money: 'Een Nederlandse architect versus de Chinese autoriteiten' (translation: 'A Dutch architect versus the Chinese authorities'), 23 July 2017, retrieved via: www.ftm.nl/artikelen/de-nederlandse-architect-en-de-chinese-boeddha (last retrieved on 26 October 2020).

v Covid-19

It cannot be ignored that the cultural world has suffered greatly as a result of the pandemic during most of 2020. There have been many aspects to the consequences of this ordeal: museum closures, cancellations of fairs, festivals, concerts and live auctions, and a more modest customer spending pattern when it comes to the art market. However, digitalisation of the market gained momentum, with positive effects such as enhanced price transparency[12] and improved market accessibility. Because of drastic governmental measures aimed at containing the spread of the virus, many artists, institutions and cultural venues suffered distress, as a result of which aid packages were presented.[13] Nevertheless and despite additional funding,[14] the Dutch culture sector is struggling for its survival. UNESCO announced in May 2020 that 10 per cent of museums worldwide will go bankrupt because of the pandemic.[15] As to the Netherlands, the immediate devastating consequences of the pandemic are pervading museums, theatres, orchestras, dance and theatre companies and festivals. Ticket sales stopped overnight. The cabinet has created support packages for the cultural and creative sector. However, this governmental 'helping hand' hardly alleviates the suffering. As a result of the expected imbalance between costs and revenues, the permanent closure of many film houses and theatres has to be assumed as likely.

III ART DISPUTES

i Title in art

Dutch law provides that the transfer of goods requires a (1) delivery by virtue of (2) a valid title, made by the person (3) having the power to dispose of the goods. 'Title' refers to the legal basis that justifies the transfer. This may include a contract of sale or gift. The actual delivery has to be executed by granting possession of the artwork to the buyer. Alternatively, if (1) the disposer will continue to hold the work for the buyer, (2) the buyer already holds the work or (3) it is held by a third party,[16] parties can transfer property by means of a mutual statement. In the latter case, parties also have to inform the third-party holder. The law protects a buyer acquiring a work in good faith from a person lacking the power to dispose of the artwork, unless the work was stolen and the owner reclaims the work within three years.

12 At Frieze, London, prices had to be transparent and public. Galleries that did not disclose these up front were approached directly.

13 The distribution of this amount showed that the vast majority of this money went to already subsidised institutions, instead of to small projects, entrepreneurs and artists, who were in dire straits. Especially since the interesting projects and innovative art usually does not come directly from the large subsidised institutions, this was not received well in the industry. Many people in the art sector work as freelancers and they enjoyed state support, with which one has to make ends meet with an amount that is actually a welfare benefit.

14 Boekmanstichting, 'Gevolgen coronavirus voor culturele sector; een overzicht van dag tot dag' (translation: 'Consequences of the coronavirus for the cultural sector; a day to day overview'), retrieved via: www.boekman.nl/actualiteit/gevolgen-coronavirus-voor-culturele-sector/ (last retrieved on 28 October 2020).

15 UNESCO Report, Museums around the world in the face of covid-19, Paris, France: UNESCO, May 2020.

16 Reference is made to the Roman law concepts of transfer *longa manu* (3:115, sub c, Dutch Civil Code), *brevi manu* and *constituto possessorio* (3:115, sub a, Dutch Civil Code).

Internationally, it causes surprise that in the Netherlands, a non-good-faith buyer – or more accurately, a bad-faith buyer – can ultimately become owner of a stolen artwork by the mere passing of time. With legal certainty as a justifying basis, 20 years is the final cut-off for all claims to become statute-barred, unless highly exceptional circumstances render the application of this rule unacceptable according to standards of reasonableness and fairness. Even in the case of looted art, this exception is applied restrictively: in 1990, a Dutch possessor of a valuable artwork by Jan van der Heyden tried to sell the painting via Christie's. When it turned out the painting was stolen by the Russians from a German museum after the Second World War, the museum could not reclaim the painting from current possessor (now owner), even though this person might have known it was stolen.[17] The Dutch Supreme Court decided that the term to reclaim the work had lapsed.[18]

In principle, good faith is assumed. If it turns out a person had or must have had knowledge of the facts that are alleged against him or her by the person entitled to the property at issue, this person is regarded as being in bad faith. This means that a person is not only regarded as acting in bad faith if that person actually knew, for instance, that the seller lacked the power to dispose of the artwork, but also where, under the relevant circumstances, that person should have known these facts or laws.

The legal concept of good faith was addressed in a case regarding the sale of a painting by the famous Dutch seascape painter Mesdag. The painting was put up for sale by the owner via a middleman, who engaged a gallery to sell it for a minimum price on condition that he would be consulted before an agreement was concluded. The galley, however, sold the work to a buyer, Mr Janssens, below the minimum price without consulting the owner's contact. Based on particular circumstances, including the low price, Janssens should have made further inquiries. In view of the fact that he did not investigate further, he was deemed to have acted in bad faith.[19]

It is important to note that the three years revindication term, during which an owner can reclaim his or her property after a theft, cannot be invoked against a consumer who,

17 Supreme Court of the Netherlands, 8 May 1998, ECLI:NL:HR:1998:ZC2644, annotated by Th.M. de Boer (*Cloister in a Landscape*, Land Sachsen, Jan van der Heyden); W.H. van Boom et al., Een kwart eeuw Privaatrechtelijke opstellen, aangeboden aan prof. mr. H.J. Snijders ter gelegenheid van zijn emeritaat., Deventer: Wolters Kluwer 2016, retrieved via: http://hdl.handle.net/1887/46819 (last retrieved on 23 October 2020).

18 The maximum limitation period used to be 30 years, until the introduction of the new Dutch Civil Code in 1992. In January 1993, the new 20-year term and extinctive prescription were introduced, meaning that as of that time, a bad-faith possessor could become owner of a property; limitation periods are discussed in more depth in Section III.iii.

19 Supreme Court of The Netherlands, 14 January 2011, ECLI:NL:HR:2011:BO3521; para 3.6.2:

> *'Section 5b rightly argues that the Court of Appeal, in the light of the fax of 23 August 2002, failed to give sufficient reasons why the facts "confessed" therein by [party concerned 2] should not have been a reason for [defendant 1] to institute an investigation into the power of disposition of [party concerned 2] ([B]). In this respect it is important to note that section 5d rightly points out that the court of appeal was not allowed to consider [defendant 1] as a "private individual" without further substantiation, since [plaintiff] c.s. had stated that [defendant 1] knows the value of art, buys and sells a [C] and exchanges it for paintings of smaller masters, has a separate bank account for his "[D]" and keeps a gallery on it. The complaint of section 5e is also aimed at, since the circumstance that the Mesdag was sold for "a very low amount", contrary to the opinion of the Court of Appeal, may give rise to doubts about the competence of [B] with regard to the painting, also against the background of the financial problems in which [person involved 2] finds himself and the earlier "lies and excuses" he confessed.'*

during that three-year term, bought the property from a professional retailer, such as a gallery.[20] The basis of this rule lies in the principle of legal certainty entailing that private persons buying from a reliable source are protected against claims from third parties. The only remedy available to the original owner is a claim for compensation from the thief or bad-faith middleman.

However, when buying at auction the above-mentioned exception is not applicable. In this respect, buying at auction entails the risk that the owner might reclaim the object within three years. Therefore, when buying at auction in the Netherlands, one has to carefully execute a due diligence process.[21]

Prompted by EU consumer law and long-distance buying regulations,[22] consumers buying outside a retail space such as a gallery or an art fair, or from distance (online, by telephone, etc.), can rely on a 14-day term after the sale, during which the contract can be terminated without any reason for the termination having to be given. If the professional seller does not inform the consumer about the 14-day term, this withdrawal term is extended by 12 months.

Was the then 81-year-old Oosje Silbermann wilfully or unwillingly incapacitated when she donated an expensive painting to the Rijksmuseum in 2013? According to Ms Silbermann (who, together with her sons, had the artwork seized), she was in a confused state at the time. Now, seven years later, the family is trying to undo the donation. According to public documents, the painting was taken from Oosje Silbermann's possession 'by hasty and careless action'. If (according to claimants) the museum had fulfilled its duty of investigation, it would have noticed the confused state of mind of the woman. The Rijksmuseum says it acted 'in good faith', that 'the donation was recorded in a notarial deed' and that 'if the judge says that the donation is not legally valid, the museum will of course comply'. One of the interesting questions submitted to the Dutch court concerns the scope of the museum's duty of investigation regarding the mental competence of the donor.[23]

Plaintiffs argue that investigatory research is required, not only because the donation involves the most prominent Dutch museum, but also in accordance with the ICOM Code of Ethics for Museums.[24]

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20 Article 3:86, para 3, sub a, Dutch Civil Code.

21 Article 3:86, para 3, Dutch Civil Code:

The owner of a movable thing who has lost possession of it because it was stolen from him may, in spite of the previous paragraphs, always claim his property back from any possessor within three years of the theft, unless:

a. the stolen object has been acquired by a natural person who, when he acquired it, did not act in the pursuance of his practice or business, and who had received it from an alienator who sells these or similar objects regularly to the public, making use of business premises intended for that purpose and who acted when he passed the stolen object to the acquiring party in the conduct of his practice or business, yet not as an auctioneer;

22 Articles 9 and 10, Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance.

23 A Ribbens, NRC: 'Familie wil geschonken schilderij terug van het Rijksmuseum' (translation: 'Family want donated painting back from the Rijksmuseum'), 18 September 2020, retrieved via: www.nrc.nl/nieuws/2020/09/18/familie-wil-geschonken-schilderij-terug-van-het-rijksmuseum-a4012746 (last retrieved on 23 October 2020).

24 Article 2.2 and 2.3, ICOM Code of Ethics for Museums (version June 2017). The full code can be consulted via: https://icom.museum/en/ (last retrieved on 23 October 2020).

ii Nazi-looted art and cultural property

In 1998, a long overdue art restitution policy was adopted in accordance with the Washington Principles on Nazi-Confiscated Art (the Washington Principles), offering guidelines on how to restore to the rightful owners works of art that were lost to the Nazis. Some 44 countries subscribed to the Principles, including the Netherlands. But praise aside – and according to scholars, interest groups and claimants – the Dutch restitution policy leaves much to be desired. Because of a number of worrying developments, Dutch policy has drifted away from the Principles' original ambitions. As a result of changes in restitution policy in 2015, Dutch museums are able to oppose restitution claims by invoking the argument that the claimed artworks are simply too important for the museum collection.

In March 2020, a review committee chaired by the former Dutch politician Jacob Kohnstamm was appointed to evaluate the restitution policy during the coming months. Numerous – coronavirus-proof – interviews were organised and the reporting is expected by the end of 2020. Shortly before the publication of its report, the chairman of the Dutch Restitutions Committee, Alfred Hammerstein, announced his 1 December 2020 resignation. No further explanation was given.

The Dutch practice has been criticised for a number of reasons:

a the absence of the possibility of (independent) appeal;

b gaps in evidence have increasingly been interpreted to the detriment of the applicants.[25] This trend of exchanging the original standard of 'plausibility' for hard evidence is contrary to the recommendations of Ekkart and Rule 4 of the Washington Principles;[26]

c the Dutch state claims ownership of claimed works whereas, after the war, the allied forces handed over looted works of art for restitution to the rightful owners with the understanding that the Dutch state could not claim more than the role of a custodian; and

d the failure to award applicants a central position in the restitution proceedings when establishing the relevant facts (inter alia, by disclosure of all sources used), given that the parties are involved in a truth-finding process (as opposed to a contentious process).

These and other points of criticism have been brought to the attention of the Kohnstamm committee by Jewish claimants, their descendants, legal scholars, lawyers and Jewish interests groups.

The main point of critique, however, concerns the introduction of a balance-of-interests test that, when considered against the open standard of reasonableness and fairness, turns out to be an instrument for owners, and museums in particular, to keep their hands on important works of art that were lost involuntarily by Jewish owners as a result of the war circumstances.

In January 2020, the descendants of a Jewish art collector, Emanuel Lewenstein, filed a lawsuit seeking the return of Kandinsky's *Painting with Houses*, dating from 1909, from the Stedelijk Museum in Amsterdam. The purpose of the proceedings at the Amsterdam District Court was to have a previously issued binding opinion of the Dutch Restitutions Committee

25 Recommendations RC 3.141 (Lewenstein), RC 3.162 (Stern-Lippmann) and RC 4.119 (De Vries II) show that the Restitutions Committee has become much stricter with regard to the rules of evidence and has clearly abandoned the norm of 'plausibility'.

26 'In establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era.'

annulled. The city-owned museum had purchased the painting at auction in Amsterdam in October 1940. The work found its way to the block under mysterious circumstances, leading the heirs to believe that the sale was involuntarily made under duress from occupying Nazi forces. In 2018, the Dutch Restitutions Committee investigated the case and found that the Stedelijk was not obligated to return the painting. The Committee argued that the exact circumstances under which the piece was brought to auction remain unclear and that there was no proof that the sale was involuntary. According to the claimants, the decision 'contradicts the internationally accepted standards for restitution of Nazi-looted art as laid down in the Washington Principles'. Nevertheless, the claim for restitution was rejected by the Restitutions Committee because it was regarded as being 'less strong' because the auction was possibly linked to (alleged) Lewenstein family financial issues that predated the war. As a consequence, the Committee applied a biased balance-of-interests test, ruling in favour of the museum on account of the importance of the work.

One of the controversial issues surrounding restitution cases concerns the question of whether the state can rightfully claim an ownership position as to post-war recuperated artworks. Lawyers and scholars have noted on several occasions that the state carefully avoids answering this question explicitly, whereas there is ample reason to refute this position.[27] Looted art in Dutch museums falls into two separate categories. First, the concept of 'looted art' may refer to works of art sent back to the Netherlands from Germany by the Allies or, alternatively, it may be applied to objects acquired by museums, other institutions or private individuals from 1933 onwards that prove to have been looted. Artworks in the first category came under the custodianship of the Netherlands Art Property Foundation, which was charged with returning the works to the rightful owners or their heirs if there was reason to believe that was appropriate. Anything deemed ineligible for restitution was gathered in the Netherlands Art Property Collection (the NK Collection), held by the central Dutch state, part of which was lent to Dutch museums or given on loan to embassies or public institutions.

The fact is that the state of the Netherlands deems itself to be the owner of the NK Collection pursuant to controversial post-war legislation based on the assumption that Hitler had become owner of looted artwork and that the objects could be confiscated upon their return across the Dutch border.[28]

However, the fact is that, from the outset, the Dutch state acted as the custodian of the works recovered from Germany, which the allied forces had handed over to the Dutch state under the strict condition of custodianship pending the claims of the rightful owners.

27 Among other examples, in a complaint letter by C Drion, lawyer and former member of the Supreme Court of the Netherlands, dated 13 November 2009 ref. 35846/CDR/614776 and addressed to the National Ombudsman regarding the case of *Koenigs v. State of The Netherlands* (several proceedings among others before the Restitutions Committee and the Council of State); and Professor H C F Schoordijk in his publication *Over Roofkunst gesproken* (Nijmegen: Wolf Legal Publishers 2010).

28 Ultimately, according to Articles 10 and 6 of RD A 6, the state's claim to ownership was established by means of the ratification order of 14 February 1947, whereby Hitler apparently had to be regarded as the rightful owner, allowing the state then to assert its ownership rights on the basis of Article 3 of Royal Decree E133. The ratification order has legal effect from the moment the NK works cross national borders.

iii Limitation periods

The maximum period to bring an action is 20 years, unless actions are subject to a different prescription term. After expiry of this period, a person loses his right to initiate a claim regarding property, damages or any other claim (extinctive prescription). However, most actions are subject to a specific prescription period and, as a result, the 20 year-term serves as a fallback catch-all provision. Prescription terms start running when performance of the obligation can be claimed. Note that recourse to judicial prescription must be made by the parties; the judge cannot apply the plea of prescription *ex officio*.

Most actions have to be brought against the defendant within five years (actions regarding fulfilment of obligations and actions for damages based on tort). For nullification of a contract based on a specific reason such as an error, misrepresentation or undue influence, a three-year term applies. A claim against consumers regarding payment of a purchase has to be made within two years.

On the other hand, current possessors of artworks may be entitled to invoke acquisitive prescription, meaning that a property is acquired on a legal basis after a period of good-faith possession. A good-faith possessor of movable property is protected against third-party claims after three years of uninterrupted possession.

Specific prescription periods apply to protected cultural property. If, for instance a painting is stolen from a museum, it can be reclaimed up to 75 year later. The basis for these provisions lies in the international framework for the protection of cultural heritage. From an EU perspective, specific terms apply for claims regarding the return of cultural heritage protected by the law (30 years) and for claims regarding property from public or religious collections (75 years). For Nazi-looted art claims, a specific policy applies, in which regard limitation periods as such cannot be invoked as long as the works claimed originate from public collections.

iv Alternative dispute resolution

In 2018, the Court of Arbitration for Art (CAfA) was founded, under the auspices of the Authentication in Art Foundation, based in The Hague, and the Netherlands Arbitration Institute foundation, based in Rotterdam. It aims to resolve disputes in the wider art community through mediation and arbitration. CAfA is dedicated to and specialised in art disputes in the broadest sense, including disputes regarding art authentication, title and restitution claims, copyright and contracts. Approximately 200 international arbitrators and mediators have been appointed to handle cases submitted to CAfA. Parties can now choose from a wide range of experts to resolve art conflicts.

As discussed in Section III.ii, a specific framework has been established for the restitution of Nazi-looted art through proceedings heard by the Dutch Restitutions Committee, based on the 1998 Washington Principles and the related Ekkart Guidelines. In the case of Nazi-looted art in possession of the central government, a request for restitution can always be based on the applicable government policy, whereas in the case of property in the possession of other governments, decentralised government museums or individuals, claimants can request a binding expert opinion, a specific type of alternative dispute resolution that requires the consent of both parties.

IV FAKES, FORGERIES AND AUTHENTICATION

People have a fascination with forgery. There is something of a Robin Hood complex about it all: only the ultra-rich are being swindled, so what's really the harm? The *Frankfurter Allgemeine* once called art forgery 'the most moral way to embezzlement'. According to the famous London-based art dealer James Butterwick, the estimated value of fake art in circulation could exceed half a billion dollars.

The process of authentication is difficult for a number of reasons. First and foremost: as technology moves forward, you can be sure that the forgers are running to stay ahead. They have grown more rigorous in their harvesting of materials, taking the trouble to source wooden panels from furniture they know is dateable to the year of the fake they are creating. Some painters are relatively easy to copy. The technical skill needed to forge a Leonardo da Vinci is colossal, but with a painter such as Modigliani, it is relatively easy.

The world of authentication is a very high-stakes environment. A work deemed authentic or deemed forged can mean the difference between a it being worth tens of millions of dollars or essentially nothing. Because of this, several authentication boards have been tangled up in lawsuits with angry collectors who disagree with their opinions.

The most notable case litigated before Dutch courts regards the matter of Roubrocks versus the Van Gogh Museum in Amsterdam.[29]

A still-life painting of peonies in the style of Van Gogh, belonging to the German art dealer Marcus Roubrocks, was insured for the very considerable sum of €33 million. Marcus Roubrocks's father bought the painting in 1977 from an antique shop in Düsseldorf. Several qualified experts (including from the Stedelijk Museum Amsterdam) and laboratories concluded that the work is very likely a genuine Van Gogh. Furthermore, laboratory tests showed that all the materials and techniques used in the painting match those used by Van Gogh, including the rarely used cadmium yellow, as well as the technique of using a white lower layer. The tests also showed that the signature was inscribed simultaneously with the painting of the picture.

To get the painting accepted by the major auction houses as a genuine Van Gogh, the museum carrying the artist's name would need to give the artwork its blessing. Roubrocks was deeply disappointed when the Van Gogh Museum, pointing out the unusual use of colour and unusual brush strokes, decided against endorsing the painting. Roubrocks argued that the rejection was almost entirely based on stylistic arguments that could easily be rebutted. After litigation in two instances, the Supreme Court of the Netherlands argued in the decision of 17 February 2017 that authentication 'is not a science' and that we 'have to rely on intuitive judgement that may be subjective'. The court of appeal had concluded earlier that the court's role is limited to judging whether or not a general duty of care has been breached.

The court furthermore concluded that the Van Gogh Museum had not breached such a duty of care, as there is no uniform legal framework. Roubrocks had approached the Van Gogh Museum, whose advice was free and he was also free to ask someone else; the Museum had sufficiently justified its clear conclusions as to provenance, iconography, style, technique, colours and signature; and, finally, the museum is entitled to disagree with other experts.

29 Supreme Court of the Netherlands, 17 February 2017, ECLI:NL:HR:2017:282.

Deciding the authorship of artworks relies on three key elements: (1) connoisseurship, (2) technical analysis, and (3) provenance. The populace of connoisseurs is, however, thinning out. One leg is growing longer, another growing shorter – and as a result, one may conclude that the stool is becoming decidedly unbalanced.

V ART TRANSACTIONS

i Private sales and auctions

The coronavirus crisis has led to a sharp increase in the online supply of art platforms. Every effort is being made to eliminate the disappointing financial results in the sector.[30] More and more art fairs are adapting their business models.[31] However, online sales are subject to different rules. In the case of online sales, the consumer is extensively protected under Dutch law. Buyers have 14 days from receipt of the work of art to consider whether it is to their liking.[32] Within this period, the buyer can return the work, without giving reasons, in which case, the seller must refund the purchase price to the buyer within 30 days. While this may seem a fairly normal procedure for, let us say, a pair of sports shoes, it may cause problems when selling valuable works of art online. Who, for instance, will be responsible for the transport costs in the event of a return? When is someone considered an art dealer? This is not unimportant given that consumers enjoy more extensive protection when trading with a professional party.

This last question was brought to the attention of the District Court of Amsterdam[33] in a matter concerning the sale of two Tang dynasty horse statues. The buyer rescinded the purchase 16 days after the event because of doubts about the origin of the statues.[34] However, the seller claimed not to be a professional art dealer, leaving the buyer with limited options of withdrawal from the agreement. The Court, however, ruled[35] that the seller did not act on his

30 If a museum wishes to sell a work, it must first offer this work for sale to other museums, on the basis of the Leidraad Afstoten Museale Werken (LAMO) (Guideline on Disposal of Museum Works).

31 Margaret Carrigan, 'Online marketplace proliferate as the coronavirus pandemic continues', The *Art Newspaper* 9 July 2020.

32 Article 6:230o, subsection 1, of the Dutch Civil Code gives the consumer the rights to withdrawal from a contract concluded outside the sales premises without giving reasons within a period of 14 days. If the seller has not notified the buyer of this right of rescission, this right of rescission will be extended by a maximum of 12 months in accordance with Section 6:230o(2) of the Netherlands Civil Code.

33 District Court Midden-Nederland 14 March 2019, ECLI:NL:RBMNE:2019:1060.

34 The sale had been concluded in the seller's flat, as a result of which Article 6:230o(1) of the Dutch Civil Code, 'Koop op afstand' ('distance selling', also referred to as 'sale outside sales premises') was also applicable here.

35 District Court Midden-Nederland, 14 March 2019, ECLI:NL:RBMNE:2019:1060, para 4.14:

> *'The foregoing shows that [the plaintiff] kept the statues on consignment, regularly sold works of art and earned money with them. This indicates, as [defendant] rightly argued, that he was a dealer. The terms 'my intermediary' and 'the deal with the Chinese' used by [plaintiff] in his letters to [defendant] are also consistent with this, as is [plaintiff's] statement in the preliminary hearing of witnesses that 'when I travel to Asia, I go to a special trader in Hong Kong who I have known and done business with for 25 years'.*

As a result, the buyer was at liberty to terminate the agreement within the statutory period of 14 days plus 12 months after the conclusion of the agreement (the term of 14 days plus 12 months applies if a seller acting in a professional capacity omits to inform the buyer regarding the right of withdrawal) based on Article 6:230g, lid 1, sub b, Dutch Civil Code implementing the Directive 2011/83/EU of the European

own behalf, having received the figurines on consignment, and that the frequency with which he traded for profit did in fact land him in the field of professional traders.[36] The Court ruled therefore that the buyer could withdraw from the agreement.

ii Art loans

Undoubtedly, the most salient court case in recent years has been the case concerning the Crimean treasures, in which global geopolitics plays a role in addition to various international conventions on the protection of cultural goods. Early in 2014, the Allard Pierson Museum in Amsterdam showed artefacts originating from four museums in Crimea, the Ukrainian peninsula, during the exhibition 'Crimea: Gold and Secrets of the Black Sea'. Shortly after the opening of the exhibition, Crimea was annexed by the Russian Federation. Since then – and in accordance with international law – the peninsula has been considered occupied territory.

Both the museums and the state of Ukraine demanded the return of Crimea's treasures: the museums on the basis of contracts and as lenders, whereas Ukraine demanded the return to Kiev of its national cultural heritage based on the 1970 UNESCO Convention and its Dutch implementation law. In December 2016, the Amsterdam District Court ruled that the Crimean treasures were residing on Dutch soil illegally following the expiry of the loan period and that the artworks had to be shipped to Ukraine as their country of origin on the basis of the 1970 UNESCO Convention. This obligation was deemed to be in line with other international agreements such as EU Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a Member State, and the UNIDROIT Convention of 1995, both of which contain the rule that the untimely return of artworks after an initial lawful export renders the export unlawful.

The Crimean museums – with the (financial) support of the Russian Federation[37] – appealed the judgment, claiming that (the implementation of) the 1970 UNESCO Convention was not applicable since the documents were not unlawfully exported from Ukraine or unlawfully imported into the Netherlands. In its in interlocutory judgment, the Amsterdam Court of Appeal ruled in July 2019 that the 1970 UNESCO Convention did not apply and that the matter needs to be decided on the basis of Ukrainian ownership claims. The parties are currently entangled in further proceedings before the Amsterdam Court of Appeal. A noteworthy incident concerned the successful recusal of the acting president of the Amsterdam Court of Appeal. The recusal chamber argued in its decision of 28 October 2020 that, according to objective standards, a fear of prejudice existed, inter alia, in light of his previous ties with the lawyers of the Crimean museums.

Foreign property intended for public service – including artworks given on loan for exhibitions – cannot be seized while present in the Netherlands. On 15 November 2010, the Netherlands signed, yet did not ratify, the authoritative 2004 United Nations Convention on Jurisdictional Immunity of States and Their Property.

Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance.

36 Court of Appeal Den Bosch, 13 May 2018, ECLI:NL:GHSHE:2008:BD5810.

37 Russian news article via RBC.ru (RosBiznesConsulting media Group) on the budgeting of lawyers' fees in the Russian Federation for the Crimean case dated 18 January 2017.

Based on the Dutch Code of Civil Procedure, the Netherlands recognises immunity from seizure. Invocation of immunity from seizure can be denied only in cases where the intended use of the cultural object clearly concerns a commercial goal, such as the sale of the object. The legislation regarding immunity from seizure is mainly laid down in Articles 436 and 703 of the Dutch Code of Civil Procedure.[38] These articles are applicable for pre- and post-judgment measures of constraint respectively. Both Articles contain the following wording: 'Attachment cannot be made to property intended for public service.'

Although several states have developed legislation to protect objects from any form of seizure, most states lending objects to the Netherlands, settle for 'soft law' 'guarantor's declarations' accompanying the agreements regarding cultural objects on loan in the country. These declarations, issued by the Dutch Ministry of Foreign Affairs, state that the Dutch authorities will do their utmost to ensure that the objects are returned to the lending institution.

The notion that the governmental guarantees are not entirely watertight was illustrated by the recent example of the Israel Museum in Jerusalem that had planned to lend a Rembrandt to the Jewish Historical Museum in Amsterdam for the 2019 'Rembrandt Year' programme. The Dutch state was unable to give the desired guarantees as to protection against immunity from seizure, with the result that the loan was cancelled.[39]

iii Cross-border transactions

See Section V.ii for information on cross-border transactions.

iv Art finance

The EU Fifth Anti-Money Laundering Directive,[40] which came into force in the Netherlands on 21 May 2020, has far-reaching consequences for the art trade.[41]

Anonymous buyers (or sellers) and undisclosed prices are among practices that the Directive seeks to make an end to, arguing that the art market for too long has lured shady representatives from the realm of money launderers.

A 2018 study[42] on fighting illicit trafficking in cultural goods commissioned by the European Commission led to these new measures. The report pointed to the increase in the trade in illegally excavated art objects from, for example, Syria and Iraq; money laundering

38 Furthermore, Article 13a of the General Provisions Act provides judges with the option to interpret the law restrictively with regard to, among other things, enforcement of judgments concerning property of foreign states. The potential consequence is that, even if an object is seized successfully and a case as to restitution of this object is decided in favour of the claimant, a Dutch court has the option to prevent execution of the decision. Therefore the return of the object to the claimant after a decision to this effect is not a foregone conclusion.

39 Jewish Cultural Quarter, Rembrandt's *Saint Peter Kneeling*, without date, retrieved via: https://jck.nl/nl/rembrandt (last retrieved on 23 October 2020).

40 Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU (OJEU 2018, L 156).

41 Official journal (Staatscourant) 2020, 146, Implementation Act Amendment fourth anti-money laundering directive.

42 DG Taxud, 'Fighting illicit trafficking in cultural goods: analysis of customs issues in the EU' (final report), June 2017.

via freeports; and the use of virtual currency in the art trade. In addition, the authors noted that the trade in illegal art objects also serves to finance terrorism. The Directive aims to ensure greater transparency.

Since 2018, the Dutch art trade has been subject to the Money Laundering and Terrorist Financing (Prevention) Act, also known as the Wwft. At present, persons and companies that mediate in art and persons or companies that buy or sell art are already covered by the Wwft as long as the monies involved exceed €10,000.[43] The rules have been extended to include entrepreneurs who store art, regardless of whether payments are made in cash or via wire transfer.

Compliance is required with strict rules regarding identification of clients, determining ultimate beneficial owners, transactions involving high-risk countries, dealings with political exposed persons and the question of when and how suspicious transactions should be reported. Traders are also required to pay attention to the training of personnel in the field of anti-money laundering rules.

Up until now there has been little enthusiasm for the new rules within the art trade, given that severe obstacles in art transactions are expected. Small art dealers will have to comply with the same rules as large art dealers. An auctioneer from The Hague has called the new measures madness: 'I can't imagine that a lot of money is being laundered there. But I can lose customers because of it.'[44]

VI ARTIST RIGHTS

i Moral rights

The Dutch Copyright Act grants each author the right to oppose modifications to his or her work, 'unless the alteration is of such a nature that it would be contrary to the notion of reasonableness and fairness'.[45] The author furthermore has 'the right to oppose any deformation, mutilation or other deterioration of the work, which could be detrimental to the reputation or the name of the author or to his [or her] value in this capacity'.[46] In several more recent cases, artists and architects have invoked these provisions to put a halt to what they considered a lack of respect for their work.

Interestingly enough, the complete demolition of a building or artwork does not per se constitute a breach of these rights, provided that the original work has been sufficiently documented and the current owner is able to come up with a rational basis for the demolition.[47] However, a balance-of-interests test is usually applied.

In a recently published matter before the District Court of Northern Netherlands, it was ruled that an artwork could not be removed for destruction without prior consultation

43 Article 1a, sub 4k, Wwft.

44 Thomas Spekschoor, 'Kunst opslaan of kopen? Bewijs eerst dat je geen crimineel bent' (translation: 'Want to keep or buy art? Prove first that you are not a criminal'), NOS (Dutch Broadcasting Foundation), 11 January 2020.

45 Article 25, sub 1 c, Dutch Copyright Act.

46 Article 25, sub 1 d, Dutch Copyright Act.

47 Supreme Court of the Netherlands 6 February 2004, ECLI:NL:HR:2004:AN7830 (Jelles / Zwolle). See also: Supreme Court of the Netherlands 29 March 2019, ECLI:NL:HR:2019:451 (De vier jaargetijden). These decisions also provided that the creator of an artwork may invoke tort (Article 6:162, Dutch Civil Code) or misuse of power (Article 3:13, Dutch Civil Code).

with the artist regarding acceptable alternatives. This matter involved an installation that consisted of a large rectangular frame with several copper objects, named *Without Title 1407*. The work had to serve as a connecting element between a school and its parking area. After several copper elements of the artwork had been stolen, the school finally proceeded to remove the artwork to destroy it.[48] Invoking his moral rights, the artist reproached the owner for failing to contact him to discuss appropriate measures for the possible preservation of the work. The Court agreed.

Another remarkable case concerned the question of whether a site-specific work of art could be moved elsewhere in spite of protests by the maker.[49] The artist in question had placed a mobile sculpture in a hangar for jet fighters at a former military airbase. The landlord, however, decided to rent the hangar out to a physiotherapy practice.[50] According to the artist, the work of art was inextricably linked to the location. The court, however, after weighing all interests involved, and while acknowledging that the context in which a work of art is placed is also part of the work itself, ruled that the owner was not obliged to use his best efforts to preserve the work of art.[51]

ii Resale rights

Based on EU Law as implemented in the Dutch Copyright Act, an artist or his or her legal successors has the right to remuneration in the event of resale of an artwork,[52] amounting to a percentage of the sales price and depending on the resale price of the work. The maximum compensation amounts to €12,500 and the artist must be an EU national (including Iceland, Liechtenstein and Norway) or a permanent resident of the Netherlands.[53]

Very few cases have been adjudicated in Dutch courts on the issue of resale rights. One of the more outstanding cases involved the question of whether the compensation is a fee to be collected by the artist or whether it is to be proactively handed over by the seller or buyer in the event of a resale.[54] When the Dutch authors' rights organisation Pictoright (a royalty collection organisation for visual creators) requested galleries to provide information on their sales involving resale rights, it met with resistance from Simonis & Buunk, a large Dutch gallery that was of the opinion that it was not obliged to respond to fishing expedition-type requests. The gallery's view (that artists can only make specific requests if a sale raises the issue of resale rights) exposes a fundamental problem: if the artist himself or herself is to collect compensation for resale and sellers are not to inform artists, the resale right remains a dead letter. The court decided that when an author has indications (not actual knowledge) of

48 District Court Assen 18 December 2018 (publication 31 January 2020), ECLI:NL:RBNNE:2018:5659 (ROC).

49 District Court Utrecht 24 December 2019, ECLI:NL:RBMNE:2019:6198 (Secret Operation 610).

50 Remarkably, the owner is a foundation that stands up for the protection of nature and heritage in the area.

51 District Court Utrecht, 24 December 2019, ECLI:NL:RBMNE:2019:6198 (Secret Operation 610), r.o. 2.10.

52 Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art.

53 There are also cases in which no remuneration is to be paid: (1) if the sale price does not exceed €3,000; (2) if the artist sells directly for a sale price not exceeding €10,000 within three years of purchase, and (3) if a person not acting as a professional art dealer sells the painting to a museum on a non-profit-making basis.

54 District Court of Gelderland, 5 February 2014, ECLI:NL:RBGEL:2014:1037 (Pictoright / Simonis & Buunk).

transactions involving resale rights, enquiries may be made at the gallery, which subsequently has an obligation to provide a response. This duty to correctly inform beneficiaries after such requests was also reaffirmed by more recent case law.[55]

VII TRUSTS, FOUNDATIONS AND ESTATES

In accordance with Dutch law, a broad definition of the term 'foundations' is used in the context of non-profit institutions. A trust whose focus is the benefit of others is considered a charitable foundation, in which case it is important to obtain public-benefit organisation status (ANBI status)[56] to qualify for tax benefits (no taxation for inheritance and gifts, provided the inheritance or gift proceeds are used solely for charity purposes). More than 43,000 foundations in the Netherlands have this tax-benefit status. However, according to a recent study, a large number of these institutions do not meet the criteria.[57]

Foundations can also be established for purposes other than charity. To avoid dilution of ownership or control over an art collection, this instrument can be chosen to separate legal and beneficial ownership. More and more charities offer donors the option of setting up a registered fund.[58] Donated or bequeathed capital is then administered separately by the charity (the main fund) and deployed within the framework of that charity's objective but on the basis of the wishes of the donor.[59] From that time on, the main fund takes care of the administrative and organisational tasks, as well as any additional (notarial) costs.

Many donors see it as an advantage to remain anonymous. A registered fund can bear the name of the donor, but this is not necessary. However, anonymity for donations (exceeding €15,000) recently became the subject of discussion because of the 2018 draft bill on the transparency of charities.[60] Terrorism threats, undesirable external influences and the above-mentioned investigation into ANBI status have ensured that the Dutch government wants to get a better grip on civil society organisations. Charity organisations will have to publish details of any donation in excess of €15,000, with the name and place of residence of the donor.[61] In fact, all 219,000 foundations, 128,000 associations and 1,500 church associations registered with the Chamber of Commerce will be subject to the obligation

55 District Court of Amsterdam, 7 January 2020, ECLI:NL:RBAMS:2020:35.

56 In Dutch: Algemeen Nut Beogende Instelling.

57 https://pointer.kro-ncrv.nl/artikelen/liefdadige-instellingen-ontlopen-massaal-controle-door-belastingdienst.

58 Most charities apply a minimum of €50,000.

59 One of the organisations that pioneered the development of the named fund is the Prince Bernhard Culture Fund. As at the beginning of 2020, there are more than 450 named funds at the cultural organisation.

60 The draft bill on transparency of civil society organisations was published online for consultation on 21 December 2018. See: www.rijksoverheid.nl/documenten/kamerstukken/2018/12/21/conceptwetsvoorstel-transparantie-maatschappelijke-organisaties---internetconsultatie.

61 Article 2 of the draft bill on transparency of civil society organisations (see footnote 60).

to publish this information.[62] The proposal has met critical reactions from charitable organisations, pointing out that existing systems of self-regulation regarding the acquisition of undesirable influence through donations suffice.[63]

Dutch inheritance law provides for a specific remission scheme, entailing certain tax obligations, through the 'donation' of one or more eligible art objects to the Dutch state.[64] The state accepts a corresponding obligation to ensure that the art object is preserved as public property.

To promote this scheme, relevant law provisions state that the inheritance tax to be remitted amounts to the value of the art object plus 20 per cent, so, in total, 120 per cent of the fair market value. Certain requirements have to be met; for example, the artwork has to be included in the register of designated cultural goods[65] or be eligible for it. To meet the latter criteria it can be important that the work has been exhibited frequently, is a highlight of the artist's oeuvre or is part of a recognised valuable collection.[66] Art by non-Dutch makers may also qualify. According to the recently appointed Advisory Committee on the Protection of Cultural Heritage, this tax scheme is not yet producing the envisaged and hoped for results. Consideration is being given to other ways of making it more attractive for private individuals to donate art for public benefit.[67]

Regulation (EU) 2019/880 on the introduction and the import of cultural goods aims to prevent the illegal removal of cultural goods from non-EU countries,[68] but may impose uncertainty and administrative burdens for dealers.[69] A distinction is made between

62 There was a great deal of indignation about the proposal, as evidenced by the 187 responses to the consultation coming from all corners of civil society (churches, funds, museums, performing arts, charities, etc.). See the position paper on the draft bill on transparency of civil society organisations by the Collaborative Branch Organisations of the Philanthropic Sector (SBF), 22 January 2019, retrieved via: www.goededoelennederland.nl/sector/belangenbehartiging/wet-transparantie-maatschappelijke-organisaties.

63 For example, in the culture sector museums have set up an Ethical Code Committee and in recent years the charitable sector has developed the Recognition Scheme for Charities. According to many donors, the bill goes against the interest that the government itself attributes to the philanthropic sector: 'In this way, supporting good causes is turned into a suspicious activity.' See the submission by three directors (Natuurmonumenten, KWF and Amensty) in NRC Handelsblad, 'Nagel donateur niet aan de charitieve schandpaal' (translation: 'Don't shame the generous donor'), 4 February 2019; see also: Financieel Dagblad, Hoofdredactioneel commentaar 'Dekker slaat de plank mis' (translation: '[Minister] Dekker misses the point'), 6 March 2019; see also the SBF position paper at footnote 62.

64 Article 67 sub 3 Dutch Inheritance Act (Successiewet).

65 See: www.collectienederland.nl.

66 Article 15 Dutch Inheritance Act (Successiewet). See also: www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/belastingdienst/prive/relatie_familie_en_gezondheid/erven/erfenis_nalaten/erfbelasting_betalen_met_kunst/.

67 Report, Advisory Committee on the Protection of Cultural Heritage, 30 September 2019, p. 14.

68 Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and the import of cultural goods (Regulation 2019/880).

69 Following its official publication on the website of the Official Journal of the European Union on 7 June 2019, Regulation 2019/880 entered into force on 27 June 2019.

(1) import licences for the most endangered cultural goods such as archaeological objects,[70] and (2) a system for obtaining an 'importer statement', necessary for the import of 'material other than the most endangered cultural goods'.[71]

The distinction between the import licence and statement results in a cluttered system for the art trade and therefore, according to former Dutch Minister of Foreign Affairs Bert Koenders, will entail 'an additional burden on the implementing and supervisory bodies, leading to further enforcement problems'.[72] The former minister's critical stance seems to be mainly due to fears that the costs of this project will be borne by the government. Furthermore, the former minister stated in a letter to the Dutch parliament that it would be inappropriate for customs authorities to decide on the legality of a cultural object.[73] Customs can only carry out a risk-based approach, but a final judgment on the lawfulness is reserved for the courts on the basis of, for example, the 1970 UNESCO Convention. However, dealers seem to be especially burdened with the execution of a great deal of research prior to import. This will not only cause additional costs, but also lead to uncertain outcomes.[74]

Art fairs may have to rely on the temporary admission procedure.[75] However, if cultural goods are sold after the fair, and will remain in the EU, an import licence will still have to be obtained.[76] These and other issues will have to dealt with through practical regulations before implementation of Regulation (EU) 2019/880 by EU Member States in the course of 2021.

VIII OUTLOOK AND CONCLUSIONS

Despite the important 2020 developments discussed above, some challenges and critical questions remain unanswered, particularly with regard to the following:

a the outcome and implementation of the expected advice on the restitution of Nazi-looted art and the advice already given on the restitution of colonial art;

b the need for better coordination between art experts and the legal world with regard to the criteria for assessing fakes and forgeries; and

c how to further develop the right balance between ensuring a lively art trade and combating illegal trade in cultural heritage.

70 Regulation 2019/880, Article 4, Annex Part B.

71 Reference is made to non-EU fine and decorative art and collectibles more than 250 years old and with a value over €18,000: Regulation, Article 5, Annex Part C.

72 Official document Parliament Second Chamber 22112, No. 2391, Letter from the Minister of Foreign Affairs, 15 September 2017.

73 Official document Parliament Second Chamber 22112, No. 2391, Letter from the Minister of Foreign Affairs, 15 September 2017.

74 Official document Parliament Second Chamber 22112, No. 2391, Letter from the Minister of Foreign Affairs, 15 September 2017.

75 Regulation 2019/880, Preamble 21.

76 Regulation 2019/880, Preamble 21 and Article 3 sub 5.

Chapter 23

NORWAY

Johan Camilo Alstad-Øhren[1]

I INTRODUCTION

To provide an overview of the Norwegian art market, one must draw some historical lines and background. It is also the first time that art law is presented as a separate discipline from a Norwegian perspective. The one real authority on the field of art law in Norway, and active in the art market, was Professor Viggo Hagstrøm who passed away in 2013. He would have been the natural author of this chapter if he were still alive. His articles and literature cite examples from the art world still used by scholars and professionals today.

With a population of approximately 5.4 million, not only is the Kingdom of Norway a small country when seen through international eyes, but also a relatively 'new' one. With 400 years under a union with Denmark (1388–1814) and almost a century under a union with Sweden (1814–1905), Norway has naturally been influenced by its two neighbouring countries. Norway has historically been regarded as a cultural province. The art market is naturally smaller and more limited compared with that of neighbours Sweden and Denmark.

There are only a few key market players. The largest auction houses are Blomqvist Kunsthandel (established in 1870), Grev Wedels Plass Auksjoner (established in 1992) and Christiania Auksjoner (established in 1998), all located in Oslo. Other auction houses are small and a few pawnbrokers also exist.

There are very few galleries compared to European capitals. The trend is focused on modern contemporary art and minimalism. The more classic galleries have 'evaporated'. Galleries often receive public support or are subsidised in one form or another. Those that operate profitably often have business beyond the country's borders.

According to Arts Council Norway, the size of the market in terms of turnover in 2018 was 754 million Norwegian kroner on sales subject to tax reporting by the sellers.[2] Galleries, professional dealers and auction houses reported sales of 564 million Norwegian kroner, and the following turnovers were reported from other areas:

a 33 million Norwegian kroner by art societies and art centres;
b 98 million Norwegian kroner by public institutions; and
c 59 million Norwegian kroner by private individuals and associations.

The grey market is apparently increasing in line with the publication of official price indices.

Art transactions in Norway are subject to freedom of contract based on background principles and the rule of law, and supplemented by the law of obligations and contracts.

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2 www.kulturradet.no/documents/10157/f3a02bf7-d177-4497-9249-90575be5f565.

Lawyers' individual client accounts and freeports make Norway a practical country to make transactions. Lawyers in Norway do not want to risk their positions in unsecured transactions, but act as a protector with their own insurance for buyers and sellers. When art disputes arise, clients tend to seek counsel on special relevant fields of law from which the dispute arises. This reason, in combination with market size and low numbers of high-level transactions, is why there are few disputes in the area of art law.

II THE YEAR IN REVIEW

Art disputes are a rare occurrence in Norway. Over the past five years, some cases have represented topics of interest under civil law. The cases relate to art held by Customs,[3] the new Copyright Act, tax on art in freeports,[4] third-party ownership and anti-money laundering (AML) legislation.

The trend is leaning towards an increase of legal and professional competence in the field of art law. Museums and institutions are updating ethical guidelines. Museums are testing more commercial loan agreements with private parties. The different art institutions are becoming more conscious of legal aspects, and in 2020 the Munch Museum in Oslo became the first museum in Norway to appoint its own in-house counsel.

III ART DISPUTES

i Title in art

The legal rules for how a buyer can obtain a title to an artwork is based on fragmented legislation and case law. This brief overview does not include the rules concerning the protection of creditors. There is no general rule on how one can gain ownership to an artwork as a piece of movable property. Ownership can be created through original, derivative and extinctive acquisitions. The right to an artwork as such property would need an obligation or agreement between the parties, or by a bona fide acquisition. From a Norwegian and Scandinavian point of view, it is the functional approach to determine the rules on transfer of title in artworks that applies.[5]

Transfer of title through contractual agreements requires a binding agreement. There are no form aliases on how such an agreement must take place, with minor exceptions.

At Norwegian auction houses, titles to the artwork will depend on the individual or general sales terms and conditions. Other arrangements can be made, such as payment through instalment. If nothing else has been agreed upon, the title is transferred when there is a binding agreement and the amount is paid in full.

3 LB-2014-195567; the Oslo Court of Appeal found that the neon artist Marit Følstad's sculptures and installations were indeed works of art, and not only goods under reference to neon light products. In 2016, 16 paintings by Bjarne Melgaard were held by Customs under the same theory by the customs officials that they were not works of art, activating a tax claim. The Minister of Finance intervened when it was realised that the works were paintings.

4 DHL Exel Global Forwarding warehouse became the subject of in-depth articles published during 2019 and 2020 in the Norwegian daily *Dagens Næringsliv* on anti-money laundering, three lost works by Munch and tax claims.

5 Martin Lilja in Faber and Lurger (eds.) *National Reports on the Transfer of Movables in Europe*, 2019, p. 17.

Good faith acquisitions, where the purchaser is unaware of a defect in the seller's title, is possible under Norwegian law. The rules concerning bona fide purchases are regulated in a special act, in combination with other acts and case law.[6] Section 1 of the Good Faith Acquisition Act states that a purchaser can gain title despite lack of title from the seller, if the purchaser did not understand, or should have understood with the diligent care required, that the seller lacked title.[7] This means that two conditions must be met: subjective good faith and due care.

One recent case from 2020 involving the art collectors Nicolai Tangen[8] and Paal Gundersen concerns the world-famous lithograph, *Madonna* by Edvard Munch, which disappeared from DHL Global Forwarding/DHL Exel Fine Art's freeport in 2015.[9]

Both collectors had a version of the Munch lithography, and the case was brought before court as a claim for compensation against the freeport provider after the artwork was handed over to Mr Tangen following the preliminary injunction. The case is nonetheless highly relevant, as the court had to assess whether Mr Gundersen had gained title to the Munch on a bona fide basis. The court found that the purchaser, Mr Gundersen, had been in good faith, but had not shown due care. He had therefore not extinguished Mr Tangen's title in the lithography. The case has been appealed.

ii Nazi-looted art and cultural property

Norway has joined the Washington Principles on Nazi-Confiscated Art of 3 December 1998. Although these are non-binding principles for the members, Norwegian museums must conduct due diligence steps when acquiring artworks under this scheme. Part of what would enable a purchaser to remain diligent and protect the purchase depends on whether or not the parties are professionals. To remain in good faith and prove due care as mentioned above, case law has shown that such inquiries should be taken to fulfil a bona fide purchase.

As a member of the United Nations, Norway ratified the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property in 2007.[10] The Convention must also be seen in combination with the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995, which Norway ratified in 2001. Additionally, through the Agreement on the European Economic Area (the EEA Agreement), Norway has incorporated Directive 2014/60/EU on the return of unlawfully removed cultural objects into Norwegian legislation.[11]

Since fluctuation in unlawfully traded cultural artefacts and works of art is a global problem, Norway has acknowledged the problem by ratifying the two above-mentioned conventions, where the first obliged Norway to report to the UN on its status every four years.[12] In addition to these obligations, the 1978 Cultural Heritage Act[13] governs the trading of fine art, particularly prohibiting against importing and exporting art and cultural material of

6 LOV-1978-06-02-37 (the Act relating to the acquisition in good faith of movable property (the Good Faith Acquisition Act)).

7 id., Section 1(2).

8 The founder of AKO Capital and the AKO Foundation; today the chief executive officer of Norges Bank Investment Management (a Norwegian government pension fund).

9 Oslo District Court, 19-121754TVI-OTIR/02.

10 14-11-1970 No. 21 Multilateral.

11 FOR-2001-10-04-1179.

12 14-11-1970 No. 21 Multilateral, Article 16.

13 LOV-1978-06-09-50.

'great importance for preservation, research or communication of cultural heritage, art and history'.[14] This Act is supported by regulations on the import and export of cultural objects. The regulations state that only such objects exported legally from countries within the EEA or that have ratified the UNIDROIT or UNESCO 1970 conventions and have secured means to be returned to the place of origin may be legally brought into the country.[15]

In 2015, former Minister of Foreign Affairs and Minister of Trade and Industry Børge Brende urged all buyers, collectors, book and art dealers and state agencies to exercise caution and due diligence when acquiring lots that may originate from Syria or Iraq. Furthermore, all audiences acting in the art market were urged to exercise such caution when buying objects in regard to origin and provenance, through the internet, abroad or at auctions.[16]

As yet, there have been no cases before Norwegian courts in connection with restitution of artworks looted under the Nazi regime. The most common cases presented to the courts have been violation of the Cultural Heritage Act in regard to construction, demolition and removal. However, there are two well-known and relevant Norwegian cases in this field in which claims have been directed at a museum and a private collector.

The first is the Henie Onstad Art Center's (HOK) return of the Matisse painting *Blue Dress in a Yellow Armchair* to heirs of the French art dealer Poul Rosenberg in 2014.[17] Niels Onstad, a well-known shipping magnate and financier who collected art with his wife, the famous ice skater and film star Sonja Henie, bought the painting in 'good faith' from Galerie Henri Benezit in Paris in 1950. In 2012, the heirs of Poul Rosenberg brought suit against the museum claiming that the Nazis looted the work during the Second World War. HOK unconditionally returned the painting in 2014 upon an assessment that the claim was legitimate. This was the first, and still the only, restitution of an artwork in Norway.

High-end collectors and professionals were appalled that HOK did not have the case heard by a court. The board of the museum followed requests from the well-known art detective Christopher A Marinello.[18] Some collectors feared that such an extradition would set a precedent for Norway, where ownership is thoroughly protected. Older collectors with knowledge of Onstad's collection believed that the artwork was bought in good faith and that history shows several periods of unknown ownership where the painting had been sold via famous galleries, most recently in Paris, where Onstad bought the painting as a gift for his wife.

The second case relates to an aquatint by Edvard Munch, *Bathing Girls* (1896), which was withdrawn from Christie's in London in 2013.[19] The Norwegian art dealer Einar Tore Ulving apparently acquired the piece in 1998. Christie's contacted Mr Ulving with reference to the legal representative of descendants of the German Jewish art collector Curt Glaser on the very day of the auction. Mr Ulving protested, and Christie's had the object sent back to the art dealer.

14 id., Section 23.

15 FOR-2001-10-04-1179 (the Regulations on the return of stolen and unlawfully exported cultural objects).

16 Speech held by former Minister of Foreign Affairs Børge Brende and former Minister of Culture Torhild Widvey on 17 March 2015 to Norway's parliament. This does not apply to objects from non-Member States of these acts and conventions.

17 Henri Matisse, *Robe bleue dans un fauteuil ocre*, 1937. HOK Press release, 20 March 2014.

18 www.artdaily.cc/news/68908/Henie-Onstad-Kunstsenter-returns-Matisse-painting-to-art-dealer-Paul-Rosenberg-s-heirs#.X3y4Xu1S8dU.

19 Yngvild Solberg Greiner, art law thesis (2018), interview with Mr Ulving and individual research.

Most of the cases before Norwegian courts are violations of the Cultural Heritage Act in regard to unlawful constructions and interference with areas protected by the law. In addition, private homes, exteriors, interiors and larger fixtures are included in the Act.[20] Even modern and contemporary art may be regarded as cultural heritage and protected under the legislation.[21] There is, however, one relatively recent case in relation to cultural property law.

The most recent and relevant case relates to the demolition of the 'Y-Block' in the Government Building Complex in Oslo, which contains a large-scale wall painting by Pablo Picasso and co-creator Carl Nesjar. It is important to emphasise that the building and works of art are not covered under the legal framework of cultural heritage because the proposal for preservation was filed by the Norwegian Directorate of Cultural Heritage only one month before the building was damaged by a car bombing in the 2011 terrorist attack in Norway.

The complex contains several Norwegian government offices located mainly in 'The High-Rise' and 'Y-Block' buildings, which are considered to have great architectural importance as examples of post-war contemporary modern architecture, and contained several integrated artworks, such as the *Fishermen*, which now has been removed.

In March 2020, the Norwegian Directorate of Public Construction and Property was given the green light to start the demolition process, but was met with a preliminary injunction filed with Oslo District Court by the Association of Norwegian Architects and the Society for the Preservation of Ancient Norwegian Monuments. In their petition, the claimants argued that the two conditions for a preliminary injunction were met under reference to (1) that it was necessary to prevent an irrevocable demolition, and (2) that according to a preponderance of evidence, the demolition permits and zoning scheme were invalid.[22] The Court found that the first condition was met, but not the second. According to the Public Administration Act, errors may constitute grounds for appeal or new assessments. The Court did not find such grounds, and referred to the fact that preservation and reuse of the murals was a prerequisite for the permits and zoning scheme, but was not the main reason for the decision to demolish.

iii Limitation periods

Claims under reference to title can be embedded into property rights, or title to and ownership of assets. Such claims are, therefore, accepted from the limitation laws pursuant to Norwegian legislation, but are rather regarded as a claim under 'vindication rights' with applicable law. The right to present a claim for a lost work of art will never be subject to limitation.[23]

On the other hand, for claims under reference to restitution or repatriation, the Cultural Heritage Act stipulates a limitation period of three years after the day the requesting state gained knowledge of the location of the artwork or cultural object. In any such case, limitation does not occur before 50 years after such objects were unlawfully removed from the requesting state's territory and no later than 75 years if it was part of a public collection or ecclesiastic goods afforded special protection under national legislation.[24]

20 Cultural Heritage Act, Section 15.

21 FOR-2011-11-09-1088, Section 8-1 on protection of the integrated works of art in and outside the Norwegian National Opera and Ballet.

22 Oslo District Court Decision: TOSLO-2020-41571.

23 Supreme Court of Norway Case Rt. 2012, p. 506 and the preparatory works in Proposition No. 38 (1977–78) to the Odelsting, pp. 50–51.

24 Cultural Heritage Act, Section 23d.

Violation of the Cultural Heritage Act can provide grounds for lawsuits from private individuals, organisations and states. The Directorate of Cultural Heritage[25] mainly administrates the enforcement of the Act, and prosecution is often carried out by the National Authority for Investigation and Prosecution of Economic and Environmental Crime. The Authority is a combination of a body within the police directorate and public prosecutor with national authority.[26] Such violations would be subject to limitation under the Penal Code.[27]

iv Alternative dispute resolution

In Norway, arbitration is usually agreed upon between contracting parties and follows the rules in the Norwegian Arbitration Act.[28] It has not been a tradition to settle disputes concerning art through arbitration. The reason for this is the few legal cases arising, and the relatively low value of transactions. Until very recently, Norway also did not have any special arbitration for art or alternative dispute resolution other than between, or on behalf of, artists and employers or sponsors through facilitation by internal legal counsel within the different organisations.[29] Since 2019, the Norwegian jurisdiction has been represented in the Court of Arbitration for Art by attorney Erlend Haaskjold.[30]

IV FAKES, FORGERIES AND AUTHENTICATION

The Norwegian Penal Code provides protection and prevention against acquiring, selling or acting as an intermediary with fake art, as this is regarded as fraudulent in accordance with the Act.[31]

The most well-known cases of forgery within the jurisdiction are in relation to Edvard Munch. First, because he is one of the world's most famous artists, and second, due to distribution of forgeries by conservators at Edvard Munch's estate and studio in Oslo.[32] In 2003, all the confiscated Munch forgeries were exhibited with the originals at the Munch Museum in Oslo.[33]

Remedies against such acts are also to be found in the Copyright Act,[34] which states that the complainant can demand that the copy or forgery be destroyed and confiscated.[35] However, there is an exemption for artworks if the purpose of their use falls within private use and the reproduction cannot be misconceived as an original.[36]

25 FOR-2019-02-15-127.

26 FOR-1985-06-28-1679, Section 35.

27 LOV-2005-05-20-28 (the Penal Code).

28 LOV-2004-05-14-25 (the Act relating to arbitration (the Arbitration Act)).

29 E.g., the Association of Norwegian Visual Artists and the Norwegian Visual Artists Copyright Society.

30 www.cafa.world/mediation/pool/erlend_haaskjold/.

31 LOV-2005-05-20-28 (the General Civil Penal Code (the Penal Code)), Sections 372–374.

32 Supreme Court Ruling Rt.1969-498.

33 www.nrk.no/kultur/en-ekte-falsk-munch-1.535529. The Munch Museum also held another exhibition on copies and forgeries in 2019.

34 Copyright Act, Section 82.

35 Supreme Court Ruling Rt-1961-611, in which the Court approved the confiscation of two fake Edvard Munch paintings. It was assessed whether the paintings could be marked as forgeries and signatures removed, but this was set aside in favour of actual considerations such as towards market sales and in respect of the name of the artist.

36 Copyright Act, Section 26.

The non-penal legislation, which provides legal protection and remedies against forgeries and unauthentic art, is found in the buyer's right to make a claim against a seller under civil law. Rules and legislation on acquisition of art, online or in situ, are governed by two different acts depending on whether the buyer is a professional or acting as a private person towards a professional buyer, as mentioned in Chapter V of the 1988 Norwegian Sale of Goods Act and the 2002 Consumer Purchases Act.[37]

Forgeries and authentic artworks sold by a dealer or at auction can constitute any defects of the lot and object acquired that deviate from what has been agreed upon. If such defect has been established, there are different remedies for impediments that can be relevant. One of the most relevant would be termination of the sale. In accordance with the Norwegian Sale of Goods Act, termination may apply if the defect constitutes a material defect.[38] According to the Consumer Purchases Act, the same right, but with a lower threshold, applies when the defect is not immaterial.[39]

Under the Sale of Goods Act, the time limits for presenting notification of complaint are stipulated as 'within a reasonable period of time' from the time the defect was or should have been detected, and no later than two years if warranties do not apply.[40] A neutral notification must be made until all supporting evidence has been gathered.[41] Two time limits apply under consumer legislation: one is a relative time limit of two months after the defect was discovered, and the other is between two and five years. Only a neutral notification is required for buyers of art under the Consumer Purchases Act.[42]

Both acts have special rules on auction sales and objects sold 'as is'.[43] The distinction between where a buyer can present a claim under a warranty or under reference to the above-mentioned legislation has not been thoroughly assessed in Norwegian courts, and Scandinavian case law has been of interest for legal literature.[44]

Courts dealing with the different art matters at hand usually appoint expert witnesses. This can be in regard to giving statements on authentications, research or investigations of the artworks or view and estimates of their fiscal value. The main experts appointed by the court's administration originate from the larger museums, auction houses, dealers and gallery owners, or other authorities. For the best-known Norwegian artists, catalogue raisonnés and foundations are also consulted in relation to private sales and acquisitions.[45]Among others, they include the Edvard Munch Catalogue Raisonné by Gerd Woll.

37 LOV-1988-05-13-27 and LOV-2002-06-21-34.

38 LOV-1988-05-13-27, Section 39. In the Court of Appeal Decision RG-1989-525, an antique dealer entered into an agreement to sell 400 objects of Chinese porcelain at auction, including the aquarelle *Grasshopper on Snow Peas* by Chi Pai Shish (1863–1957). The buyer of the lot filed a notice of the defect in the artwork, stating it was a fake. The sale was terminated and the buyer was reimbursed because the aquarelle was presented as an original in the auction catalogue.

39 LOV-2002-06-21-34, Section 32.

40 LOV-1988-05-13-27, Section 35.

41 See preparatory work to the Act, Proposition No. 80 (1986–1987) to the Odelsting, p. 81.

42 See preparatory work to the Act, Proposition No. 44 (2001–2002) to the Odelsting, p. 181.

43 LOV-1988-05-13-27, Section 19 and LOV-2002-06-21-34, Section 17.

44 Lars G Norheim, *Mangelfull kunst: når har kunstverk og antikviteter en kjøpsrettslig mangel?*, Department of Private Law, University of Oslo, 1998.

45 Two paintings by Hariton Pushwagner that were handed in to the auction house Blomqvist Kunsthandel in 2015 were deemed fake. Oslo District Court agreed to confiscation.

V ART TRANSACTIONS

i Private sales and auctions

Private sales of art in Norway are regulated by freedom of contract between the parties. The sale between auction houses and the buyer is regulated by a combination of contract freedom (general terms and conditions) and regulations set out in the Voluntary Auctions Act.[46] The Act is also deemed to apply to online auctions.[47] Sales that take place between a professional and a consumer are governed by the Consumer Purchases Act.

In Norway and Switzerland, lawyers are appointed as escrow agents unlike in many other countries, such as France, Germany and the United States. Buyers and sellers use lawyers and conduct the transaction through their client's accounts, which would be covered under the insurance of the Bar Association, and therefore protects the transaction itself if: (1) the work is sold by a person entitled to do so, (2) the work has been proven authentic, and (3) the AML regulation has been complied with. The free enterprise of buying and selling art relates to the trust between the two lawyers appointed by the buyer and the seller on each side, but often the trade takes place through an invoice alone from the seller, relying on trust.

A practical consideration of buying art in Norway is that sales are usually channelled through freehold warehouses. In freeports, it is the owner's (legal) responsibility to ensure that there are no tax or customs-related costs under a purchase agreement, as the government is seeking to interfere more in matters of private sales. However, in terms of the customs authorities, it is the recipient that is subject to the Act on customs duties and movement of goods.[48]

In regard to settlement and in comparison with countries operating with third-party escrow agents, transactions through Norwegian lawyers' clients' accounts is much more practical.[49] Swiss lawyers obtain a permit to represent a transaction as escrow agents and in this way both seller and buyer are well protected. New rules on money laundering will of course be easier to follow when there are two lawyers in between who document the necessary investigations. Today, many Norwegian collectors are concerned when a third party without personal references handles larger settlements. In Norway, membership in the Norwegian Bar Association is sufficient to take responsibility as an escrow agent where the responsibilities rest with the lawyer.

46 LOV-1918-08-14-3 (the Act relating to voluntary auctions (the Voluntary Auctions Act)).

47 See A Å Sandum, published master thesis (2008), www.duo.uio.no/bitstream/handle/10852/21825/87180.pdf?sequence=1, where the student applies the rules with support from the article on auction law by Professor Viggo Hagstrøm, LLD, in *Tidsskrift for rettsvitenskap* 1986, p. 461.

48 LOV-2007-12-21-119 (the Act on customs duties and movement of goods), Chapter 1, Section 2-2.

49 Anonymity in art transactions has been acknowledged as normal practice; see Supreme Court Ruling HR-2012-2023-U. The extent of a lawyer's duty of confidentially and providing, for example, the tax authorities information on art transactions must be assessed on a concrete and individual basis according to the same ruling; see Supreme Court Ruling Rt. 2008-645, Paragraph 47. The lawyer's duty of confidentially, and the right to oblige authorities, depends on whether the lawyer is providing legal advice in combination with management of the transaction. If it is only in relation to the latter, the secrecy protection is weakened.

ii Art loans

In 2013, KODE Museums in Bergen signed a loan agreement with Peking University and Huang Nubo at the Zhongkun Investment Group concerning seven of 21 marble plinths from the old Summer Palace in China. The marble works were legally acquired by Johan Wilhelm Normann Munthe (1864–1935), a Norwegian adventurer and officer in the Chinese army who befriended the president and later Emperor Yuan Shikai. Until his death in 1935, Mr Munthe donated approximately 2,500 pieces of his collection to the Norwegian museum. The loan agreement is a long-term exhibition at Peking University's own museum.[50]

Norway has no legal framework for immunity from seizure of artwork on loan such as the US Immunity from Seizure Act, or under Part 6 of the 2007 UK Tribunals, Courts and Enforcement Act. This means that the Norwegian authorities can cooperate with foreign governmental tax collectors through international tax collection agreements, bilateral agreements and through courts' decisions for enforcement through debt collection, or preliminary injunctions for securement of private claims.

iii Cross-border transactions

No restrictions exist in terms of access to purchasing or selling an artwork in Norway as such. A transaction of an artwork is regulated by freedom of contract. However, for antiques with cultural or academic importance for the country, furniture older than 100 years, gifts or inherited objects to be shipped abroad, one must first apply for an export permit through the correct department of the National Museum of Art, Architecture and Design (the National Museum). Applications must also be made to export paintings, sculptures and other visual arts, handicrafts and prototypes for design products, motor vehicles, aircraft and rail materials from before 1950. This also applies to boats and parts of such that are older than 50 years, and 'Sami material' from before 1970.[51] For works by Edvard Munch, an export permit from the Munch Museum is also required in addition to an approval from the National Museum.[52]

When it comes to choice of law, the 1988 Lugano Convention, ratified by Norway, regulates disputes arising from an international agreement of transactions in art (movable property).[53] The Convention is incorporated into Norwegian legislation through the Dispute Act.[54] It only applies where choice of jurisdiction has not been agreed upon in the contract. Regarding choice of law, this is a comprehensive field of law by itself. Where the indicated is not included under a governing law clause, relevant regulation to find such answers can be found in the 1964 Act concerning international private law rules for sales of goods and

50 www.griegmuseum.no/artikkel/tilbakef%C3%B8rer-kinesiske-s%C3%B8yler.

51 FOR-2007-01-01-1 (the Regulations on the Import and Export of Cultural Objects), Section 2(c). 'Sami material' relates to objects created by the indigenous Sami people, after 1930.

52 Determined by the Ministry of Culture and Church Affairs (now the Ministry of Culture) on 1 January 2007, pursuant to Section 23, second paragraph, and Section 23f of Act No. 50 of 9 June 1978 concerning the cultural heritage, Regulation No. 8785 of 9 February 1979 on professional division of responsibilities etc., pursuant to Section 12(3) of the Cultural Heritage Act and Section 28 of the Act of 10 February 1967 relating to procedure in cases concerning the public administration (the Public Administration Act).

53 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

54 LOV-2005-06-17-90 (the Act relating to mediation and procedure in civil disputes (the Dispute Act)).

applicable fragmented legislation.[55] This Act is based on the 1955 Hague Convention,[56] and is only applicable to consumers, but is relevant for purchasing at auction and from dealers. The Rome I Regulation is also relevant.[57] For non-consumers, relevant legislation is CISG 1980, ratified by Norway and incorporated into the Norwegian Sale of Goods Act.[58]

Financially strong Norwegian collectors, dealers and dealectors[59] prefer to deal with countries that practise the same code of professional conduct for lawyers as in Norway.[60] As mentioned above, a lawyer in Norway who is member of the Norwegian Bar Association still has an individual client account and conducts the transaction under obligatory professional insurance.[61] It is the lawyer's responsibility to ensure that the AML regulations are followed and that quality in transfer of title is ensured, which prevents any doubt about the practice under the licences and the lawyer's professional liability. Furthermore, the lawyer must ensure: that it is the right seller that meets the right buyer, that the lawyer knows his or her client, provenance and that the artwork is documented to be authentic.

The only tax that arises from the sale of art in Norway was established by Norway's parliament in connection with the Art Tax Act of 1948.[62] Under the Law, the Relief Fund for Visual Artists collects 5 per cent of all public sales of original works of art in Norway with a sale price of over 2,000 Norwegian kroner per work of art, and manages the funds raised.[63] The full fee goes to the fund, which returns the money to new production of art through grants, scholarships and prizes to artists in Norway.[64] The Act also applies to non-Norwegian citizens acquiring art in Norway as well as when the artwork is taken out of the country. This is not applicable to sales between two private parties, or towards a museum or institutions.[65]

iv Art finance

Norway is relatively underdeveloped on art finance matters in comparison with financial products and solutions provided on the international art market. This is in general due to low competence in the field and bad experiences of financial institutions in the past. Collectors and art investors therefore prefer international providers of financial products aimed at fine art acquisitions. There are currently no art dealers or auction houses that provide or offer such solutions in Norway.

55 LOV-1964-04-03-1 (the Act concerning international private law rules for sales of goods).

56 Convention on the Law Applicable to International Sales of Goods, 15 June 1955, The Hague.

57 Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (Rome I).

58 Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980; see Section 87 of the Norwegian Sales of Goods Act.

59 'Dealector' as a professional expression was first coined in 2018 during a private conversation between the chairman of Sotheby's, the Right Honourable Harry Primrose, Lord Dalmeny, and the Norwegian collector and art curator Tor Petter Mygland. The title describes a person who is active on the world's art scenes in several areas, including actively participating in auctions around the world and facilitating or contributing to art exhibitions. It also describes a collector that cannot let go of any of their purchases to be a dealer.

60 Norwegian lawyers managing art transactions within the EEA are bound by the Council of Bars and Law Societies of Europe Code of Conduct; see FOR-1996-12-20-1161, Chapter 12.5, Section 6.

61 FOR-1996-12-20-1161 (the Regulations for advocates, the Norwegian Bar Association), Chapter 2, Section 2-2.

62 LOV-1948-11-04-1 (the Act relating to taxation of sales of visual art, etc. (the Art Tax Act)).

63 id., Section 2.

64 For more information see www.kunstavgiften.no.

65 LOV-1948-11-04-1, Section 3. (The tax percentage will appear in a bill from an auction house, for example.)

However, some financial institutions do offer loans for art purchases with collateral in other assets such as property, stocks or bonds. There may be some banks that offer loans with collateral in the artwork in combination with third-party guarantees. The only financial institutions providing loans solely with collateral in artwork are pawnbrokers in Oslo, who offer 10 per cent to 15 per cent of the market value.[66] If auction houses or dealers offer purchase through instalments of the purchase sum, the agreement would be secured by a pledge in the objects for safe custody. Nevertheless, as we know, such arrangements in the market are also very much based on trust. Private arrangement of financial proxy is also not uncommon.[67] Financing of art with collateral in the artwork or other assets follows the regulations set out in the 1980 Mortgage Act.[68]

Auction houses and transaction lawyers operating with client accounts are subject to the reporting requirements of the Financial Supervisory Authority of Norway, and for financial institutions more excessive obligations apply under the anti-money laundering regulations incorporated into Norwegian legislation from EU law.[69] Auction houses and dealers are not directly obliged entities under the legislation,[70] but must report cash transfers of 40,000 Norwegian kroner or more.[71] Norway has yet to implement the Fifth AML Directive through the EEA Agreement,[72] which will expand obligations of customer due diligence (e.g., know your customer) for auction houses, and art and antique dealers when handling transactions, not only for cash management.[73]

VI ARTIST RIGHTS

i Moral rights

The Norwegian legislation and case law in the copyright area, and for artist's rights, are influenced by the other Scandinavian countries. On 1 July 2018, a new Copyright Act was enacted.[74] This replaced the Act from 1961 that was enacted under the aim of a common Nordic alignment in the copyright area. This is still the case, but the Act has been amended several times, particularly to adapt to the EEA Agreement. Norway has ratified the 1886 Berne

66 www.lånekontoret.no.

67 See Supreme Court Ruling, HR-2008-1832-A – Rt-2008-1365, on the financing of the painting *Two Nurses* by Edvard Munch between private parties. The ruling was on contractual revision, but the case might serve as an example of private arrangements. In Appeal Court Decision LB-2009-188599, the painting *Lykkehuset* by Edvard Munch served as pledge for a loan agreement.

68 LOV-1980-02-08-2.

69 LOV-2018-06-01-23 (the Act relating to measures to combat money laundering and the financing of terrorism, etc. (the Money Laundering Act)).

70 id., Section 4, No. 3.

71 id., Section 5.

72 AVT-1992-05-02-1. The EEA Agreement links the EU Member States and the three EFTA States (Iceland, Liechtenstein and Norway).

73 Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU.

74 LOV-2018-06-15-40 (the Norwegian Copyright Act 2018).

Convention[75] and the 1961 Rome Convention,[76] alongside the relevant EU directives through the EEA Agreement.[77] In regard to copyright, artists' moral rights and art, Norway has had very few cases. It is therefore acknowledged that cases concerning art from our neighbouring countries may be given weight.[78] The main changes in the new Copyright Act are primarily in relation to the structure and set up of the Act itself, its written language and adaption to EU legislation, and the fact that it is now better suited to modern technological development.

The creation of an original and individual creation entitles the author to creative ownership in accordance with the Copyright Act.[79] The right to disclosure is embedded in the exclusive rights of the creator of an artwork, who becomes the sole proprietor of the copyright.[80] This right includes the right to disclose, exploitation of the work and examples of this.

As creators of artwork, Norwegian artists are entitled to be attributed to and respected as far as is practical when the work is displayed or made public.[81] This can be compared with the right of integrity under US law. The right to attribution according this rule is only a continuity of the earlier principle of attribution such as 'good custom' dictates.[82]

The law protects the author of the work for 70 years from the end of the calendar year in which the artist dies. If there is more than one artist (e.g., for a collaborative work), the protection period follows the longest living artist.[83] However, the ideal rights are, in principle, everlasting, and even where the copyright has been transferred, the ideal rights remain with the artist.[84] However, such rights can be subject to restriction through agreements.

ii Resale rights

The droit de suite was incorporated into Norwegian legislation in 2007 through the EEA Agreement, after the EU made it mandatory by all Member States in 2006.[85] Section 59 of the Norwegian Copyright Act dictates that the author (artist) has the resale right for original examples such as drawings, lithographies, etchings, paintings and collages. The artist can neither waive the resale right, nor transfer the right to compensation under this rule. However, the right does not cover sales that a non-professional and private person conducts towards a public museum, unless the transaction was carried out through a third party.[86]

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75 Berne Convention for the Protection of Literary and Artistic Works (1886), WIPO.

76 The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961), WIPO.

77 Including, in particular, Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

78 Rognstad, *Opphavsrett*, 2009, p. 42. In the 2019 edition (pp. 45–46), the author modifies this view. The author of this chapter's personal opinion is that this is not applicable for fine art, where there are still few court cases.

79 LOV-2018-06-15-40, Section 2.

80 id., Section 3.

81 id., Section 5. The artwork may not be made public in a manner that may violate the reputation or character of the work by the artist, also known as the 'right to be respected'.

82 id., first paragraph.

83 id., Section 11.

84 id., Section 108.

85 Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art.

86 LOV-2018-06-15-40, Section 67, second paragraph.

Sections 60 to 61 of the Norwegian Copyright Act regulate in more detail the level of fees and threshold, notification rules and rules on inheritance and beneficiaries. The Norwegian Visual Artists Copyright Society administrates and is responsible for collection of the remuneration. It is the seller or third party that reports and pays the amount, regardless of where the artwork is situated geographically.[87]

iii Economic rights

A Norwegian artist's right to make his or her artwork available to the public by distribution or by exploitation is protected by Section 3 of the Norwegian Copyright Act. The economic right is an exclusive right, also known under 'right to the example' of the work, and under the 'right to distribute'.

However, the exclusivity can be transferred only within the limits set out in the Act.[88] Although the economic rights have been transferred, it does not automatically allow the other party to change the artwork, unless otherwise agreed.[89] An artist has the right to a 'fair price' where a transfer of the copyright takes place.[90]

VII TRUSTS, FOUNDATIONS AND ESTATES

Norway has one of the oldest modern and liberal constitutions in the world. When Norway separated from Denmark in 1814, the constitution found inspiration from the United States Declaration of Independence (1776) and the French Constitution (1791). Because of this, no new nobility titles could be issued or inherited, and fideicommissa were abolished. Anglo–American 'trusts', therefore, have no similar institution in Norway. The only options in this area are foundations and estates.

The 1959 Act relating to foundations governs rules and regulations on foundations in Norway.[91] All Norwegian foundations are subject to supervision and control by the Norwegian Foundation Authority, which oversees that the foundations act in accordance with their articles.[92] According to the Authority, as at 2020 there are approximately 7,100 foundations in Norway.[93]

87 For more information, see www.bono.no. See the European Court of Justice (ECJ) Decision, C-41/14, *Christie's France SNC v. Syndicat national des antiquaires*, 27 September 2015, where the French branch of Christie's included the payment management of the remuneration in their terms of sale. Syndicat national des antiquaires found this to be a disloyal breach of competition. The ECJ found that payment management could be regulated in an agreement.

88 LOV-2018-06-15-40, Section 67.

89 id., Section 68.

90 id., Section 69. This crystallisation of a compensation is mostly aimed at musicians, directors and creators and the performance of art. The preparatory work of the Act provides more detailed guidance on what is regarded as 'fair'; see Proposition to the Storting (Bill) Prop. 104 L (2016-2017) pp. 235–236.

91 LOV-2001-06-15-59.

92 www.lottstift.no; see LOV-2001-06-15-59, Section 7.

93 www.lottstift.no/en/the-foundation-authority/.

Foundations in Norway are separate legal entities, and can obligate the foundation and act as a contracting party. It is not the name or label of the foundation that is of the essence for being subject to the legislation, but the content of its articles. The Foundation Act dictates that it is a transfer of the assets and disposition rights in accordance with the purpose of the creation that is of the essence.[94] Norwegian foundations may go under the name of *legat*, *fond* or *stiftelse*.

When it comes to the holdings and administration of the foundation, its board of representatives is obliged to manage this in a sound way.[95] Such management is not only limited to assets currently owned by the foundation, it can also relate to donations made by the foundation to a museum or institution, which are still under the supervision of the Foundation Authority.[96]

In relation to estate planning and art holdings, such disposition of artworks or collection upon the owners' death can have two legal bases. It is either through a will or by law. The latter option is set out in the 1972 Inheritance Act, but is also relevant for the content and limits for a will to be valid.[97]

The main rules are that one is an heir by law in accordance with the rules in Chapters I and II and Section 28B of the Inheritance Act. Another alternative is to appoint heirs by will.[98]

As long as the owner of the artworks or collection is still alive, he or she can freely give away assets.[99] This means that the artwork must physically be passed on, or access or disposition rights to the collection must be transferred.[100]

The Inheritance Act from 1972 is being replaced by a new Act, which will enter into force on 1 January 2021.[101] The main changes under this new Act will be an expansion of the right of inheritance by law, a right of inheritance for partners (non-matrimonial) without a common child or children, and a reduction of the inheritance for linear descendants.

Although tax on inheritance and gifts was set aside in 2014, artworks and cultural objects were exempted from this taxation.

94 LOV-2001-06-15-59, Section 2.

95 id., Section 18.

96 A recent example can be found in Professor Viggo Hagstrøm's 2015 donation to the Nordnorske Kunstmuseum, where the foundation's chair of the board, Professor Tone Sverdrup, LLB, made the museum aware of the fact that the condition of the donation may have been breached as no artworks were displayed in the museum. *Klassekampen*, 2 September 2020.

97 LOV-1972-03-03-5 (the Act relating to inheritance, etc. (the Inheritance Act)).

98 Section 48. As a starting point, heirs appointed by will shall have precedence over heirs by law. There are some exceptions from this: first, for children who have not ended their right to allowance, which precedes any will. Second, a surviving spouse is entitled to a minimum share of the assets. Third, lineal descendants are entitled to a minimum share. That being said, the above-mentioned rule applies when there are assets left after the testator has passed away.

99 Given that this does not materialise itself after the time of death. If transaction of the gift itself materialises after the time of death, it can be voidable.

100 See the Court of Appeal Decision LB-2011-138256 on return of artworks from an artist's estate passed on to the children by the deceased.

101 LOV-2019-06-14-21.

VIII OUTLOOK AND CONCLUSIONS

If one is to pinpoint and highlight cases of importance to the recent and current situation in Norway, the following must be considered: the case involving DHL Exel Global Forwarding (freeport) and the lost Munch, the customs-related cases[102] and developments in AML regulations.[103]

Despite the fact that Norway is a small country, its egalitarianism and relatively wealthy inhabitants have led to an increase of consumer wealth manifested by the collection of valuable art and antiques. It also leads to more knowledge, consciousness of aesthetics and eagerness to support fine art. Wealthy Norwegian citizens are slowly returning from abroad with extensive art collections. The Norwegian government still upholds legislation and tax-friendly measures that encourage Norwegian art collectors to live in Norway. Public auctions in Norway remain free markets without the involvement of the authorities because, to date, turnover and pricing are low compared to nations with a longer and more valuable cultural history.

> *It is better to paint a good picture than a poorly completed one. Many believe that a picture is finished when they have worked in as many details as possible.*[104]

102 See footnote 3.

103 The *DHL v. Gundersen* case is not only relevant for the sake of case law on title in art, but has been essential in the public debate on use of freeports in relation to taxation and AML. The customs-related cases, which have not been elaborated on in detail, are relevant to illustrate the importance of competence and knowledge for officials in service. As mentioned in Section I, Norway still has some catching up to do on insight, competence and knowledge in the art law area, as well as in relation to intricate transactions and training of customs officers.

104 Edvard Munch. The exact opposite was the cause of arguments in Supreme Court Ruling Rt. 1924-340, where the sculptor Gustav Vigeland (1869–1943) sued the contractor for losses resulting from not being able to finish mosaic glass installations in a foyer.

Chapter 24

RUSSIA

Matvey Levant, Yulianna Vertinskaya and Tatyana Alimova[1]

I INTRODUCTION

The Russian and global art market shrank significantly in terms of volume in 2020; the Russian art market grew in 2019, while the global market decreased. The global volume of Russian art has been fixed at US$411.9 million. The world leaders in Russian art sales remain Christie's and Sotheby's auction houses, whose Russian weeks in London totally make 20 per cent of global annual volume of Russian art. Prior to the economic crisis brought on by covid-19, the domestic art market within the Russian Federation saw growth in 2018 (total sales value of US$7.2 million) and 2019 (total sales value of US$10 million), with 2019 witnessing the highest volume within the past six years.[2]

Notwithstanding the civil legislation that has recently been significantly developed, many art transactions related to old masters continue to be made on a 'handshake' only basis.

The market size, the restrictions on import and export of art and the prevalence of handshake deals all reflect the low volume of legal disputes in Russia.

II THE YEAR IN REVIEW

Avant-garde artworks by renowned Russian artists such as Chagall, Malevich and Rodchenko are in high demand; however, the market offer is limited. Recent cases show that the risk of fake or misattributed works is prominent. The most notable cases took place outside Russia, and include recent scandal around Igor and Olga Toporovski's lending of allegedly fake artworks to the Museum of Fine Arts in Ghent in Belgium for an exhibition entitled 'Russian Modernism 1910–30'. In January 2020, the Tribunale di Milano cleared Mr James Butterwick, a London-based Russian art dealer, of charges of defamation, which were brought by the organisers of the exhibition 'Russian Avant-Garde: from Cubo-Futurism to Suprematism', held in Mantua between November 2013 and February 2014. The ground of the claim was James Butterwick's expressed opinion that exhibited works lack any provenance or exhibition history.

Among the main trends is the positive practice of law enforcement of droit de suite and the key active role of the UPRAVIS organisation,[3] a non-commercial partnership for the protection and management of rights in the art world. In connection with the high demand and relatively small supply of Russian art in the Western market, the state is

1 Matvey Levant is a partner and Tatyana Alimova is an attorney at Levant & Partners Law Firm. Yulianna Vertinskaya provided independent legal counsel.

2 https://artinvestment.ru/russian-art-market-reports/2019.html.

3 www.upravis.ru.

strengthening control and introducing mechanisms aimed at preserving and protecting art and cultural property, by way of legal, administrative and organisational aspects. With regard to combating money laundering and the use of works of art for committing such crimes, control over transactions of works of art, requirement for a written form of the transaction and know-your-customer (KYC) checks have been strengthened.

III ART DISPUTES

i Title in art

There is no specific regulation on the legal status of artworks or on the acquisition and transfer of property rights for artworks. Hence, commercial relations with artworks are subject to civil law general requirements for civil rights objects with some restrictions in relation to cultural property imposed by the Russian Constitution and the Civil Code, including reference to specific laws and import and export regulations. Article 129 of the Civil Code specifies that 'civil rights objects' may be freely alienated or transferred from one person to another by way of universal succession (inheritance or re-organisation of a legal entity) or otherwise, if they are not limited in circulation. Oral agreements are not exceptional in the art market; however, the conventional method of sale is with a sales agreement.

Under Russian law, title is obtained at the moment of transfer, unless otherwise provided by law or under contract.[4] The transfer of exclusive rights to artwork is to be separately specified under agreement because (1) if the purchase is made directly with the artist and the provided agreement is silent on the transfer of such rights, exclusive rights remain vested in the artist; and (2) if an original artwork is purchased from a person who has the exclusive right, but is not the artist (e.g., a gallery), the exclusive right passes to the buyer, unless otherwise provided by agreement.

There is no distinction of the title transfer by the auction, unless otherwise provided by the auction documentation. Title is usually transferred at the moment of sale; however, the actual transfer and payment take time due to formalities. Note that an auction house proposes its standard sale agreement with no possibility to negotiate, although a private sale agreement allows the parties to negotiate mutually beneficial provisions, including regarding the moment of title transfer.

Artwork transactions are not subject to registration. Provided private artworks or art collections are registered in the non-state part of the museum fund of the Russian Federation, Federal Law No. 54-FZ, as amended, on the museum fund of the Russian Federation and museums in the Russian Federation, dated 26 May 1996, does not prohibit transactions with such artworks; however, certain requirements are to be complied with.

Article 10(5) of the Civil Code specifies that good faith and reasonableness of the parties are presumed. Article 302 of the Civil Code specifies that if the property was acquired for consideration from a person who did not have the right to alienate it, of which the acquirer has been unaware and could not have been aware (a bona fide purchaser), the owner has the right to reclaim the property from the acquirer in the event that the property was lost by the owner or the person to whom possession of the property was transferred by the owner,

4 Article 223 of the Civil Code.

or stolen from one or the other, or the owner was deprived of possession by any other means outside their will. Conscientiousness is an internal criterion that reflects a person's lack of awareness of the illegality of action in acquiring the property.

Pursuant to Article 460 of the Civil Code, the seller is obliged to transfer the goods to the buyer free of any rights of third parties, unless a buyer has agreed to accept the goods encumbered with the rights of third parties. The agreement of the parties on the release of the seller from liability in the event that the purchased goods are reclaimed from the buyer by third parties or on its limitation is invalid. A seller is expected to transfer free title and by interpretation of the law a buyer is not expected to inquire about the title. However, due to sensitivity of the artworks, the relationship between a seller and a buyer in the art and antiques market is built on the *caveat emptor* principle (i.e., the legal and financial risks associated with the acquisition of artwork are borne by the buyer). Hence, a buyer usually inquires about the title or asks the seller to provide certain representations under agreement.

ii Nazi-looted art and cultural property

The Russian Federation has ratified the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. These conventions directly prohibit the treatment of cultural objects as war trophies.

The main national law in this sphere is Federal Law No. 64-FZ on cultural objects transferred to the USSR as the result of the Second World War and located in the territory of the Russian Federation, dated 15 April 1998. The Law is based on international legal acts adopted during the period and upon termination of the Second World War.[5]

Provisions of the Law define that the transferred cultural objects (with certain exceptions) are the property of the Russian Federation.

Article 4 of the Law explains the notions of 'restitution' and 'compensatory restitution' as means of recovery of material damage brought to an injured state by an aggressor state.

Meanwhile, the Law also provides the possibility of exchange of the transferred cultural objects for Russian cultural objects beyond the boundaries of the Russian Federation, regarding which the Russian Federation had not made any restitution claims. Such an exchange shall be executed as an international agreement.

Regulatory control over import and export of the cultural objects, along with issues of retaining cultural heritage, development of international cultural cooperation, and mutual familiarisation of Russian Federation nations and other states with the cultural objects, is provided in Law No. 4804-1 on import and export of cultural objects, dated 15 April 1993.

iii Limitation periods

General terms for submitting a court application

Russian legislation does not define any special terms for presenting claims and court applications under dispute in the sphere of art.

Therefore, this is governed by the general period of limitations. The substantive law[6] provides a subjective and objective term for court application. The subjective term is three years

5 Article 2.

6 Article 196 of the Civil Code.

from the person becoming aware of the violation of the right. The objective term (in other words, the maximum term) is 10 years. This means that a period of limitation may not exceed 10 years from the day of the violation of the right that is protected under such term.

Special terms and the order of presenting claims on the return of cultural objects transferred during and after the Second World War are provided by Federal Law No. 64-FZ. The Law provides the possibility of presenting claims on the return of the transferred artwork exclusively on the state level. Claims to the government by natural persons and legal entities, municipal bodies, and social and other organisations or associations are not considered upon submission.

Note that for states – former republics of the USSR – the Law provides a simplified procedure for the return of cultural objects with no limitation periods for presenting claims.

State management bodies of other countries can present claims to the Russian government at any time, upon obtaining information on artwork in the Russian territory, but no later than 18 months from the day the Ministry of Culture publishes data on the values of the objects in question.[7] Claims not presented by an interested state within the term defined will not be considered.

However, natural persons and legal entities may seek satisfaction of their claims in Russian judicial bodies. Natural persons who consider themselves owners (inheritors) of the transferred cultural objects may claim the return of the artwork by two means:

a addressing the government of their country, if the term for presenting claims to the government has not expired; or

b addressing judicial bodies in the defined order with *actio vindicatio*. Under such claims, the Russian legislation applies general provisions on the period of limitation, as discussed above.[8]

To successfully address a court, a claimant must prove the right of ownership for the claimed property.[9]

An exclusion of general rules applies to cultural objects that are family heirlooms (family archives, photographs, letters, honorary distinctions and awards, portraits of family members and their ancestors). Regarding family heirlooms, representatives of families that owned these previously may address the Ministry of Culture with an application for return. A period of limitation for this kind of claims is not defined, but return of heirlooms is made upon payment of costs for identification, expertise, storage, restoration and transportation.[10]

iv Alternative dispute resolution

Federal Law No. 193-FZ on alternative procedures of settlement of disputes with participation of a mediator (mediation procedure), dated 27 July 2010, has been valid in Russia since 2011.

This procedure can be applied to relations arising from civil, administrative and other public relations, including those regarding execution of entrepreneurial and other economic activity.

7 Published on www.lostart.ru.

8 Article 196 of the Civil Code.

9 Item 36 of Decree No. 10 of the Plenum of the Supreme Court and the Decree No. 22 of the Plenum of the Supreme Arbitration Court on certain issues arising in the judicial practice when solving disputes regarding protection of right of ownership and other material rights, dated 29 April 2010.

10 Article 19 of Law No. 64-FZ.

The basis for application of the procedure is the mediation agreement. An agreement can be made either by conclusion of a separate document or as a mediative clause in the general agreement.

As for the disputes related to artwork and copyright, mediation can provide more effective and prompt results than a standard judicial hearing because in such disputes a violator often acts unintentionally. Correspondingly, both parties aim for prompt resolution of a dispute, without any extra expenses for expertise, witnesses and other purposes. It is also important that mediation is more efficient than a judicial hearing. Pursuant to Article 13 of the Law on mediation, parties independently agree on the term of this procedure.

The presence of a mediative clause in an agreement does not rule out the possibility of addressing a court by any party.

The procedure is carried with the fulfilment of principles of voluntary participation, confidentiality, cooperation and equal rights, detachment and independence of a mediator.

Currently there are no specialised alternative dispute resolution organisations or other institutions dealing specifically with art matters.

Mediators can be selected from self-regulated organisations of mediators or associations of advocates, comprising art specialists.

IV FAKES, FORGERIES AND AUTHENTICATION

Fakes, forgeries and inauthentic art represent the seller's deceit and are subject to legal implications whether under the Civil Code or the Criminal Code. Civil rights shall be protected as specified under Article 12 of the Civil Code.

The seller usually provides certain representations and warranties under agreement.[11] The buyer, having relied on such representations, which are significant to him or her, along with a claim for compensation for losses or recovery of a penalty, is also entitled to rescind the sale, unless otherwise provided by agreement. The seller shall be held liable provided he or she realised that the buyer would rely on such representations or had reasonable grounds for such assumption to be made. A person (the seller) who provided a knowingly inaccurate representations cannot, as a ground of the release from liability, refer to the fact that the party to the agreement (the buyer) relying on representations was imprudent and did not itself reveal inaccuracy.

If a buyer enters into the sale under fraud or material delusion caused by misrepresentations given by the seller, he or she has the right, instead of rescission, to demand that the agreement is declared null and void.

If fraud is committed (false statements leading to sale or sale of fakes, forgeries or inauthentic art), the buyer can also open a criminal case under Article 159 of the Criminal Code.

When entering into a relationship with an auction house, a buyer is to be aware and solicit professional legal advice for auction house guarantees in respect of counterfeit clauses.

The *caveat emptor* principle places the onus on a buyer to perform due diligence before entering into an artwork sale agreement. Before parties proceed with an art transaction, a pre-step authentication (i.e., an expert's opinion on authorship (artist, art school, period, etc.)), followed by a technical examination of the artwork are usually to be completed. Instituting an examination helps to reduce the risks and to receive appraisal of an artwork. The

11 Article 431.2 of the Civil Code.

national standard of the Russian Federation, entitled 'Expertise of works of art. Paintings and Graphics. General requirements', came into force in 2017. This standard has no mandatory power, its goal is to be a benchmark of sorts for the art market. Depending on whether a buyer wants to invest time and money into the authentication and examination, or wishes to skip such procedures, he or she may still complement the experts' statement with certain seller's representations under an agreement. If a breach takes place, a buyer shall be entitled to remedies and protections as mentioned above.

A dealer acting in the interest of the buyer has a duty to act with due care. If representations are provided by a person in the course of entrepreneurial activity, such dealer must compensate losses of any misrepresentations, regardless of whether he or she was aware of such representations being false (regardless of fault), if otherwise is not provided by agreement of the parties. In the case of unfair behaviour or misconduct by a dealer, a buyer is also entitled to approach the trade or professional society of which the dealer is a member and file a complaint. It is expected that well-known players in the art market are unlikely to blemish their reputation with doubtful deals.

The reputation of an expert becomes one of the most important factors that lend confidence in art transactions. In Russia there is no state-authorised entity that is empowered to issue a guaranteed authentication document. State museums are no longer authorised to render any services in the field of commercial expertise and authentication for art market stakeholders. However, it is not prohibited for museum experts and art connoisseurs to supply their personal opinions on an artwork's authenticity. Whether an expert can be held accountable for such opinion on authenticity is a matter of continued debate. The International Confederation of Antique and Art Dealers (ICAAD) of Russia and the CIS (Moscow) publishes on its website a list of experts who are trustworthy in the eyes of the antique and art market community. ICAAD adopted the Code of Professional Ethics for Antiquary and Art Dealers, which is regarded as the minimum moral and ethical standard of the Russian antique community.

Artist foundations and catalogues raisonnés are considered guardians in terms of authentication of artworks, reputation of artists and preventing the mass distribution of fakes and forged art. Taking into account the evolving trend of fake Russian avant-garde works being placed in overseas exhibitions,[12] the risk of fake or misattributed works is high, making authentication and technical examination of paramount importance. A Russian avant-garde research project was established to encourage and advance the wider understanding through the scholarly application of research into art history and technology; there are also artists' foundations to protect artists' legacy.

12 The Ghent and Mantua exhibitions discussed in Section II and the 2016 *Goncharova* case, in which the Ministry of Culture of the Russian Federation prevailed in an arbitration court proceeding against UK publisher Antique Collectors Club Ltd in regard to the book *Goncharova: The Art and Design of Natalia Goncharova* by Anthony Parton. The book was consequently withdrawn from sale in Russia.

V ART TRANSACTIONS

i Private sales and auctions

The Russian legislation does not provide special regulations governing auction sales and private deals in the sphere of art. As such, one shall be guided by general provisions of the Civil Code. The basis for conclusion of an agreement at an auction is provided in Articles 447 and 448 of the Civil Code. Selling items 'by samples' and by remote methods are provided by Article 497 of the Civil Code.

Law No. 2300-1 on protection of customer rights, dated 7 February 1992, governs the relations of the parties to a sale and purchase agreement concluded remotely, including by way of catalogues, booklets and photographs.[13] The Law is applied when a party to an agreement is a customer (natural person) who buys items in private interests or a seller (a legal entity or a sole proprietor).

Subject to October 2019 amendments to the Civil Code, an online form completed to conclude a remote deal is eligible as a written form. Article 434 of the Civil Code provides that a written agreement can be concluded by composing one document (including electronic) signed by parties, or by exchanging letters or electronic documents. This is important because non-fulfilment of a written form for a deal results in voidance; additionally, a written document (agreement) will be necessary for executing and obtaining permission for export, which certifies the right of ownership for works of art.

ii Art loans

In Russia, there is a detailed procedure for the provision of objects of art by state museums and private collectors for temporary use in foreign countries. Statutory regulation of this procedure is provided in the following legislation:

a Federal Law No. 54-FZ, of 26 May 1996, on the Museum Foundation of the Russian Federation and museums in the Russian Federation;

b Federal Law No. 4804-1, of 15 April 1993, on the import and export of cultural valuables;

c Russian Federation Government Decree No. 827, of 5 June 2020, on the approval of rules for the purchase, collection, exhibition, accounting, maintenance and transportation of weapons with cultural value, by state and municipal museums;

d departmental acts of the Ministry of Culture; and

e local acts of museums on the registration of the transfer of art objects for exhibition in foreign states.

The export of items from museum collections for exhibition abroad is made with the permission of the Ministry of Culture of the Russian Federation, which is obtained by providing the following to the Ministry of Culture:

a the museum's application for permission for the export and reimport of its items, which should state the name, location and timing of the exhibition, as well as the involved partners;

b the written consent of superior agencies of executive power in the appropriate governmental department;

13 Article 26(1).

c a copy of the agreement between the sending and accepting parties, in Russian and other relevant languages, with notarised translation. The agreement must be signed on every page by the contracting parties, and must provide:
   - confirmation that items will be accompanied by a museum representative who will be present during the installation and deinstallation of the exhibition;
   - details of mandatory medical insurance;
   - confirmation of a police escort during the land-based transportation of items within the foreign state; and
   - financial obligations of the foreign partner;

d a copy of the insurance policy (including evaluation details), accounting for transportation, installation, exhibition and deinstallation (e.g., nail to nail or wall to wall insurance); note that insurance for items belonging to the state may only be acquired from Russian insurance companies (in limited cases, when a museum sends certain items to an international exhibition or an accepting party provides state guarantees of financial responsibility (indemnity), the Ministry of Culture may decide that these items can be insured through a foreign insurance company or via indemnity);

e guarantees of state or municipal bodies of the accepting party regarding the safety and integrity of items during their stay in that territory, as well as a guarantee of the timely return (translated into Russian);

f a list of items, including catalogue data;

g an extract of the museum's committee's protocols on the state and the establishment of the insurance value of temporarily exported cultural property (alternatively, it is possible to submit an expert opinion on the classification of the items as cultural property); and

h a sealed set of colour photographs of the exported items with annotation on the back of each photograph.

When exporting items to which copyright applies, it is necessary to provide documented verification of the author's or copyright holder's consent. In the transfer of exclusive rights, a separate agreement must be concluded.

Museum items being exported abroad must be transferred and stored responsibly by the exhibition curator.

For the temporary export of cultural property by non-state (private) companies and individuals, the following must be attached to the permit application:

a the agreement with the accepting party, containing the terms and conditions for the temporary export of cultural property;

b cultural property originating from the non-state part of the Museum Foundation of the Russian Federation must be insured for the duration of the export period (alternatively, a document on the state guarantee of financial compensation, issued by a foreign state, may be included);

c a copy of the exporting individual's identity document;

d copies of documents confirming the right to own or use the temporarily exported cultural property;

e two copies of lists detailing and describing the cultural property;

f two colour photos of each item; and

g in some cases, an expert opinion classifying the objects as cultural property.

Note that applicants, with the exception of state and municipal organisations, must also pay the state a fee for an export permit.

There are no special regulations providing immunity for artwork on loan, although some rules can be found in Federal Law No. 4804-1, of 15 April 1993, on the import and export of cultural valuables; for example, Article 35.6(5) of the Law states that: 'Temporarily exported cultural property cannot be used as security for the fulfilment of obligations of their owners both in the Russian Federation and abroad'.

The authors are aware of one case in which a Swiss company aimed to recover the millions of US dollars that it had lent to the Russian Federation by seizing a collection of artworks worth US$1 billion, on loan to a Swiss museum from the Pushkin State Museum of Fine Arts, in 2005. The Swiss government ordered the release of the works on grounds of national interest, and the artworks were returned to Russia.

Temporarily imported cultural property belonging to foreign states enjoy judicial immunity in the Russian Federation: immunity in respect of measures to secure a claim and immunity in respect of enforcement of a court decision in accordance with Russian Federation legislation on jurisdictional immunities of a foreign state and property of a foreign state.[14]

iii Cross-border transactions

The commercial turnover of cultural property is regulated on the interstate and national level. On a national level, the basic legislation comprises the Constitution of the Russian Federation, Federal Law No. 3612-I on fundamentals of the law of the Russian Federation on culture, dated 9 October 1992 (as amended), Law No. 4804-1, the Criminal Code of the Russian Federation of 13 June 1996, and by-laws and instructions of the relevant competent authorities introducing the regulation and protection of cultural property, containing certain restrictions on the circulation of cultural property.

Russia is a participant of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, concluded in Paris in 1970 and ratified in the Russian Federation in 1988, and the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, which was ratified by the Russian Federation in 1956.

Conventions contain mutual agreements and regulations regarding import and export of cultural objects, as well as requirements for their transportation and protection.

As Russia is a member of the Eurasian Economic Union (EAEU), when trading with third countries it is governed by the 'Provision on the order of import to the customs territory of the Customs Union and export from the customs territory of the Customs Union of cultural objects, documents of national archive foundations and originals of archive documents', approved by Decree No. 30 of the Board of the Eurasian Economic Commission on 21 April 2015. Subject to this Provision, cultural objects being transferred over the customs boundary of the EAEU must be declared in mandatory order. To export cultural objects for commercial purposes, a licence is necessary, which is issued by an authorised state body of a country member of the EAEU in the territory of which a declarant is registered (in the Russian Federation this body is the Ministry of Industry and Trade of Russia).

14 Article 26.2(3) of Federal Law No. 4804-1, of 15 April 1993, on the import and export of cultural property.

If a piece of art is being exported by natural persons for private use, a licence is not required; nevertheless, it is necessary to provide a permissive document issued by a corresponding body of the state in the territory of which a declarant is registered (the Ministry of Culture).

Transfer of art objects over the state boundaries of the Russian Federation to or from countries that are not members of the EAEU is regulated by Law No. 4804-1 (revised on 28 December 2017).

Meanwhile, the Law differentiates the notions of cultural objects and cultural objects of special value. The difference is that free export of cultural objects of special value is prohibited from the territory of the Russian Federation without obligations on reimportation.

Criteria of classification of movable objects as cultural objects and classification as cultural objects of special value are provided in Decree No. 1425, of 14 September 2020, approved by the government of the Russian Federation. The document becomes valid on 1 January 2021.

When entering into an agreement, parties may independently define the applicable right for the entire agreement as well as for its parts. In the absence of such an agreement, parties apply the right of the country that is the residence or main place of activity of the party executing the agreement at the moment the agreement is concluded. For sale and purchase agreements, it is defined that such a party is the seller.

The term 'tax resident of the Russian Federation' is defined in the Tax Code as any natural person physically in the Russian territory for not less than 183 calendar days during 12 consecutive months. Therefore, the status of resident is assigned to a foreign citizen who has lived in Russia for the stated period of time.

Residents and non-residents pay taxes on income of natural persons obtained from the sale of property, in particular artwork. If a piece of art was sold in Russia, the tax must be paid. However, the amount of tax is different for residents (13 per cent of income) and non-residents (30 per cent of income). In other words, if a foreign citizen who is not a resident sells a piece of art owned by him or her, in Russia, he or she pays 30 per cent of the obtained income. Tax is not collected from a buyer of art. If a resident (whether or not a Russian citizen) sells a cultural object in the territory of Russia, he or she must pay the relevant tax (13 per cent of his or her income). The 13 per cent tax is also paid by Russian residents for sales outside Russia. In 2021, the 13 per cent rate will increase to 15 per cent for natural persons whose income exceeds 5 million roubles.

If more than three years elapse between the purchase and the sale of an art object, the income of the seller (natural persons) is exempted from taxation.

For a certain category of Russian and foreign legal entities making deals on disposal of property, the Tax Code defines the obligation on payment of income tax at 20 per cent.[15]

To avoid double taxation, the government and several foreign states have concluded corresponding double taxation agreements (of avoidance). Such agreements are applied to persons who are residents of one or both states party to the agreement, and relate to taxes defined in the text of such agreements.

If cultural objects were purchased abroad, a buyer is exempt from VAT on import to Russia, irrespective of the status of a declarant and the purpose of the importation, including

15 Chapter 25 of the Tax Code.

for resale in Russia. The only condition for obtaining this benefit under the law is verifying the status of a piece of art by providing customs bodies with an expert statement containing conclusions on classifying such object as having cultural value.

iv Art finance

The Russian art market has not yet been developed to the level of a professionally structured finance market; therefore, purchases are made by buyers' personal funds. Corporate collections do take place in Russia; large corporations and banking institutions historically invested in contemporary artists, although this is no longer the case due to the economic situation.

Loans secured by art are not common in Russia; however, there are a few professional art pawnshops. The process combines art appraisal and expertise provided by duly licensed third-party companies. Provenance verification is usually carried out either by experts or dedicated law firms.

Only a few insurance companies provide art insurance in Russia due to the comparatively small art market and the low number of players in the market. However, insurance companies are naturally involved in shipment services for art.

There are some art investment advice companies operating in Russia, which mostly deal with private individuals, private banking or family offices. Hence, the demand and the market volume has significantly decreased because of the covid-19-related economic crisis. Personal shopping services are not popular in Russia; these services, as well as curators' services, mostly depend on personal relationships between art experts and their clientele.

In 2018, the EU tightened its anti-money laundering rules, directly targeting the art market by adopting Directive (EU) 2018/843. This signified the development of a global trend to enhance financial transparency in the art market. In January 2020, the new rules took effect in all EU countries. The Russian Federation legislation for anti-money laundering has been developing in line with global trends. In Russia, statutory provisions targeting anti-money laundering can be found in the Federal Law on Anti-Money Laundering and Countering Terrorism Financing (the AML Law) and in the Criminal Code. The AML Law is complemented by multiple regulations and by-laws issued by the Federal Financial Monitoring Service, the Ministry of Finance, the Bank of Russia and other governmental authorities. The AML Law specifies that measures against money laundering can also be found in other federal laws, including, but not limited to, laws on investment funds and non-profit organisations. Under the AML Law, due diligence for both legal entities and physical persons must be undertaken: companies, irrespective of their size, are to implement policies, procedures and controls, including KYC and supplier due diligence procedures.

The AML Law does not currently address specific issues in terms of the art market and artwork circulation. However, a number of Russian legislative acts provide that, among the business activities in which a client can be assigned 'high risk', are activities related to the sale, including commission, of art, antiques, furniture, cars and luxury items. Resolution No. 32 of the Plenum of the Supreme Court of the Russian Federation on judicial practice in cases of legalisation (laundering) of funds or other property acquired by criminal means, and on the acquisition or sale of property knowingly obtained by criminal means, dated 7 July 2015, classifies the sale of artworks and antiques as an activity with a high risk of money laundering.

VI ARTIST RIGHTS

i Moral rights

Since 2008, all the general provisions regulating legal relations in the sphere of intellectual property and exclusive rights have been defined in Part 4 of the Civil Code. Moral rights of authors of art, despite not being named so in the applicable Civil Code, are personal non-material rights, and include:

a right to being admitted as an author of an object (right of authorship);

b right to name, which means right for free use or permission to use an object or work under one's name, under a pseudonym or anonymously;

c right to sanctity of an object or work – prohibition of amending or corrupting an object is reflected as a right of an author to the sanctity of works; and

d right for publication of a work. Meanwhile, an author may independently bring his or her new work into the world, and transfer this right under an agreement to another person, simultaneously with a disposal right.

Such rights cannot be alienated and are protected for an unlimited period. Waiving such rights is nominal. In practical terms, this means that transfer of right of ownership for a material carrier, in which a result of intellectual activity is expressed, does not lead to loss of personal non-property rights of authors of art objects.

Any transformation of the result of intellectual activity that discredits the honour, dignity or goodwill of an author, as well as attempts of these, empowers an author demanding protection of his or her honour, dignity or goodwill, recovery of damage and compensation of moral damage.

ii Resale rights

Together with personal non-material and exclusive rights, authors of art objects own the resale royalty right. The resale right may not be alienated but transfers to heirs of an author for the period of validity of an exclusive right for an object.[16] The Russian Supreme Court has also stated multiple times that the resale right is a part of inheritance.[17]

In the Russian legislation, the resale right is regulated by Article 1293 of the Civil Code.

From 1 June 2018, amendments made to the Civil Code are valid. Subject to the last update, the right for obtaining profit as interest rate of the price of resale of the original work occurs for an author at each resale of an original, in which the auction house, art gallery, art salon or shop participates as a mediator, buyer or seller.

Subject to the previously applicable revision of item 1 of Article 1293 of the Civil Code, an author of an original work of art may expect to obtain profit from resale only where a legal entity or sole proprietor acted as a mediator.

The above-mentioned legal entities or sole proprietors are obliged to provide data necessary for payment of reward immediately to an artist, or an organisation representing his or her interests. UPRAVIS organises and manages these rights on a collective basis for creators of fine art. Due to UPRAVIS' active efforts, Russian artists and heirs of late artists obtain rewards for the resale of original artwork and other art objects.

16 Item 3, Article 1293 of the Civil Code.

17 See Decree No. 9 of the Plenum of the Supreme Court on judicial practice regarding cases of inheritance, dated 29 May 2012.

iii Economic rights

Subject to the Russian legislation, the following rights are recognised:

a personal non-material rights of an author; and

b exclusive rights, which means material rights allowing an author of an artwork, a right holder and heirs that obtain material, to profit from using such right.

While personal non-material rights may not be alienated, the law provides the possibility of alienating exclusive rights.

The civil legislation defines that initially an exclusive material right for an art object arises in its author, and is valid throughout his or her life and for 70 years after his or her death. An author may decide how to dispose of his or her work appropriately: to conclude an agreement on alienation of an exclusive right for an artwork, or transfer to another person a certain amount of rights for use of an artwork (licence agreement).

Subject to the laws of the Russian Federation, a right of authorship and a right of an author to name (i.e., personal non-material rights) may not be alienated or transferred, including by inheritance. Nevertheless, an inheritance includes exclusive rights for an artwork and a right for obtaining profit from using the result of intellectual activity (resale right).

Heirs obtain the right for publication of an author's works, if the latter had not made it himself or herself. Exclusions are cases when publication is prohibited by an artist himself or herself through a will or other certain written document.

Along with rights, heirs who accepted inheritance are also obliged to keep authorship and the name of the author. A testator may select a certain person who will bear this obligation, and state him or her in a will.

VII TRUSTS, FOUNDATIONS AND ESTATES

Russian Federation legislation on the holding and administration of art collections can be found in the Civil Code, the Federal Law on investment funds, the Federal Law on limited liability companies, the Federal law on the museum fund of the Russian Federation and museums in the Russian Federation and the Tax Code. Private and corporate collections can be found in Russia and collectors may choose the appropriate legal structure, depending on the purpose of collecting and the tax implications. Ownership and management of art collections can be achieved via direct ownership by either private or corporate collections, non-commercial organisation (fund, non-commercial partnership), closed investment fund of artworks, limited liability company or inheritance fund after death of a testator. There is no notion of trusts in Russian law, although many wealthy Russians still prefer trusts operating in foreign jurisdictions. However, before settling a trust outside Russia, the resident should consult the Tax Code provisions in respect of a controlled foreign company (CFC) and 'controlling persons'. Such provisions apply to taxation of non-resident organisations or structures without formation of a legal entity under the control of Russian residents recognised as tax residents. Taxation of CFC profit is made indirectly, through the company's founders and controlling bodies proportionally to their share of participation in the structure. Regarding foundations, the Tax Code does not provide peculiarities of taxation. Calculation and payment of taxes is regulated by general rules defined for non-commercial organisations (NCO). One of the main requirements stated for NCOs is to keep separate accounts for commercial and non-commercial activity.

Russian art collectors acquiring art abroad are to consider the UK Unexplained Wealth Order, which is a legislative initiative governed by the Proceeds of Crime Act 2002. Such orders can be initiated outside any civil or criminal case in relation to a lifestyle that appears to the competent authorities to be incompatible with the known, official level of income of a respective person. In parallel with the Order, there is a procedure for freezing funds in bank accounts, personal property, etc., for which, again, only reasonable suspicion is required.

Russian law does not contain special provisions regarding the inheritance of artworks and art collections. Nevertheless, for estate planning it is worth seriously considering having a full inventory of inherited property, including works of art and cultural property.

In accordance with Russian civil law, inheritance is carried out by will, by inheritance contract and by law. Since 1 September 2018, the provisions on the inheritance fund have been in effect. With the help of the inheritance fund set after the death of the testator, it is possible to exclude the negative fragmentation of assets, as well as separating the collection from the business assets and preserving it, setting charitable aims. The fund can be established for a specified period or indefinitely in accordance with the terms of fund management. To set up an inheritance fund, it is necessary that the will includes the testator's decision on the establishment of the fund and the charter of the fund, as well as the conditions for managing the fund.

Since 1 June 2019, inheritance provisions have been complemented with the joint will of spouses and any inheritance contract.

In Russia, the freedom of will is limited by the rules on the compulsory share attributed to certain persons, despite the will. Minors or disabled children of the testator and his or her disabled spouse or parents, as well as disabled dependents of the testator, can apply for the compulsory share; the latter, regardless of the content of the will, inherit at least half of the share that would be due to each of them in the case of inheritance by law.

There is no inheritance tax; pursuant to Article 217(18) of the Tax Code, income in cash and in kind received from individuals by way of inheritance is not subject to taxation (exempted from taxation), with the exception of remuneration paid to heirs (successors), authors of works of science, literature or art, and remuneration paid to the heirs of patent holders of inventions, utility models and industrial designs.

VIII OUTLOOK AND CONCLUSIONS

The art market in Russia clearly has a potential that is dependent on alteration of the legislation. Remaining closed for export and import, the market has obvious restrictions in terms of development of the private sector.

The release of Second World War art pieces will be resolved sooner or later as the dialogue at a government level continues.

Chapter 25

SPAIN

Rafael Mateu de Ros and Patricia Fernández Lorenzo[1]

I INTRODUCTION

The Spanish art market, with a sales value of almost €400 million, represents 2 per cent of the EU market and 1 per cent of the global art market. Spain is the fifth-largest contributor to the EU art market (behind the UK, France, Germany and Italy). With 650 art galleries and 50 active auction houses, it is estimated that 80 per cent of sales are made through the gallery channel and 20 per cent through auctions. Art fairs currently account for 40 per cent of gallery sales. Online sales have grown in recent years but represent less than 7 per cent, although it remains to be seen how this parameter will evolve as a result of the coronavirus pandemic. The sale prices of works of art and antiques are relatively lower than those of the surrounding countries. The cancellation of fairs, gallery closures and capacity limitations during the pandemic have had a strong effect on the Spanish art market, which is facing the challenge of reorienting its strategies and expanding its reach.

The resolution of disputes in contracts of sale of works of art, when between individuals, is governed by the general regime of the Civil Code and the Law on Civil Proceedings. This legislation also applies to transactions between professionals in a subsidiary manner to the Commercial Code, but if the buyer is a consumer, the special regime of the Retail Trade Law,[2] designed, in principle, for auctions and extending to any sale of works of art to the public, must be taken into account. For the interpretation of contracts for the sale of works of art, case law refers to the principle of good faith and the standard professional practice in Spain.

With regard to transactions in cultural goods, the Spanish Historical Heritage Law[3] is protective with regard to the classification of goods that form part of the Spanish historical heritage and the granting of export permits. Competencies are shared between the state and the regional governments. The public administration has a pre-emptive right to buy the works of art classified as assets of cultural interest and the goods whose exportation permission has been refused under the Spanish Historical Heritage Law. Owners of works of art must notify the public administration of their intention to sell the artwork, specifying the price and conditions of the transaction. Within a maximum period of two months, the public administration must inform the seller if the right of pre-emption will be exercised. In the case of sale at auction, the auctioneers must notify the competent administrations, within four to six weeks of auctions in which they intend to sell any object belonging to the Spanish historical heritage. The public administration may exercise the right of first refusal

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2 Law No. 7/1966.

3 Law No. 16/1985.

by the appearance of a representative of the Ministry of Culture in the auction. The right of withdrawal can be exercised when the private sale of any object belonging to Spanish historical heritage has not been correctly communicated to the state. This right must be exercised within six months of the sale being officially announced.

The Spanish Historical Heritage Law is in the process of being amended and the amended version is expected to be published in the first half of 2021. The new law will provide a unified regulation of cultural heritage, intangible treasures and industrial patrimony. It is hoped that some restrictions, such as the tax on exports of cultural goods outside the European Union, will be abolished or reconsidered.

II THE YEAR IN REVIEW

During 2020, the Spanish art market encountered some interesting matters:

a the effects of the new requirements concerning provenance and transparency before providers and clients derived from the EU Fifth Anti-Money Laundering Directive (5AMLD).[4] 5AMLD will soon be fully transposed into Spanish law; and

b the consequences of the lockdown that the global pandemic has generated in all economic sectors, including art galleries and auction houses, specifically in terms of the regular development and execution of transactions and contracts related to the selling, loaning, deposits and insurance of works of art. Some signs of a partial market recovery can now be seen.

III ART DISPUTES

i Title in art

The title of ownership of a work of art is acquired, in the first place, by transfer of possession of the work,[5] although the Spanish system also contemplates transfers made by means of a symbolic delivery as valid, such as the delivery of the keys of the premises where the work is located.[6] For greater security, a deed of sale can be made public. The Spanish system also establishes the acquisition of title by usucapion or acquisitive prescription in such a way that public, peaceful, uninterrupted possession of the work of art during the periods established by law confers the title of ownership on the holder. In ordinary usucapion, the law establishes a period of three years of possession to acquire ownership of the movable property when there is good faith and fair title in the acquirer. Extraordinary usucapion occurs when there is neither good faith nor fair title in the acquirer, who obtains ownership of the property after a six-year period has elapsed.[7] Usucapion does not apply if the possession originates from an illicit or criminal action. The claimant will have to reimburse the possessor the amount paid for the artwork.

Neither the buyer nor the seller is obliged to conduct due diligence enquiries. Usually, the buyer carries out a legal due diligence on the ownership of the object, to establish whether it is free of encumbrances and its authenticity and provenance.

4 Directive (EU) 2018/843.

5 Article 1462 of the Civil Code.

6 id., Article 1463.

7 id., Article 1955.

ii Nazi-looted art and cultural property

There are no specific rules within the Spanish legal system for Nazi-looted art, so the rules of acquisitive prescription of the Civil Code are applicable (see Sections III.i and III.iii). Furthermore, there is no specific body to hear claims of Nazi-looted art.

The *Cassirer v. Thyssen Bornemisza Foundation* case, decided by the Court of Appeal of the State of California in application of Spanish law, has recognised the ownership of Camille Pissarro's painting, *Rue Saint-Honoré, dans l'après-midi. Effet de pluie*, by the Spanish public collection at the Thyssen Bornemisza Museum, despite the fact that it was proven to be stolen by the Nazi regime from the Jewish Cassirer family.[8] The application of the statute of limitations on acquisition of the Spanish Civil Code, the measures of diligence taken by the Spanish government in relation to the acquisition of the collection from Baron Thyssen and the non-binding nature of the Washington Principles of 1998, which have not been developed into a specific Spanish law, have led the judge to reject the Cassirer family's claim. Nevertheless, the sentence confirms some kind of 'moral condemnation' against the Thyssen Bornemisza Foundation, according to the Washington Principles.

iii Limitation periods

In Spain, the limitation period for the action to claim is six years from the loss of possession of the property, unless the possessor had acquired the property title by means of usucapion (i.e., three years with good and fair title possession or six years without good faith or fair title).[9] However, in the case of theft or robbery of the work of art, the acquisitive prescription cannot be effective in favour of those who stole or robbed, nor in favour of accomplices or accessories after the fact.[10] In such cases, the statute of limitations does not expire after six years for actions to claim damages nor for actions to demand civil liability, born of the crime or misdemeanour. Therefore, when the heirs of the legitimate owner of a stolen or misappropriated work of art file a claim, the judge may consider that the six-year period for filing an action begins to run from the moment they have become aware of the location and identity of the illegitimate holder.

Furthermore, statutory limitations cannot be applied to crimes qualified by the Spanish Criminal Code as genocide, crimes against humanity, crimes against protected persons, assets acquired in armed conflicts or piracy.

iv Alternative dispute resolutions

The mediation system is barely used in Spain for the resolution of disputes. Law No. 5/2012 on mediation establishes the voluntary option of resorting to mediation in a series of civil and commercial matters and is currently being reformed through the 2019 draft law on the promotion of mediation, which is pending approval. There is no specialised institution for the mediation of disputes related to art matters. Arbitration is applicable for solving private disputes but conflicts with the government are out of the scope of the Law.

8 Judgment of 18 August 2020.

9 Articles 1962 and 1955 of the Civil Code.

10 id., Article 1956.

IV FAKES, FORGERIES AND AUTHENTICATION

There are two possible legal pathways when dealing with fakes and forgeries, depending on the quality of the contracting parties: for transactions between merchants and private individuals, the Civil Code or the Retail Trade Law applies and, for transactions between art dealers, the Commercial Code applies. The Civil Code protects the purchaser, but in practice courts adopt a very strict approach when determining the satisfaction of the requirements for granting nullity, namely with regard to the excusable nature of the error, which ultimately means that in many cases the judicial practice fails to grant such protection. Pursuant to Article 1266 of the Civil Code, which regulates material error in contracts and its effects, the purchaser of a forgery or of an artwork whose provenance, authorship or value has been falsely determined can contest or void the sale by producing evidence of the following:

a first, that the buyer has been falsely misled with regard to the authenticity or the features of the artwork;

b second, that the buyer's defective consent was crucial to the acquisition (i.e., had the purchaser been aware of the forgery, he or she would not have entered into the contract); and

c finally, that the buyer's lack of awareness of the forgery is excusable because even through diligent actions (e.g., requesting an expert opinion), the forgery could not have been identified at that moment.

The action for annulment of the contract in cases of error has a time limit of four years from its execution, and the parties must reciprocally return to one another the assets that constituted the subject matter of the contract, including refunding the price to the purchaser.[11] It is possible to resort to the application of the Retail Trade Law, which contemplates the specific case of public sales of works of art that, by establishing for the seller (whether it is an auction house or an art gallery) the legal obligation of providing a truthful description of the item, with identification of whether their qualities are true or, simply, assessed as being such (or not) by a certain expert,[12] which makes the seller the guarantor of the quality of originality of the authorship of the work of art when it is sold as such.

In commercial law, the main focus is the protection of the seller (to the detriment of the purchaser) because the agreement is interpreted in accordance with the 'custom of trade'. In view of the above, the purchaser of a forgery or of an artwork whose features have been erroneously determined can only be effectively protected against such eventualities when it has been so agreed, which is usually the case for artworks acquired in auction where the auction house guarantees the authenticity of the work.

V ART TRANSACTIONS

i Private sales and auctions

Generally, the main auction houses offer a post-auction private sales service but only a few offer items for private sale. The works of art sold in public auction cannot be challenged – unless there is bad faith conduct either from the auction house or from the buyer – by the previous

11 Article 1303 of the Civil Code.

12 Article 58 of the Retail Trade Law.

owner or authorities. There is an exception regarding goods declared by law as 'out of commerce' because they belong to the state or other public or semi-public institutions such as religious institutions.

Special rules are applicable to public auctions of works of art.[13] The offer for sale in public auction must include an accurate description of the relevant goods, including a reference to whether the specified features are certain or merely estimated, or if they have been assessed by an expert. In particular, where the object for sale in a public auction is an imitation, or a piece that appears to be a precious object but in reality is not, this fact must be expressly disclosed publicly, as well as in any invitations for bids. This obligation will also apply to the sale of works of art that are offered to the public other than in public auction.

Law No. 43/2007 for the protection of consumers in purchases of goods with an offer of restitution, will apply to the legal relations between the consumers and the businesses or professionals engaging in the sale of works of art, antiques, jewels and other goods, with the offer to return at a later stage, in one or several instalments, all or part of the purchase price settled by the consumer or an equivalent sum, with or without a provision for the appreciation of the amounts involved. Distance and off-premises sales, in which the purchaser is a consumer, are regulated by the applicable provisions of the Consumer Defence Act.[14] Contracts concluded by electronic means are governed by the rules on distance contracts and by Law No. 34/2002, on information society services and electronic commerce.

Pursuant to the Retail Trade Law and the Consumer Defence Act, the consumer shall have a period of at least 14 calendar days, counted from the date of delivery of the goods, to withdraw from the contract. In distance and off-premises contracts, with the exception of contracts concluded at a public auction, the consumer will also have the right to withdraw from the contract within a period of 14 calendar days without giving any reason and without incurring any costs other than as specified below. The withdrawal period shall expire after 14 calendar days from the date on which the consumer, or a third party other than the carrier and indicated by the consumer, acquires physical possession of the goods.

ii Art loans

In 2011, Spain decided to accede to the United Nations Convention on Jurisdictional Immunities of States and their Property (2005). In 2015, Spain incorporated Law No.16/2015 on the privileges and immunities of foreign states, which regulates the immunity of foreign states from jurisdiction and execution, closely following the United Nations Convention.

iii Cross-border transactions

Licensing regulation for exports of cultural goods is regulated in the Spanish Historical Heritage Law. Cultural goods are structured in three levels according to their relevance, which directly affects the restrictions imposed on their movement and the obligation to apply for the corresponding export permit:

a property of cultural interest: non-exportable goods that can only be exported temporarily upon request to the Ministry of Culture;

b general inventory of movable goods: the exporter must always apply for an export permit regardless of the age of the goods; and

13 id.

14 Royal Legislative Decree Law No. 1/2007.

c historical heritage goods of the general category that, in principle, can be freely disposed of without notifying the public administration, except if:
   - they are over 100 years old; these always need an export permit; or
   - if they are between 50 and 100 years old and their destination is a country outside the European Union; these need an export permit if their value exceeds the thresholds established by Council Regulation (EC) No. 116/2009 on the export of cultural goods.

There is also an 'extraordinary' proceeding for goods that have been legally imported and declared to the Ministry of Culture because they can be re-exported within a renewable 10-year term.[15]

The export of artworks belonging to the Spanish historical heritage without the required export permission results in the goods becoming the property of the state.[16] Furthermore, pursuant to Law No. 12/1995 on the repression of smuggling, a person commits a smuggling offence if he or she exports an item with a value higher than €50,000 without permission, which is punishable by one to five years' imprisonment and a fine of up to six times the value of the item. A person commits a smuggling infraction if the value of goods exported without permission is less than €50,000. The infringement will be punished by a fine of four times the value of the item.

In the recent *Spain v. Coll & Cortes Ltd* case, two works of art over 100 years old, *David and Goliath* and *Los Mendigos*, were seized at the French border while circulating with an expired export permission. The works were not intended for sale, only for a temporary exhibition, and were located in France in transit. Contrary to the claims of the Public Prosecutor's Office, the Provincial Court of Madrid has considered in appeal that there is no crime of smuggling (as the two works did not exceed the value of €50,000) and that, therefore, the two works of art do not become public property.[17]

Regarding import control, there are two categories of cultural property imports: temporary and permanent. The proceedings for temporary imports are usually carried out by customs and police officers. Temporary imports coming from third countries require an administrative document, and those coming from within the EU require proof of their entry and exit dates into the country.

Law No. 16/1985 establishes the payment of a fee for the issue of export permissions, applicable to the export of cultural goods to countries outside the European Union,[18] which is applied to the value of the exportable good, in instalments, according to the following rates:

a 5 per cent for values up to €6,000;
b 10 per cent for values of €6,001 to €60,000;
c 20 per cent for values of €60,001 to €600,000; and
d 30 per cent for values of at least €600,001.

The fee is accrued by and settled with the Ministry of Culture.

15 Article 32 of the Spanish Historical Heritage Law.
16 id., Article 29.
17 Resolution of 20 September 2020.
18 Article 30 of the Spanish Historical Heritage Law.

iv Art finance

Auction houses in Spain do not currently offer advances, loans or guarantees on artworks. The type of security interest taken against art or antiques could be a non-possessory pledge. Its regulation expressly contemplates its use for art, antiques and collectibles. It is a security granted over movable property, where the collateral continues to be in possession of the owner (debtor) as a deposit. It requires execution in a public deed and must be registered in the Chattel Registry. The prevention of money laundering and the financing of terrorism in the art trade is regulated by Law No. 10/2010 and its Regulation of 2014, which oblige art and antiques dealers, in the case of such transactions of value equal to or exceeding €1,000, to:

a formally identify the client;
b put in practice due diligence measures regarding the transaction;
c provide training to managers and employees;
d register the transaction's documentation for 10 years; and
e provide a suspicious activity report to the Spanish Financial Intelligence Unit after verifying suspicious transactions by special examination.

5AMLD is pending transposition. On 12 June 2020, the Draft Law for the prevention of money laundering and terrorism financing was published; unlike 5AMLD, this does not contemplate a minimum transactional threshold of €10,000 for exemption from anti-money laundering regulations. The new Law is expected to be published in the first quarter of 2021.

VI ARTIST RIGHTS

i Moral rights

Moral rights are regulated in the Intellectual Property Law.[19] Article 14 of the Law provides the seven moral rights for artists, which are recognised without any time limitation:

a the right to decide whether a work is to be made available to the public and, if so, in what form;
b the right to determine whether the work should be released under the author's name, under a pseudonym, a sign or anonymously;
c the right to claim authorship of the work;
d the right to demand respect for the integrity of the work and to object to any distortion, modification or alteration of it or any act in relation to it that may be detrimental to the artist's legitimate interests or to his or her reputation;
e the right to alter the work subject to respect for the acquired rights of third parties and the protection requirements of goods of cultural interest;
f the right to withdraw the work from circulation owing to changes in his or her intellectual or ethical convictions, after paying damages to the holders of the exploitation rights; and
g the right of access to the sole or a rare copy of the work, when it is in another person's possession, with the intention to exercise the right of communication or any other applicable right.

These rights cannot be waived or assigned.

19 Law No. 1/1996.

ii Resale rights

The right of participation in the resale price of works of art is recognised in Article 24 of the Intellectual Property Law. The artist's resale right will apply whenever 'art market professionals' participate in the resale and when the resale price exceeds €800 (before the amendment to the Law in 2019, the minimum resale price was €1,200). There is an exception for the resale of works purchased by an art gallery directly from the creator, provided that the period between that first purchase and the resale does not exceed three years and the resale price does not exceed €10,000, excluding tax. The artist's resale royalty depends on the purchase price:

a 4 per cent of the first €50,000;
b 3 per cent of the part of the price between €50,001 and €200,000;
c 1 per cent of the part of the price between €200,001 and €350,000;
d 0.5 per cent of the part of the price between €350,001 and €500,000; and
e 0.25 per cent for any part of the price over €500,000.

However, the artist's resale right can never exceed €12,500.

The duration of the artist's resale right is 70 years after the author's death and 80 years if the author died before 7 December 1987. In both cases, the period begins the first day of the year following his or her death. The person liable to pay is the seller (art market professionals involved in the resale are jointly responsible), and the beneficiary of the artist's resale right is the author during his or her lifetime and, after his or her death, the person expressly nominated or the legal heirs. Beneficiaries can collect the artist's resale royalty directly or entrust a collective management company to collect it.

iii Economic rights

According to the Intellectual Property Law, the following economic rights are exclusive to the author and cannot be exploited without his or her authorisation:

a the right to reproduce his or her work, in any format, except for educational purposes;
b the right to distribute the work and its copies by sale, rental, loan or other means;
c the right to public communication or presentation to an audience outside the private sphere. The purchaser of a work has the right to display it publicly unless the author has expressly stated otherwise in the sales agreement or objects on the ground that the manner in which it is displayed is prejudicial to his or her honour or professional reputation; and
d the right to transformation, or any modification of its form from which it results in something different.

The author may assign his or her economic rights to a third party or assignee, but this must always be done in writing. If no assignment period is mentioned, it is limited to five years, and if no territory is mentioned, it is limited to the country in which it is signed.

Infringement of copyright is sanctioned by the Intellectual Property Law with compensation for damages, calculated according to the economic consequences for the author of the infringement. In the criminal field, the reproduction, plagiarism, distribution and public communication without the author's authorisation constitutes a crime if the infringer has the intention of obtaining a direct or indirect economic benefit to the detriment of a third party. The penalty, set out in Articles 270 and 271 of the Criminal Code, shall be a fine and imprisonment for six months to four years.

In a recent judgment, *F Mateo & Mateo v. SEAT*,[20] the court had to determine whether the artist's copyright for the video installation *I travel to know my geography* had been infringed by a SEAT advertisement. In 2018, the court ruled in favour of the artist, F Mateo, stating that the similarities between both works reached mathematical certainty; therefore, the SEAT advertisement was to be considered plagiarism.

VII TRUSTS, FOUNDATIONS AND ESTATES

Foundations are a useful structure to either own or manage art collections. Foundations are governed, from the national sphere of competence, by the Law on foundations[21] and, from the regional sphere of competence, by the laws on foundations of each of the 17 autonomous communities. The Law on incentives for patronage[22] provides for a series of direct and indirect tax exemptions that benefit artwork holders' foundations.

The tax incentives for patronage have been modified by Royal Decree-Law No. 17/2020, which introduced tax measures to support the cultural sector to deal with the economic and social impact of covid-19. Since 1 January 2020, individuals have been able to deduct up to 80 per cent of the first €150 donated and 35 per cent of the remaining amount from their personal income tax. This last percentage of deduction will rise to 40 per cent if donations for the same amount or more have been made in favour of the same entity in the two immediately preceding financial years. Legal entities (corporate) may deduct 35 per cent of the amount donated from corporate tax, rising to 40 per cent if, in the two immediately preceding financial years, donations of the same amount or more had been made in favour of the same entity.

VIII OUTLOOK AND CONCLUSIONS

Spain provides a clear system for residents who import works of art from abroad. These goods may be exported without limits for a 10-year period,[23] which can be renewed at the end of the first 10-year period.

20 Resolution No. 10/2018. Ordinary Proceeding 250/2014, dated 8 January 2018.

21 Law No. 50/2002.

22 Law No. 49/2002.

23 Law No. 16/1985.

Chapter 26

SWITZERLAND

Marc-André Renold and Peter Mosimann[1]

I INTRODUCTION

Switzerland is an important art market and art transit country and, as such, its laws on art and cultural heritage acquisition and transfer are highly relevant. In addition, museums and collectors play an active role on the cultural scene, which explains why contemporary art and, therefore, copyright issues are also of central importance in the field.

II THE YEAR IN REVIEW

From the point of view of international law, 2020 saw two important changes in Switzerland. In addition, some comments can be made on the issue of deaccessioning from the point of view of Swiss law.

i International conventions ratified by Switzerland

The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, ratified by Switzerland in October 2019, entered into force on 25 January 2020.[2] To implement this ratification in Swiss law, the concept of cultural heritage was extended to include 'all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years'.[3]

Another important international text entering into effect in Switzerland in 2020 is the 2005 Council of Europe Framework Convention on the Value of Cultural Heritage for Society (the Faro Convention).[4] This important Convention enhances the rights of individuals and communities in relation to cultural heritage; in particular, to the common heritage of Europe.

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2 RS 0.444.2.

3 See the newly modified Article 2(1) of the Swiss Federal Act on the International Transfer of Cultural Goods, RS 444.1.

4 RS 0.440.2 (the Faro Convention).

ii Deaccessioning (in general)

Deaccessioning can be defined as the final removal outside of a museum's permanent collection of a cultural good that is fully owned by the institution. As to the proceeding by which a cultural good is deaccessioned, the terms of the International Council of Museums (ICOM) Code of Ethics for Museums[5] and the substantial laws that are binding for a specific museum may be referred to.[6] As a general rule, deaccessioning is considered as being the removal of inalienable public property and so, as such, wrong. All museums that are wholly state-owned[7] or private entities that receive their main funding from the state are committed by law to refrain from deaccessioning; the majority of the museums and their directors are also committed to being members of ICOM and, therefore, to comply with the terms of the ICOM Code of Ethics for Museums.[8]

There are numerous reasons for a museum to deaccession part of its collection, including lack of storage room, reduction of operational costs for storage, insurance and restoration, sale of duplications and restricting the scope of the collection. Even famous museums fulfil deaccessioning to finance the acquisition of a masterpiece.

The public understanding is, however, that deaccessioning should not occur for several reasons. The popularity of art occurs in waves. Museums exist at the interface between past and future. What is considered to be valuable should also be approachable for future generations. The reality, however, is that 'fashion' changes. Art considered highly valuable today may be considered abdicable by future generations (e.g., the Neue Wilden pieces were highly priced works in the art market in the 1980s and have today almost disappeared).

Deaccessioning may also be frustrating for donors of art when they realise that the museum is disposing of parts of its collection.

In the international practice of museums it is established that deaccessioning is allowed in certain cases. These exceptions include the disposal of duplicates of the museum's collection, unusual high costs of restoration of masterpieces, lack of authenticity of an art work, restitution of a piece of the collection to the rightful owner, and restitution to a donor because of the museum's inability to fulfil donation agreement conditions after a certain time has lapsed.

It is international practice that deaccessioning is not allowed for the financing of the museum's operational costs or the financing of investments in the infrastructure of the museum.

5 Section 2.12 et seq.

6 See Section 6 of the Basel Town Museum Act; disposal of museums' cultural goods is strictly barred and may only be done as an exception, subject to a request of the museum to the government.

7 See Kunstmuseum Basel, which was incorporated in 1661 as an agency of the Canton of Basel Town. The collection is defined as public property (and not financial property) of the Canton of Basel Town; it is protected by immunity.

8 See, re history and the public awareness of deaccessioning, Stephen K Urice, 'Deaccessioning policies and practices in the United States museums', in: Mosimann and Schönenberger (eds), *Art & Law 2018*, Bern: Stämpfli Verlag AG, 2018, pp. 15, 18 et seq.; Martin Gammon, *Deaccessioning and its Discontents – A Critical History*, Cambridge (Mass.): MIT Press, 2018.

iii Deaccessioning at the Langmatt Foundation, Baden

While all the cultural policy arguments against deaccessioning are indeed very strong, museum collections are nonetheless at risk. In times of a policy of budgetary rigour, politicians time and again come up with the idea of instructing museums to sell items from their collections, not only to fund infrastructure investments, but also to pay for their operating costs. In 2019, the Langmatt Foundation was forced by the authorities to consider selling several works from its outstanding collection of French impressionists. The City of Baden had advised that it was willing to contribute 10 million Swiss francs to renovate the museum building only if the Foundation itself increases its capital by 40 million Swiss francs. This amounted to forcing the museum, a member of ICOM, to sell up to three major impressionist works. The Foundation is still evaluating which pictures should be sold. Swiss museums have decried the actions of the Langmatt Foundation and of the authorities as sinful. This could represent a warning beacon for other publicly funded museums as municipal finances are likely to be strained in the coming years for a variety of reasons.

III ART DISPUTES

i Title in art

The transfer of ownership of a work of art in Swiss law requires the transfer of possession of the work of art, as is the case in the transfer of any chattel. As provided by the Swiss Civil Code (SCC),[9] a condition for the transfer of ownership is the good faith of the person to whom the chattel is transferred.

Good faith is presumed, but no one can invoke good faith if it is incompatible with the attention required by the circumstances.[10] Recent case law shows that courts are setting a high standard for the attention required by the circumstances. In a landmark decision of 2015, the Swiss Supreme Court stated that the fact that the purchaser knew about a rumour relating to the sale on the European market of a stolen Malevich painting was sufficient to raise his standard of attention and that, had he made the appropriate investigations, he would have found out that the painting he purchased was in fact that same stolen painting.[11]

The bad faith possessor will never acquire ownership, even through the passing of time.[12]

ii Nazi-looted art and cultural property

From a strictly legal point of view, Nazi-looted art is not treated differently in terms of its transfer and possible acquisition in good faith. Interestingly, a US court recently applied Swiss law to the transfer of a looted Pissarro painting to a Swiss collector who then gave his collection to a Spanish foundation. Although the claimant was not able to recover the looted painting for reasons connected to Spanish law, the US court correctly interpreted Swiss law in connection with the issue of the original acquisition of the painting in Switzerland. The fact that old stickers on the back of the painting showing the initial Jewish provenance had been partially torn off was considered to be an indication that, had the purchaser taken this

9 Article 714 of the Swiss Civil Code (SCC).

10 id., Article 3.

11 BGE 139 III, p. 305.

12 Article 936 SCC; see Section III.iii.

element seriously and further investigated, he would have discovered that the painting had been looted from its Jewish owner in 1935.[13] The initial acquisition was therefore considered invalid for lack of good faith.

From the soft law perspective, Switzerland is a signatory of the 1998 Washington Principles on Nazi-Confiscated Art and, as such, these Principles have had an effect, in particular, when alternative dispute resolution is used (see Section III.iv). Swiss law has, however, not been amended, as such, to take the Principles into consideration. A looted art section was added to the Swiss Federal Office of Culture's specialised agency, but it has no decision-making power and can only advise potential claimants.[14]

iii Limitation periods

Since 2015, Swiss law has provided for specific limitation periods for title claims regarding cultural objects. According to Article 934, Paragraph 1 *bis* of the SCC, title claims by the original owner of stolen cultural objects can be made within one year of the claimant knowing the identity of the present possessor and the location of the object. In any case, the original owner's claim will be time-barred 30 years after the theft.

If, however, the present possessor is not to be considered in good faith – the burden of which lies on the shoulders of the claimant – the claim for restitution is subject to no limitation period.[15]

iv Alternative dispute resolution

Alternative dispute resolution is used with regard to Nazi-confiscated art. This was the case in the claim made by the French Jaffé heirs against the Museum of Fine Arts in the city of La Chaux-de-Fonds for the restitution of a Constable painting subject to a forced sale in Nice in 1943. Initial negotiations with the museum were unsuccessful, forcing the heirs to bring the matter before the local courts. Swiss procedural law requires that an attempt at conciliation be made under the guidance and supervision of the court. The judge responsible for this aspect of the procedure took his conciliatory role very seriously and was able to get the parties to enter into an agreement according to which the painting was returned to the family in exchange for a part payment of the expenses of caring for the painting for the past 20 years. The payment of that amount was made possible through the intervention of the French Commission for the Indemnification of Victims of Spoliations on the basis of France's responsibility for the 1943 forced sale.[16]

Another case regarding, among others, two lithographs by Edvard Munch claimed by the heirs of Curt Glaser from the Kunstmuseum in Basel was successfully negotiated by the

13 *David Cassirer et al. v. Thyssen-Bornemisza Collection Foundation* (C.D. Cal., 30 April 2019 (Case No. CV 05-3459-JFW)).

14 www.bak.admin.ch/bak/fr/home/patrimoine-culturel/l-art-spolie/le-bureau-de-l_art-spolie.html.

15 Article 936 SCC.

16 Report of the Municipal Council relating to a request for transfer to Jaffé joint possession of a painting by John Constable, property of the city of La Chaux-de-Fonds, exhibited at the Museum of Fine Arts (6 September 2017) and Order of General Council of the city of La Chaux-de-Fonds (28 September 2017).

parties. The agreement provides for a 'just and fair solution' under the Washington Principles: the lithographs remain at the museum in exchange for an undisclosed financial participation as well as the organisation of an exhibition as a tribute to Curt Glaser.[17]

IV FAKES, FORGERIES AND AUTHENTICATION

Fakes and forgeries are frequent and give rise to criminal and civil claims. It is interesting to note that the *Beltracchi* case in Germany – which led to the criminal indictment of the well-known German forger – was initiated in Switzerland where the gallery of the purchaser of a fake painting attributed to Campendonk by the German auction house Lempertz was located.[18]

In Swiss private law, the purchaser of a fake or forgery is relatively well protected. The purchaser can base his or her claim not only on the specific rules of warranty applicable to a sales contract,[19] but also on the general rules applicable to the legal effect of a substantive error on the basis of Article 24 of the Swiss Code of Obligations (SCO). In a long-standing line of precedents, the Swiss Supreme Court has decided that the two sets of rules on warranty and error could be invoked alternatively, thus making the invalidation of the sale based on an error possible, even if the shorter limitation period of the claim based on warranty has expired.[20] Claims based on warranty are subject to a limitation period of two years after the sale,[21] whereas claims based on error are subject to no absolute limitation period.[22]

The parties can of course adopt a different rule in their contract, as the above-mentioned rules on warranty are not imperative and can be modified by the parties to the agreement. This is often the case with auction sales, as the general conditions of sale adopt alternative solutions more favourable to the seller. Such changes to the general rules are valid, as provided by Article 234(3) of the SCO.

V ART TRANSACTIONS

i Private sales and auctions

Private sales and auctions are subject to the freedom of contract so that they are regulated by the agreement of the parties. If there is no specific written or oral agreement, the rules of the SCO apply. In certain cases model contracts have been proposed.[23]

The entering into force of the Swiss federal act on the International Transfer of Cultural Goods (ITCG) in 2005 led to some changes in the rules relating to sales contracts on cultural

17 Case note: Vuille, Chechi and Renold: 'Case Two Lithographs of the Glaser Collection – Glaser Heirs and Kunstsammlung Basel', ArThemis database, https://plone.unige.ch/art-adr/cases-affaires/two-lithographs-of-the-glaser-collection-2013-glaser-heirs-and-kunstmuseum-basel/case-note-2013-two-lithographs-of-the-glaser-collection/view (October 2020).

18 Stefan Koldehoff and Tobias Timm, *Falsche Bilder Echtes Geld*, Berlin: Galiani, 2012, p. 14 et seq.

19 Article 197 et seq. of the Swiss Code of Obligations (SCO).

20 See, e.g., BGE 82 II, p. 411; BGE 114 II, p. 131.

21 Article 210 SCO.

22 id., Article 24.

23 Renold, 'Contract for the Sale of an Artwork', in: Marchand, Chappuis and Hirsch (eds), *Recueil de contrats commerciaux*, Basel: Helbing, 2013, p. 241 et seq.

objects. In particular, the limitation periods for claims relating to third-party rights or to the warranties of the seller are extended to one year after the buyer has discovered the cause of his or her claim, and in any case to 30 years.[24]

ii Art loans

Art loans between international museums have increased significantly in recent years.[25] According to the Swiss Federal Supreme Court, such loans are part of the 'standard operations of museums'.[26] A distinction must be made between the usual national or international loan transactions between museums or between private individuals and museums, on the one hand, and the permanent loan of artworks, on the other.

Museum loans for the purpose of an ephemeral special exhibition are characterised as loans pursuant to Article 305 et seq. of the SCO and hence as gratuitous contracts. Loans against payment are rare in public museums and could be characterised as rental agreements.[27] In the case of loans to private museums, contracts containing some form of remuneration are more often entered into.[28]

When it comes to international loans, protection against seizure under private or public law is of fundamental importance. The ITCG[29] provides for the novelty of a state guarantee of return, which is not stipulated in the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.[30] This legal instrument enjoys effective protection in Switzerland and Europe against seizures in international relations. Moreover, Switzerland is party to the UN Convention on Jurisdictional Immunities of States and their Property of 2 December 2004.[31] In addition, state museums may invoke immunity under public international law for cultural property that constitutes administrative assets. However, in recent years, Switzerland has seen several cases of civil seizures; in particular, *Noga v. Soviet Union*.[32] Moreover, seizures in cases of art looted during the Holocaust, as well as illegal excavations, time and again lead to civil proceedings and judicial assistance in criminal cases, where immunity does not apply. Thus, an ambivalent relationship exists between state immunity and cultural heritage. Several judicial assistance proceedings in criminal matters of the Republic of Italy are currently pending in Switzerland, in which Italy does not recognise immunity under international law in cases of alleged illegal excavations where the museums in question had acquired antiquities in good faith.[33]

24 Articles 196a and 210(3) SCO.

25 Peter Mosimann, 'Der internationale Leihverkehr der Museen', in: Mosimann and Schönenberger (eds), *Art & Law 2014*, Bern: Stämpfli Verlag AG, 2014, p. 157 et seq.

26 BGE 133 III, p. 421 ('*operations classiques des musées*' in the original French text).

27 Article 253 et seq. SCO.

28 On the issue overall, see Marc-André Renold, 'Die Leihe und die Hinterlegung', in: Mosimann, Renold and Raschèr (eds), *Kultur Kunst Recht*, 2nd Edition, Basel: Helbing, 2020, p. 831 et seq.; Mosimann, *Der internationale Leihverkehr*, p. 161 et seq.

29 Article 10 et seq.

30 Regarding the procedure, see Raschèr, Renold and Desboeufs, 'Kulturgütertransfergesetz', in: *Kultur Kunst Recht,* p. 462 et seq.

31 RS 0.273.2.

32 BGE 29 January 2008, 5A.334/2007; Checchi and Renold, 'Staatliche Immunität', in: *Kultur Kunst Recht*, pp. 653 et seq.; Mosimann, in: *Art & Law 2014*, p. 172 et seq.

33 On the issue, see Checchi and Renold, 'Staatliche Immunität', in: *Kultur Kunst Recht*, p. 645 et seq.

Permanent loans or permanent lending are not legal terms. The object is on loan for the long term, and in particular, not for the short duration of a temporary special exhibition.[34] 'Long term' is to be defined and ranges from about five years to an infinite number of years.[35] Usually, there is no claim for 'adequate remuneration'; the contract does not require a special form. According to Article 117 of the Swiss Federal Act on Private International Law (PIL), the law of the party borrowing the work is applicable. This follows from the provision on the performance typical for the contract at stake. In reality, in the case of permanent loans, museums regularly provide a multitude of non-qualifiable non-gratuitous and pecuniary services based on terms and conditions that require qualifying the contract as non-gratuitous. These are the obligations to:

a exhibit, to increase the publicity and the public awareness of the loaned work;
b provide long-term storage that is safe in every respect and under ideal climatic conditions;
c transfer the insurance obligation at the lending museum's expense; and
d depending on the quality of the work, investigate the painting technique, provenance, authenticity, etc.[36]

A permanent loan, therefore, has elements of remuneration, and is rather to be qualified as a lease or deposit agreement.[37] Loan and deposit contracts with very long terms can fail due to the element of duration being morally excessive.[38] Overall, it seems more reasonable to qualify a permanent loan as a usufruct[39] in accordance with the parties' interests. Thus, a term of many decades is permissible, up to a maximum of 100 years. The contract may be renewed. Moreover, the usufruct gives each party clear legal titles under property law (i.e., ownership for the grantor of the usufruct and direct dependent possession for the usufructuary). The latter can thus defend himself or herself under property law against any unauthorised influence by third parties on his or her possession and violation of possession with precautionary dispositions.[40]

International art loans and permanent loans rarely lead to judicial disputes. It is worth mentioning disputes on compliance with conditions and obligations, especially in the case of permanent loans, in particular, after many years and once conditions have changed,[41] or in the case of international museum loans due to third-party claims (both private and public law bodies) against the owner or lender in violation of the immunity of cultural property.[42]

34 Mosimann, *Der internationale Leihverkehr,* pp. 160–1.

35 e.g., Kunstmuseum Basel, *Sari Dienes* (1898–1992), *Under Cover*, 1949, perpetual permanent loan by the Hüni-Michel-Stiftung Foundation, Basel, Inv. No. 2016.100.

36 See also ICOM Code of Ethics for Museums, Article 2.

37 Renold, 'Die Leihe und die Hinterlegung', in: *Kultur Kunst Recht*, p. 831 et seq.; Mosimann, *Der internationale Leihverkehr*, p. 165.

38 BGE 125 III, p. 365; BGE 114 II, pp. 159, 161.

39 Article 749 SCC; see, e.g., Mosimann, *Der internationale Leihverkehr*, pp. 161–2.

40 On the options of adequately structuring a usufruct agreement, see Mosimann, *Der internationale Leihverkehr*, p. 161 et seq.

41 BGE 133 III, p. 421 et seq.

42 BGE 29 January 2008, 5A.334/2007; Mosimann, *Der internationale Leihverkehr*, p. 172 et seq.; Odendahl, 'Die Immunität entliehener ausländischer Kulturgüter', *AJP* 2006, p. 1175 et seq.; Odendahl, 'Die völkerrechtliche Vollstreckungsimmunität von Kulturgütern', in: Mosimann and Schönenberger (eds), *Art & Law 2011*, Bern: Stämpfli Verlag AG, 2011, pp. 77 et seq.; Renold, 'Die Leihe und die Hinterlegung', in: *Kultur Kunst Recht*, p. 833 et seq.; Checchi and Renold, 'Staatliche Immunität', in: *Kultur Kunst Recht*, p. 641 et seq.

Furthermore, in recent years, the legal bodies of state museums have started to examine the obligations and rights of permanent museum loans more cautiously, with the result that some contracts have been rejected or not renewed. The museums are aiming, in particular, to combine permanent loans with 'promised gifts'.

iii Cross-border transactions

Cross-border transactions raise conflict of law issues. According to the PIL, international contracts are primarily subject to the law chosen by the parties.[43] If the parties did not choose the applicable law, the contract is subject to the law of the state with which the contract is more closely connected.[44] The PIL reserves the application of Swiss mandatory rules or legislation (i.e., rules that apply irrespective of the normally applicable law).[45] The ITCG is such a mandatory piece of legislation.

In this context, the most relevant rule of the ITCG is the duty of diligence in the art trade. According to this duty, provided by Article 16 of the ITCG, no cultural object should be transferred by participants to the art trade if there is any doubt as to its provenance (i.e., that it might have been stolen, plundered in illegal excavations or illicitly imported into Switzerland). The same provisions request specific duties from art dealers (know-your-client duties, keeping of a registry of transactions, etc.).[46]

iv Art finance

In the United States, pledging art as collateral to secure financing loans by a bank or a private person is not uncommon. The financing bank checks the artworks serving as collateral with regard to authenticity, provenance, quality, marketability of both artist and work, in particular, ownership, and any risk of family disputes of the owner arising from marital property and inheritance law.[47] Finally, the artwork used as security is to be evaluated. The 'risk calculus' is and remains the main issue.[48] Art is not like a corporate share in a liquid market. 'The Art Market is remarkably different from all other asset classes – it is opaque, illiquid, unregulated, non-commodity sized and emotional.'[49]

In Switzerland, pledging artworks as chattel security for loans is a lien within the meaning of Article 884 et seq. of the SCC. The pledgee is granted a limited right *in rem* by way of a pledge of chattels for the duration of the existence of the claim to be secured. Alternatively, there is the option of an assignment as security.[50] In this case, the creditor obtains possession of the security (artwork), and this serves as security for the creditor should the debtor become insolvent. Swiss law is characterised by the fact that the transfer of possession of the pledged asset (artwork) is a mandatory concept. The legal situation in

43 Article 116 PIL.

44 id., Article 117.

45 id., Article 18.

46 Gabus and Renold, *Commentaire LTBC – Loi fédérale sur le transfert international des biens culturels (LTBC)*, Geneva: Schulthess, 2006, p. 176 et seq.

47 See Stephen D Brodie, 'The Risk Calculus of Art Loans', in: Mosimann and Schönenberger (eds), *Art & Law 2013*, Bern: Stämpfli Verlag AG, 2013, pp. 61, 63 et seq.

48 id., p. 79 et. seq.

49 *Investing in Contemporary Art – What You Need to Know*, ArtVest Investment Advice for the Art Market (Newsletter, Fall 2011), p. 4.

50 Article 714 et seq. SCC.

German law is similar.[51] The principle of publicity requires that any and all rights *in rem* must be in an externally recognisable form. The transfer of ownership is necessary to pledge a chattel as security. Article 884(3) of the SCC states very clearly that the lien is not established while the pledger remains in exclusive control over the object. Constructive possession[52] is not sufficient to establish a lien.[53]

Under US law, a transfer of ownership is not required. Quite on the contrary, the artwork serving as security remains in the debtor's possession; the granting of the lien in the creditor's favour is entered in a register pursuant to Uniform Commercial Code (UCC) filing.[54] This enables the loan debtor to continue displaying their artworks at home without any change. This UCC filing system, coupled with the US floating line system,[55] is the reason why this type of financing is so popular with wealthy bank customers. The transfer of possession, which is mandatory for the Swiss 'principle of pledge of chattels', may explain why financing against the pledging of art is rare in Switzerland.[56]

The US system can be treacherous when artworks are moved abroad in an extraterritorial manner; for example, to a freeport in Geneva. Possession and pledge are based on the principle of *lex rei sitae*. Once the pledged artwork is in Switzerland, failure to transfer ownership constitutes a violation of mandatory Swiss law,[57] and the US pledge is invalid in Switzerland.

VI ARTIST RIGHTS

i Moral rights

Moral rights are stipulated in Articles 9 and 11 of the Swiss Copyright Act (SCA). According to Article 9(1) of the SCA, the author has the original right on his or her own work and the right to recognition of his or her authorship. This is considered to be a fundamental and broad clause about moral and the economic rights. From the general right, flow the particular component rights.

a The exclusive right to decide whether, when, how and under what author's designation his or her work is published for the first time.[58] This clause also serves as the exclusive right of recognition of authorship.[59]

51 Section 930 of the German Civil Code.

52 Article 924 SCC.

53 BGE 119 II, p. 326.

54 Article 9-303 Uniform Commercial Code (UCC).

55 Article 9 UCC provides that a security interest arising by virtue of an after-acquired property clause as equal status with a security interest in collateral in which the debtor has rights at the time value is given under the security agreement.

56 A survey conducted by the two authors with the major banks and several private banks has confirmed that financing against pledging of art is not common in Switzerland.

57 BGE 94 II, p. 297; see Renold, 'Art as collateral', in: Mosimann and Schönenberger (eds), *Art & Law 2010*, Bern: Stämpfli Verlag AG, p. 43 et seq.

58 Article 9(2) of the Swiss Copyright Act (SCA).

59 BGE 131 III, p. 480.

b From this clause of first publication, certain rights are depending. Only published works are subject to debt enforcement.[60] Also, only published works may be used for private use[61] and may be quoted[62] if the quotation serves as an explanation, a reference or an illustration.

c The work is considered to be published when it has been made available for the first time by the author (right to control making public).[63]

d Article 11(1) of the SCA establishes the author's right to control alterations with the exclusive right to decide whether, when and how a work may be modified, transformed into a derivative work or included in a collection. This provision grants to the author a very strict protection of the integrity of his or her work. There is an exception to this right of integrity in Article 12(3) of the SCA: works of architecture that have been constructed may be altered by the owner. This is a clause that is often debated in court.[64]

It is disputed whether moral rights are assignable.[65] Commentators argue that the core of the work of integrity is not assignable but that the author can waive his or her moral rights.[66]

ii Resale rights

There have been many attempts to introduce resale rights in Switzerland; however, the Swiss parliament has never admitted resale rights although all of the countries surrounding Switzerland have adopted it.

iii Economic rights

The SCA deals with economic rights in Article 10. Article 10(1) introduces the author's 'exclusive right, to decide whether, when and how his work is used'. This is a short clause that allows the author to make every thinkable exploitation of his or her work. Article 10(2) follows with a non-exhaustive catalogue of defined authors' rights, such as reproduction, adaptation, translation, distribution, rental, importation, performance, display and, naturally in the digital age, the very important 'making available' right. Article 10(2) begins with the words: 'The author has the right, in particular: . . . ', illustrating that the list is non-exhaustive.

In summary, Article 10 of the SCA grants authors all imaginable exploitation rights, whether already known or not, rendering the making available right unnecessary for digital use as this is already covered by the general clause of Article 10(1). This umbrella clause covers all unknown new uses.[67]

60 Article 18 SCA.

61 id., Article 19(1).

62 id., Article 25(1).

63 id., Article 9(3).

64 BGE 142 III, p. 387 – *Terrasse*; see Mosimann, 'Die Architektur im Urheberrecht', in: *Kultur Kunst Recht*, p. 887 et seq.

65 Reto M Hilty, *Urheberrecht*, Bern: Stämpfli Verlag AG, 2020, p. 240 et seq.; BGE 142 III, p. 387 – *Terrasse*.

66 id., pp. 159 and 163–4; BGE 136 III, p. 401.

67 See Hilty (footnote 65), p. 119 et seq.

iv Exceptions to copyright

The exceptions to copyright law are regulated in Articles 19 to 28 of the SCA. In a landmark ruling, the Swiss Federal Supreme Court explained the system of exceptions and developed an interpretation method:[68]

> *[The right of citation] belongs to the exceptions to copyright law . . . , which limit the copyright exclusive rights in the interest of the general public or of certain user groups. The legislator has used these provisions to regulate circumstances where fundamental constitutional rights collide, by seeking to balance the existing conflicting interests.*

The exceptions deal repeatedly with the discourse of interests of artists, intermediaries (museums, galleries, auction houses) and collectors. The Federal Supreme Court has ensured, with the aforementioned landmark ruling, that the barriers are to be interpreted in the light of diverging interests. The main exceptions for visual artists, museums, galleries and auction houses are as follows:

a use of orphan works,[69] an exception that can be combined with a new innovative clause pursuant to collective rights management exploitation and the extended collective licences of Article 43a of the SCA;

b Article 24 of the SCA on archives and back-up copies;

c use of works for the purposes of scientific research (text and data mining);[70]

d inventories[71] with the right of libraries, educational institutions, museums, collections and archives to serve the purposes of describing and making their collections accessible, and reproduce short excerpts of the works or copies of works in their collections;

e quotations;[72] and

f museum exhibition and auction catalogues.[73]

Swiss copyright law recognises a further exception, which is of major significance for the relationship of innovative creative activity between artists. According to Article 11(3) of the SCA: 'It is permissible to use existing works for the creation of parodies or other comparable variations on the work.' The wording of the end of this provision, 'or other comparable variations on the work' is of major significance. Legal commentators[74] are of the view that appropriation has always been predominant in art, namely intertextuality and interpictoriality as a principle of art. Thus, the anti-thematic treatment and art-specific consideration of the artist using a pre-existing work by a third artist can be permissible.[75]

68 BGE 131 III, p. 480 et seq. – *Georg Kreis v. Schweizerzeit*.

69 Article 22b SCA.

70 id., Article 24d.

71 id., Article 24e.

72 id., Article 25.

73 id., Article 26; see de Werra, 'Grenzen des Urheberrechtsschutzes', in: *Kultur Kunst Recht*, p. 734 et seq.

74 Mosimann, 'Die Aneignung', in: *Kultur Kunst Recht*, p. 52 et seq.

75 id., p. 63 et seq.; see also Dessemontet, *Le droit d'auteur*, GRUR: Lausanne 1999, pp. 382–416.

VII TRUSTS, FOUNDATIONS AND ESTATES

Trusts are unknown as such in Swiss law. However, since 2007, Switzerland has been a party to the Hague Convention on the Law Applicable to Trusts and on their Recognition, meaning that, subject to the provisions of the Convention, foreign trusts are generally recognised in Switzerland.

Estates are regulated by Article 457 et seq. of the SCC. Switzerland follows the tradition of civil law countries with respect to the 'reserve' of the descendants and spouse (i.e., that a certain percentage of the estate cannot be freely disposed of).

From the perspective of art and cultural objects, it is worth mentioning that a certain number of Swiss cantons have legislated in favour of the transfer of works of art in lieu of payment of inheritance taxes. This is the case in the cantons of Geneva, Vaud, Neuchâtel and Jura.

VIII OUTLOOK AND CONCLUSIONS

Switzerland is an important art market state. The market is regulated to a certain extent, in particular with regard to the transfer of cultural goods and related topics (e.g., anti-money laundering regulations). Copyright is also a field in which the law is important for the art market.

The SCA has been revised very recently, so no changes to the applicable rules are expected in the near future, although case law might bring some welcome precision to the law.

The ITCG is over 15 years old and some changes to its implementation may transpire. This is a matter that will have to be followed closely in coming years.

Chapter 27

UNITED KINGDOM

Gregor Kleinknecht and Petra Warrington[1]

I INTRODUCTION

The United Kingdom remained one of the major centres of the international art market in 2019, retaining its second position with a 20 per cent market share, equivalent to US$12.7 billion, closely behind the United States and ahead of China. Although behind these figures lay a 9 per cent decline in the UK market, driven principally by the uncertainty around Brexit, the UK continued to dominate the European art market.[2] UK auction sales accounted for US$4.3 billion in sales, down by 20 per cent year on year, roughly in line with the change in total auction sale volumes worldwide, excluding private treaty sales.[3] The four large London auction houses (Christie's, Sotheby's, Bonhams and Phillips) typically account for around 70 per cent to 75 per cent of UK total auction sales.[4]

By contrast, dealer sales were largely stable.[5] Art fairs remained a critical part of the art market's infrastructure in 2019, accounting on average for 45 per cent of dealer sales.[6]

Like all other art market centres, the UK market was fundamentally affected by the coronavirus pandemic in 2020, with a large number of art fairs cancelled, dealers and galleries closing for several months during the national lock-down, and economic uncertainty contributing further to declining sales. UK galleries expected a 79 per cent drop in revenue this year, according to an *Art Newspaper* survey from April 2020.[7] According to the first comprehensive analysis of the impact of covid-19 on the gallery sector, published by Art Basel and UBS, art gallery sales fell by an average 36 per cent in the first half of 2020 with a majority of galleries expecting sales to continue to decrease for the rest of the year.[8] Earlier research by ArtTactic found that auction sales fell by 49 per cent for the leading auction houses in the first half of 2020.[9]

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1 Gregor Kleinknecht is a partner and Petra Warrington is a senior associate at Hunters Law LLP. The authors are grateful to colleagues Julia Richards and Vanina Wittenburg for their contribution to the 'Trusts, foundations and estates' section of this chapter. The law as stated is the law of England and Wales.

2 *The Art Market 2020*, an Art Basel and UBS Report, prepared by Dr Clare McAndrew, p. 17.

3 id., p. 134.

4 Laura Chesters, 'UK remains in second place in the global art market league table', *Antiques Trade Gazette*, 5 March 2020, www.antiquestradegazette.com/news/2020/uk-remains-in-second-place-in-global-art-market-league-table.

5 *The Art Market 2020*, an Art Basel and UBS Report, prepared by Dr Clare McAndrew, p. 18.

6 id., p. 186.

7 Georgina Adam, 'The art market shapes up for a post-pandemic future', *FT Magazine*, 18 September 2020.

8 Art Basel and UBS Report: 'The Impact of COVID-19 on the Gallery Sector: A 2020 mid-year survey'.

9 Melanie Gerlis, 'Art market report shows the severe impact of Covid-19', *Financial Times*, 9 September 2020.

At the same time, the pandemic accelerated the move by auction houses, dealers and art fairs to online platforms, viewing rooms and transactions. According to Art Basel and UBS, the share of online gallery sales rose from 10 per cent of total sales in 2019 to 37 per cent in the first half of 2020.

As covid-19 enters a second wave in the UK and across Europe in the autumn of 2020, it remains to be seen whether the UK art market is both sufficiently resilient and innovative to weather the coming months.

II THE YEAR IN REVIEW

While the impact of covid-19 on the art market has been attracting most of the news headlines over recent months, the art market continues (at the time of writing) to be affected by the uncertainty about the future relationship between the UK and the EU post-Brexit. It also faced a number of significant new statutory changes and regulatory developments this year, including the implementation of the 5th EU Anti-Money Laundering Directive (5AMLD) as of 10 January 2020, which means that the art trade will face an increase in regulation and transparency that will at first feel alien and inquisitorial. While large international art businesses and auction houses will be able to adapt to the changes in the law relatively seamlessly, small businesses and sole traders that do not have the same resources at their disposal are likely to find compliance more of an administrative and technical burden.

On 18 May 2020, the Court of Appeal of England and Wales rejected an appeal in the judicial review proceedings against the Ivory Act 2018, one of the world's toughest bans on the trade and cross-border movement of antique ivory.[10] On 30 July 2020, the UK Supreme Court rejected an application for permission to appeal further the decisions dismissing the judicial review claims.[11] The Act is now expected to come into effect in the foreseeable future although certain secondary legislation required to implement the Act has yet to be brought forward.

III ART DISPUTES

i Title in art

Under the Sale of Goods Act 1979 (SGA), title passes when the parties to a transaction intend it to pass. Where this is not set out in contract, various assumptions assist with ascertaining when the parties to a contract intended title to pass. In the case of a private treaty sale of an artwork, title would be assumed to pass when the contract is entered into. Parties will generally displace this rule in their contract for sale by stipulating that title passes on payment of the purchase price. Auction terms also generally stipulate that title to a lot passes on payment, rather than on the fall of the hammer, which is the point at which the contract is usually formed at auction.

10 [2020] EWCA Civ 649.

11 UKSC 2020/0121.

The SGA implies certain terms into contracts of sale, including that, unless the seller expressly sells goods subject to limited title (or this can be inferred from the circumstances of the sale), the seller has a right to sell the goods, that the goods are free from any undisclosed charge or encumbrance, and that the buyer will enjoy quiet possession of the goods.[12]

As news headlines demonstrate, there have been a number of recent high-profile cases of art agents and dealers acting dishonestly, including by selling artworks more than once to different parties, or without permission from their owners, or by fraudulently securing loans against artworks. London, being one of the centres of the international art market, has attracted its share of such fraudsters. Inigo Philbrick, who was arrested by the FBI in the summer of 2020,[13] had a gallery in Mayfair. Matthew Green, part of the Green dynasty of art dealers in Mayfair, has been accused of fraudulent dealings and convicted of contempt of court for failing to cooperate in legal proceedings in the UK.[14] Also this year, art intermediary Angela Gulbenkian faces charges of theft and fraud and is reportedly awaiting extradition to the UK.[15]

Although the buyer has no legal duty to enquire into title under English law, this is of no comfort if the buyer has been the victim of fraud. Ultimately, the buyer, for his or her own protection, is responsible for performing due diligence in relation to the transaction and establishing good title. This includes making sufficient enquiries into the identity and reputation of the seller and the provenance of the artwork, and checking registers of lost or stolen art. A buyer who fails to perform due diligence may also unwittingly expose himself or herself to a claim by the true owner in conversion if an artwork is discovered to be stolen or otherwise misappropriated. In that case, the burden of proving that the purchase was made in good faith rests with the buyer.

A buyer who knowingly purchases stolen or illicitly excavated or exported cultural objects faces potential sanctions under criminal law. Under the Dealing in Cultural Objects Offences Act 2003, the Theft Act 1968, the Cultural Property (Armed Conflicts) Act 2017 and the Proceeds of Crime Act 2002, a dishonest buyer might commit various offences, including dealing in cultural objects that are tainted, handling stolen goods, or acquiring or possessing criminal property.

ii Nazi-looted art and cultural property

Claims related to art spoliated during the Nazi era typically crystallise in the London art market when artworks with tainted provenance are consigned for sale at auction or otherwise offered for sale; such claims are then generally resolved through negotiation between the claimants and present owners of the artwork, where appropriate, involving mediation. Historic claims are unlikely to succeed in civil court proceedings where the Limitation Act 1939 applies and claims have invariably become time-barred.

The Spoliation Advisory Panel was established for the purposes of the Holocaust (Return of Cultural Objects) Act 2009 and considers claims from anyone (or from any one or

12 Section 12(1) to (3), Sale of Goods Act 1979.

13 Reported in *The Art Newspaper*, www.theartnewspaper.com/news/art-dealer-inigo-philbrick-arrested-on-pacific-island-by-fbi.

14 Reported in *The Telegraph*, www.telegraph.co.uk/news/2020/01/11/fine-art-dealer-ran-10m-debts-fled-rehabilitation-clinic-spain.

15 Reported by Bloomberg, www.bloomberg.com/news/articles/2020-06-18/german-art-collector-wanted-in-the-u-k-arrested-in-portugal.

more of their heirs) who lost possession of a cultural object during the Nazi era (1933–1945), where such an object is (1) now in the possession of a UK national collection, or (2) in the possession of another UK museum or gallery established for the public benefit. The Panel's paramount purpose is to achieve a solution that is fair and just both to the claimant and to the institution. The Panel's proceedings are an alternative to litigation, not a process of litigation. The Panel will therefore take into account non-legal considerations, such as the moral strength of the claimant's case.

If the Panel upholds the claim in principle, it may recommend:

a the return of the object to the claimant;

b the payment of compensation to the claimant, the amount being in the discretion of the Panel having regard to all relevant circumstances including the current market value, but not tied to that current market value;

c an *ex gratia* payment to the claimant;

d the display alongside the object of an account of its history and provenance during and since the Nazi era, with special reference to the claimant's interest therein; or

e that negotiations should be conducted with the successful claimant to implement such a recommendation as expeditiously as possible.

The Panel's recommendations are not legally binding but have, to date, in each case been accepted and implemented by the Secretary of State. The Panel operates under its own terms of reference and rules of procedure.[16]

The Panel also provides a private mediation service and may be designated to advise about any claim for an item in a private collection at the joint request of the claimant and the owner. The authors are not aware that the Panel has ever given advice in such a case.

Following the London Spoliation Conference in 2017, the Spoliation Advisory Panel and restitution committees of France, Germany, Austria and the Netherlands have come together to form a Network of European Restitution Committees for the purpose of enabling greater collaboration and information sharing between the committees.[17]

iii Limitation periods

Limitation periods for art claims are governed by the Limitation Act 1980. The general time limit for an action founded on tort or contract is six years from the date on which the cause of action accrued. The start of the limitation period can be deferred in cases where an action is based on the defendant's fraud or concealment of the claimant's right of action, or in cases where a mistake has taken place. In such cases, the limitation period runs from the time when the claimant discovered, or could with reasonable diligence have discovered, the fraud, concealment or mistake. The general limitation period still applies in cases of theft but, to prevent time running in favour of the thief, the limitation period is suspended in cases where a chattel has been stolen until the chattel is purchased in good faith by a third party, at which point time begins to run.

The position was different under the previous Limitation Act 1939, which applied until May 1981. Under that legislation, the six-year limitation period started running from

16 www.gov.uk/government/groups/spoliation-advisory-panel.

17 www.gov.uk/government/groups/spoliation-advisory-panel#uk-joins-network-of-european-countries-to-increase-cooperation-on-returning-nazi-looted-art.

the original conversion, rather than a good faith purchase. This is particularly significant in relation to historic claims involving the looting of objects during the Nazi era as legal title will inevitably have been extinguished where a conversion can be established.

iv Alternative dispute resolution

Alternative dispute resolution (ADR), including mediation, arbitration and expert determination, has become an established part of the dispute resolution toolkit in the UK. The fact that ADR proceedings can be agreed to be confidential, and lend themselves to the resolution of cross-border and multiparty disputes much more readily than proceedings before a national court, makes them particularly suited to the resolution of art and cultural heritage disputes.

It is now a well-established principle under the Civil Procedure Rules that a party to court proceedings that refuses to engage in ADR at the request of another party may be ordered to pay some (or even all) of the other party's costs of the proceedings if the court determines that the refusal to mediate was unreasonable, even if the party is successful at the trial.

The Civil Mediation Council serves as an independent body to represent and promote civil and commercial mediation in the UK; it promotes best practice and operates an accreditation scheme for organisations that provide mediation services.[18] Art Resolve provides specialist art mediation service in the UK.[19]

IV FAKES, FORGERIES AND AUTHENTICATION

The principle of *caveat emptor*, or buyer beware, applies to the purchase of artworks. The level of due diligence that is required by the buyer will depend on factors such as the relative experience of the buyer and the seller, and the reliance placed by the buyer on the seller's expertise in the subject matter. The outcomes of authenticity disputes usually turn substantially on their facts.

If an artwork turns out to be a fake or forgery, a buyer's recourse may depend on whether the artwork was bought through a dealer or at auction. Most major auction houses offer a limited contractual authenticity guarantee in relation to artworks catalogued without qualification as being by a particular artist, which entitles the buyer, subject to various conditions being fulfilled, to return an artwork within a set time period if the work turns out to be a fake or forgery.

Such authenticity guarantees also usually extend to private treaty sales via auction houses. This was recently illustrated in a dispute involving a painting attributed to Frans Hals. In 2010, Sotheby's brokered the sale of the painting between co-owners, Fairlight Art Ventures (Fairlight) and London dealer Mark Weiss, and US collector Richard Hedreen, who paid US$10.75 million for the painting. A few years later, following scientific analysis of the painting, Sotheby's accepted that the painting was a forgery, rescinded the contract for sale, and refunded the full purchase price to the buyer. Litigation ensued over whether the sellers were in the circumstances legally liable to repay their portions of the sale proceeds to

18 https://civilmediation.org.

19 https://artresolve.org.

Sotheby's. The sellers maintained that the painting was genuine and refused to agree a refund. Mr Weiss eventually settled out of court while Fairlight and Sotheby's continued to trial. The High Court found in Sotheby's favour in December 2019.[20]

Dealers may offer a contractual warranty or, if the contract is silent on these points, certain statutory warranties in relation to the quality of an artwork, its fitness for purpose and whether it matches its description will be implied into the contract for sale either under the SGA,[21] in business-to-business sales, or under the Consumer Rights Act 2015 (CRA)[22] in business-to-consumer sales.

If a sale is deemed a sale by description, and the artist is wrongly identified, the buyer will in principle have the right to cancel the sale. Traditionally, however, the English courts have not regarded sales of artworks, even if the artwork is clearly attributed to a particular artist, as sales by description. The case law in this regard has consistently concerned sales between art market professionals on both sides of the transaction and it remains to be seen whether the courts would be prepared to imply more readily a sale by description in a transaction between a dealer and a consumer, given the protections now afforded to consumers by the CRA.

V ART TRANSACTIONS

i Private sales and auctions

The operation of the art market has been greatly affected by covid-19. The increasing shift from face-to-face transactions to online dealings during the pandemic has had far-reaching legal and practical implications for art businesses of all types and sizes. Like other jurisdictions, the UK has seen an increase in online auctions and private treaty sales, both in the primary and secondary markets, being executed by remote means, as well as artists and dealers making greater use of online viewing rooms and social media platforms to market and sell works directly to an expanded and often global client base.

Many auction houses offered online sales before the pandemic but nevertheless faced a logistical challenge in moving more sales to an online format, due to the lack of opportunities for pre-sale viewings and changes to collection and delivery processes. Sales that try to preserve a traditional format with an auctioneer standing at a rostrum and taking bids on commission and via telephone, as well as online, are still classified as 'online only' sales if members of the public are not able to attend in person. This has implications, in particular, for the application of consumer protection legislation to such sales.

Sales of artworks to individuals are regulated in the UK through a range of consumer protection legislation, of which the CRA and the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 are of primary importance. The effect of this legislation is to impose requirements on art businesses selling to individuals, including to make prescribed information available to the consumer in writing before a contract is entered into, to imply various seller warranties into any contract for the sale of an artwork, and to inform the consumer about applicable cancellation rights if the sale is made off-premises (away from the trader's usual business premises) or by distance means

20 Case No. CL-2017-000071, unreported.

21 Sections 13–14, Sale of Goods Act 1979.

22 Sections 9–11, Consumer Rights Act 2015.

(e.g., telephone, email or via a website). Consumer protection legislation in the UK is largely derived from EU directives and regulations and it remains to be seen whether they will eventually be amended or revoked altogether following the end of the Brexit transition period.

ii Art loans

Loans of artworks for exhibition from private lenders to public museums will typically be insured under the Government Indemnity Scheme, which is administered by the Arts Council England.[23] Importantly, certain risks are excluded from cover under the scheme and borrowers and lenders should consider taking out additional commercial insurance cover for excluded risks.

Sections 134 to 138 of Part 6 (Protection of Cultural Objects on Loan) of the Tribunals, Courts and Enforcement Act 2007 provide immunity from seizure for the loan of certain artworks usually kept outside of the UK and not owned by a person who is resident in the UK, when the work enters the UK for temporary public not-for-profit exhibition at an approved museum or gallery. They are supplemented by the Protection of Cultural Objects on Loan (Publication and Provision of Information) Regulations 2008.

iii Cross-border transactions

The importation of cultural goods into the UK is not currently subject to any licensing regime, although certain imports are prohibited (e.g., on the basis of United Nations sanctions (see further below) or in the case of material originating from endangered species (e.g., ivory) under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)).

The cross-border movement within the EU of cultural goods originating from outside the EU is now affected by Regulation (EU) 2019/880, which came into force on 27 June 2019, although it remains to be seen what its impact will be in the UK following the end of the Brexit transition period. The Regulation requires the creation of a central electronic database for the licensing and registration of cultural goods, which must be implemented no later than 28 June 2025 and, as of 28 December 2020, prohibits the import into the EU of certain cultural objects of particular importance, whether for archaeological, historical, literary, artistic or scientific reasons, that have been illegally removed from their country of origin. Cultural objects that have been legally introduced to the EU and meet certain age and value thresholds will require a licence or importer statement.

In the meantime, the UK continues to operate a two-tier system in relation to any proposed exports of cultural goods from the UK, whether of a temporary or permanent nature. Regulation (EC) No. 116/2009 on the export of cultural goods (as amended) (the Regulation) regulates the export of certain cultural goods by requiring a Community licence to export them from the UK to a destination outside of the EU. UK national law applies if an item is being exported from the UK to a destination within the EU. From 1 January 2021, the UK rules will apply to all exports, regardless of their destination, although EU licences granted prior to that date will continue to be valid for their term and restrictions relating to any licences already in operation, such as temporary EU licences, will continue to apply.

The established framework for the UK export control regime is found in the Export Control Act 2002 and the Export of Objects of Cultural Interest (Control) Order 2003 (as

23 www.artscouncil.org.uk/protecting-cultural-objects/government-indemnity-scheme.

amended). Export licences are also subject to any sanctions in place and goods cannot be sent to embargoed destinations. Currently, the Iraq (United Nations Sanctions) Order 2003 prohibits the import or export of cultural property illegally removed from Iraq since 6 August 1990 and the Export Control (Syria Sanctions) (Amendment) Order 2014 prohibits the import or export of cultural property illegally removed from Syria since 15 March 2011.

The requirement for an export licence under the UK or EU rules is linked to the type of cultural goods in question, their age, value and how long they have been in the UK. The export control system operates by placing temporary export bars on items of 'national importance' to allow public institutions in the UK to raise funds to make a matching offer to purchase them at fair market price. National importance is judged by a group of experts in accordance with the Waverley criteria, to establish whether the item in question has a particularly close connection with the UK's history and national life, or is of outstanding aesthetic importance or scholarly significance. If one or more of the criteria is met, and the Secretary of State temporarily defers the decision to grant the export licence, public institutions are invited to put forward offers. The owner of the item is not compelled to agree a sale to any interested institution but is unlikely to be granted an export licence if he or she refuses an offer.

Import and export law rarely features in case law, with the recent exception of *R (Simonis) v. Arts Council England*,[24] which was heard and dismissed by the Court of Appeal in March 2020. The appeal concerned a painting entitled *Madonna con Bambino*, attributed to Giotto, which had made several journeys to and from Italy, where it was purchased in 1990, before the owner sought a permanent export licence to send the painting from the UK to Switzerland. The Arts Council decided that Italy, rather than the UK, was the competent authority under EU law to determine whether the export licence should be granted, given that the painting's earlier dispatch from Italy to the UK in 2007 had not been 'lawful and definitive' within the meaning of the Regulation. Both the court at first instance and the Court of Appeal agreed with the Arts Council. The result was that the owner of the painting would either be forced to return the painting to Italy, and to apply to the Italian authorities for an export licence to Switzerland, which is unlikely to be granted given Italy's stringent export laws, or for the painting to remain in the UK subject to restrictions on its movement.

iv Art finance

Art lending (i.e., the borrowing of money secured against art, antiques or other collectibles as security) is under-developed in the UK compared to other major art market centres, such as New York. Under English law, there is no fit-for-purpose non-possessory security interest for artworks where the borrower is an individual, although corporate borrowers can create a chattel mortgage. The Law Commission has produced a Goods Mortgages Bill, which has not, however, so far been brought forward by the government; the legal position is therefore unlikely to change in the foreseeable future. It remains to be seen whether the bill will be brought forward after Brexit to support the development of the London art market.

On 10 January 2020, 'art market participants' (including dealers, galleries, agents and auctioneers) became part of the 'regulated' sector for anti-money laundering purposes under the new Money Laundering and Terrorist Financing (Amendment) Regulations 2019, which implement the 5AMLD into UK law.

24 [2020] EWCA Civ 374.

Members of the art trade who carry out transactions, or series of linked transactions, involving works of art valued at €10,000 or more must now conduct ongoing risk-based due diligence on the parties involved in those transactions. The definition of works of art is in line with current VAT legislation and excludes antique furniture and some decorative objects.

Her Majesty's Revenue and Customs (HMRC) is the supervising body responsible for overseeing art market participants, keeping a register of supervised businesses, and checking that they are complying with their obligations under the new regulations. Failure to comply with the regulations is an offence, which can result in a range of sanctions including fines, suspension from dealing in high-value transactions and imprisonment.

Compliance includes putting into place risk assessments for new and existing clients, implementing anti-money laundering policies and procedures (and ensuring that they are followed), appointing a nominated officer and a compliance officer, where appropriate, and continually monitoring and training staff. Art market businesses were originally required to register with HMRC by January 2021 but this deadline has now been extended to 10 June 2021; businesses are nevertheless expected to carry out risk assessments and put policies and procedures in place to ensure they are compliant before that date.

Importantly, the new money laundering compliance regime will have ramifications beyond the UK and EU in so far as it will affect non-European buyers who seek to purchase artworks in galleries, at fairs or at auction in the UK as much as non-European dealers who transact as buyers and sellers in the London market, whether in person or online.

On 7 February 2020, the British Art Market Federation published guidance on anti-money laundering for UK art market participants, which was approved by HMRC.[25]

VI ARTIST RIGHTS

i Moral rights

Moral rights are personal rights granted to the creators of artistic works, pursuant to Chapter IV of the Copyright, Designs and Patents Act 1988. The four components of moral rights are identified as: (1) the paternity or attribution right, which is the right of an artist to be identified as the creator of a work; (2) the right of integrity, which is the right of an artist to object to derogatory treatment of his or her work; (3) the right not to have a work falsely attributed, which entitles an artist not to be identified as the creator of a work created by someone else; and (4) the right to privacy in certain photographs and films. Like the economic rights associated with copyright described further below, moral rights arise automatically, except for the right of attribution, which must be asserted by the artist. Moral rights can be waived by the artist but are not capable of assignment.

ii Resale rights

Artists' resale rights (ARR) were introduced to the UK via the Artist's Resale Right Regulations 2006, implementing a European directive. Originally, the rights were restricted to living artists until January 2012, when amending legislation came into force entitling successors of deceased artists to exercise any inherited resale rights. Subject to certain exceptions, ARR entitles artists and their heirs to claim a percentage of the sale price on any resale of an

25 www.gov.uk/government/publications/art-market-participants-guidance-on-anti-money-laundering-supervision.

original artwork in the secondary market (i.e., through an auction house or other art market professional), while copyright in that artwork subsists. ARR is collected and distributed through two entities in the UK: the Artists Collecting Society and the Design and Artists Copyright Society. Since their introduction, ARR have been subject to criticism by art market professionals and it remains to be seen whether they will be retained in the longer term after Brexit.

iii Economic rights

Copyright is the most significant intellectual property right subsisting in an artist's works and is designed to protect the artist's economic interests. Unlike in certain other jurisdictions, under UK law copyright arises automatically at the point when an original artwork is created if the artist meets the criteria for protection under national law and does not require registration. For artistic works, the term of copyright is the life of the author plus 70 years from the end of the calendar year in which the author died. Copyright can be transferred by inheritance, licensed or assigned.

In view of Brexit, the UK government does not intend to implement the controversial Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC into UK law but has stated that any future changes to the UK copyright framework will be considered as part of the usual domestic policy process.[26]

More unusually, artists may try to protect their creations, brands or names by registering a trademark. An ultimately unsuccessful attempt was made by the street artist Banksy, through his representatives, Pest Control Office Limited, to trademark his well-known *Flower Thrower* image. Following a complaint by a greeting card company, Full Colour Black, the EU trademark was invalidated in September 2020 by the European Union Intellectual Property Office on the grounds of bad faith, the office concluding that Banksy showed no intention to use the trademark to commercialise goods at the time of its registration.[27] The decision throws into question whether other trademarks in the artist's portfolio will face similar challenge.

VII TRUSTS, FOUNDATIONS AND ESTATES

Trustees holding and managing art collections are not subject to wealth tax in the UK, but they may be liable to inheritance tax (IHT) or capital gains tax (CGT) on certain events.

The IHT treatment of art collections will depend on the nature of the trust. Where the trust is subject to the 'relevant property regime' (broadly speaking, discretionary trusts), then the trustees will generally be liable to IHT every 10 years or on appointments out of the trust, currently at a maximum rate of 6 per cent on the value of the trust fund, if the assets do not qualify for exemption. If the trust is a life interest trust, then no IHT will arise until the death of the life tenant or earlier termination of the life interest.

26 https://questions-statements.parliament.uk/written-questions/detail/2020-01-16/4371.

27 https://euipo.europa.eu/eSearch/#details/trademarks/012575155.

Relevant IHT exemptions include the following.

a Conditional exemption, which is an IHT deferral scheme. The tax may be clawed back on a subsequent transfer or failure to observe the terms of the undertakings. To qualify for this exemption, the assets must meet a pre-eminence test and the owner is required to provide undertakings as to public access and the maintenance and preservation of the assets. The exemption can be claimed on certain chargeable events, including when assets are transferred by an individual into a trust, preventing an immediate IHT charge. In certain circumstances it can also be claimed to defer CGT. Conditional exemption was historically regarded as a good way to hand down family heirlooms to the next generation in a tax-efficient manner, but the rules have tightened significantly in relation to public access and can often be burdensome on a new owner.

b The acceptance in lieu scheme allows trustees to offer artwork to public institutions in exchange for IHT tax credit. A wish can be expressed as to the ultimate destination of the property. To qualify for this exemption, the objects must either be of pre-eminent importance on the grounds of their national, scientific, historic or artistic interest, or associated with an important historic building.

c Business property relief may be available at 100 per cent if the artwork is situated in a building that is open to the public and run as a business.

Trustees are liable to CGT (currently at 20 per cent) on the disposal of chattels exceeding £6,000 in value (although there are special rules about the treatment of sets of chattels). However, no CGT is payable on 'wasting assets' (i.e., assets with a predictable life not exceeding 50 years, including fine wines, antique clocks and watches, and some motor vehicles), provided the disposal is not deemed to be made as part of a trade or business.

VIII OUTLOOK AND CONCLUSIONS

As we approach the end of 2020, the art market continues to face uncertainty about the future relationship between the UK and EU; at the same time, the reach of the UK art market has always been much wider than Continental Europe and no doubt London will continue to thrive as a leading centre of the international art market. Covid-19-related restrictions are tightened as the UK faces a second wave of the pandemic. Both issues will no doubt continue to dominate headlines for some time to come. But there will be other developments to watch as we enter 2021, in particular, the way in which the government will implement proposals for a network of new freeports across the UK following the end of the Brexit transition period, with the first of the new sites expected to be open for business in 2021, and the impact they will have on the London and the UK as an art market hub.[28] Art market participants will need to keep their focus on implementing the requirements of 5AMLD in anticipation of HMRC as the sector regulator starting to police and enforce the tighter anti-money laundering and compliance regime in the course of next year.

28 www.gov.uk/government/news/government-outlines-new-plans-for-freeports-to-turbo-charge-post-brexit-trade.

Chapter 28

UNITED STATES

Lawrence M Kaye, Howard N Spiegler, Yael M Weitz and Gabrielle C Wilson[1]

I INTRODUCTION

The US art market is diverse in its composition, with stakeholders that include art dealers and galleries, advisers and appraisers, auction houses, museums, private collectors, foundations and artists. The laws that govern the art transactions and legal disputes among these market players comprise a varied combination of federal and state laws, differing in content and application depending on the jurisdiction and the matter involved.

On a global scale, the US art market is considered the largest in the world. In 2019, sales reached an estimated US$28.3 billion, with an estimated market share of 44 per cent of global sales.[2] However, since the spring of 2020, the coronavirus pandemic has had a significant impact on the art market. With restrictions on travel and other covid-19 limitations in place, much of the art business is now being conducted online. For example, galleries report a rise of online sales from 10 per cent of total sales in 2019 to 37 per cent in the first half of 2020.[3] Online auctions[4] and online viewing rooms in place of in-person art fairs[5] have also seen growth amid the pandemic. But this shift has not stopped the economic damage of covid-19. Although the long-term effect of covid-19 is still unknown, to date, it has severely affected certain sectors of the market, including art galleries[6] and museums[7] in the United States.

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2 See Clare McAndrew, *The Art Market 2020*, Art Basel & UBS Report, available for download at www.artbasel.com/signin?redirect=/theartmarket2020. Although sales in 2019 declined by 5 per cent as compared to 2018, the market in 2019 was at its second-highest level in history.

3 See Clare McAndrew, *The Impact of COVID-19 on the Gallery Sector*, Art Basel & UBS Report, https://d2u3kfwd92fzu7.cloudfront.net/The_Art_Market_Mid_Year_Survey_2020-1.pdf.

4 See, e.g., Abby Schultz, 'Online-Only Auction Sales Rise 255% in 2020', *Barron's* (14 September 2020), www.barrons.com/articles/online-only-auction-sales-rise-255-in-2020-01600113303.

5 See, e.g., Melanie Gerlis, 'Art fairs in the virtual world', *Financial Times* (16 September 2020), www.ft.com/content/b08ff88f-0e4e-42da-8ab7-d57c8cabeaad.

6 See Clare McAndrew, footnote 3.

7 See, e.g., Letter to members of Congress from the American Alliance of Museums, www.aam-us.org/wp-content/uploads/2020/03/3.18.2020-Museum-Community-Economic-Relief-Request-Letter-FINAL.pdf.

II THE YEAR IN REVIEW

Art fraud and financial crimes perpetrated by means of art transactions have been in the forefront of art news in the US. Unlike other markets in the US, the art market remains largely unregulated, making it the 'largest unregulated market in the world'.[8] Indeed, there exists no regulatory agency in the United States overseeing art transactions that is equivalent to, for example, the Securities and Exchange Commission, which regulates the US securities market. This lack of regulation has created a lack of transparency in the art market that makes it vulnerable to fraud, money laundering and other financial crimes.

A recent example of the effects of this involves the now-disgraced art dealer, Inigo Philbrick, who has been accused of defrauding clients of over US$20 million and has been charged with wire fraud and aggravated identity theft. According to the government's complaint, Philbrick knowingly 'misrepresented' the true ownership of the artworks at issue, 'for example, by selling a total of more than 100 percent ownership in an artwork to multiple individuals and entities without their knowledge; and by selling artworks and/or using artworks as collateral on loans without the knowledge or permission of co-owners, and without disclosing the ownership interests of third parties to buyers and lenders'.[9] If convicted, Philbrick could be sentenced to a maximum prison term of 20 years for wire fraud, and a mandatory prison sentence of two years for aggravated identity theft. At the same time, civil lawsuits have been filed in multiple jurisdictions by Philbrick's former clients and investors in connection with artworks affected by the fraud scheme.

Around the globe, jurisdictions outside the US have put in place laws to combat this type of opacity in the art market;[10] and the US may also follow suit. In July 2020, the US Senate's Permanent Subcommittee on Investigations released a report documenting the lack of transparency in the US art market and recommending, among other things, that Congress amend the Bank Secrecy Act (BSA)[11] to add art to the 'list of industries that must comply with BSA requirements'.[12] According to the report, '[i]llegal activity, including money laundering, in the art market is made possible, in part, because the art market is generally not subject to the transparency requirements of the [BSA]'.[13] The BSA, which is the primary anti-money laundering law in the US, currently applies to 'dealers in precious metals, stones and jewels, as well as sellers of automobiles, planes and boats, casinos, real estate professionals, travel agencies and pawnshops'[14] – but not to dealers in art. Whether Congress will enact legislation to amend the BSA remains to be seen.

8 The Financial Crimes Task Force, 'Reframing U.S. Policy on the Art Market, Recommendations for Combatting Financial Crimes' (September 2020), https://theantiquitiescoalition.org/developing-implementing-solutions/financial-crimes-task-force/#report.

9 Complaint at 1–2, *U.S. v. Inigo Philbrick*, No. 1:20-mj-04507 (S.D.N.Y. 30 April 2020).

10 See The Financial Crimes Task Force, Global Anti-Money Laundering Legislation ('[O]ther major market jurisdictions – including the United Kingdom, Switzerland, and the European Union – have already taken similar action to fight money laundering and terrorist financing in their art markets . . .'), https://theantiquitiescoalition.org/developing-implementing-solutions/financial-crimes-task-force/.

11 Bank Secrecy Act of 1982, Pub. L. No. 97-258, codified at 31 U.S.C. § 5304.

12 United States Senate Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, Staff Report, 'The Art Industry and U.S. Policies That Undermine Sanctions', www.hsgac.senate.gov/download/majority-and-minority-staff-report_-the-art-industry-and-us-policies-that-undermine-sanctions.

13 id.

14 The Financial Crimes Task Force, footnote 8.

III ART DISPUTES

i Title in art

The Uniform Commercial Code (UCC), which has been adopted by every state in the United States, is a collection of laws governing commercial transactions in the US.[15] Sales of tangible personal property, such as fine art, are governed by Article 2 of the UCC. Article 2 provides that title to artwork will generally pass from the seller to the buyer upon the physical delivery of an artwork.[16] But, where the seller does not possess good title – such as when the artwork has been stolen or where some other defect in title exists – title may not transfer to the buyer, often leading to a title dispute.

A basic tenet of US law is that no one, not even a good-faith purchaser for value, can obtain good title to stolen property. This rule applies regardless of whether the purchaser acquired the artwork at auction or by private sale, or from a subsequent purchaser rather than directly from the thief. This is because title to stolen property is considered void.

In contrast, a good-faith purchaser for value may acquire title to an artwork where the transferor possesses voidable title.[17] The UCC illustrates specific instances in which voidable title may arise, including, for example, when '(a) the transferor was deceived as to the identity of the purchaser, or (b) the delivery was in exchange for a check which is later dishonored . . .'[18] The UCC also allows a merchant – such as an art dealer, gallery or auction house – to transfer good title to a buyer in the 'ordinary course of business', where the artwork was entrusted to that merchant. This provision is commonly referred to as the 'entrustment doctrine'.[19]

Recently, in *Richmond v. F-40 Restoration*, the US District Court for the District of Connecticut examined the relative ownership rights to an antique car, a rare 1934 Pierce Arrow coupé, analysing both the entrustment doctrine and the application of void, versus voidable, title.[20] Although the property at issue in this case was an antique car, the Court's analysis would be equally applicable to a work of fine art or other art object. The claimant in *Richmond* had hired a restorer to inspect, negotiate for and purchase the Pierce Arrow on his behalf. Several years later, without consent from the claimant, the restorer sold the car to a third party. The Court first examined whether the entrustment doctrine applied. Since the restorer did not regularly engage in the sale of antique cars and had specifically disavowed having a dealer's licence or being in the business of selling vehicles, he was not a 'merchant' under the UCC; therefore, the doctrine did not apply. The Court then held that, in any event, any title the restorer had in the car was void, not merely voidable. Thus, 'even assuming *arguendo* that the [subsequent possessors] qualify as good faith purchasers for value', their title, which traced back to the restorer, remained 'void under Section 2-403(1)'.[21]

15 www.uniformlaws.org/acts/ucc.

16 U.C.C. §2-401(2) ('Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place . . .').

17 U.C.C. § 2-403(1).

18 id.

19 U.C.C. § 2-403(2).

20 *Richmond v. F-40 Restoration, LLC*, No. 3:18-CV-01409 (KAD), 2020 WL 3316052 (D. Conn. 18 June 2020).

21 id.

ii Nazi-looted art and cultural property

Nazi-looted art

In the United States, civil claims for the return of art misappropriated by the Nazis are determined by the courts or otherwise resolved through alternative dispute resolution (ADR). Unlike in many European countries, there is no restitution commission or committee that has been established by the US government for evaluating claims to artworks that were lost during the Nazi era. In part, this is due to the federal government's limited involvement in the operation of museums; the vast majority of US museums are privately owned or are owned by state and municipal authorities. Thus, restitution claims, whether against an individual or a museum, are decided under state law, which at times can vary widely from state to state.

In 1998, the US government convened the Washington Conference on Holocaust-Era Assets, held in Washington, DC, to consider the issues raised by the continuing discovery of Nazi-looted assets, including artworks. The Conference promulgated the Washington Conference Principles on Nazi-Confiscated Art (the Washington Principles), adopted by 44 nations. The Washington Principles invited Holocaust victims and their heirs to assert claims for the recovery of artworks and encouraged affected nations to develop processes to implement the principles and address disputes as to the artworks to achieve a 'just and fair' solution.[22] At the subsequent Prague Holocaust Era Assets Conference in 2009, 46 nations, including the US, signed the Terezin Declaration on Holocaust Era Assets and Related Issues (the Terezin Declaration), which reaffirmed the core tenet of the Washington Principles that it is essential to 'facilitate just and fair solutions with regard to Nazi-confiscated and looted art . . .'[23] The participating states urged, through the declaration, that all parties, including public and private institutions, adhere to its principles.

In 2019, an appellate court in New York affirmed a decision ordering two pieces of Nazi-looted art to be returned to the heirs of their original Jewish owner, Fritz Grunbaum, a prominent cabaret performer in 1930s Vienna and a prolific collector of art.[24] The lower court, in applying the Holocaust Expropriated Art Recovery (HEAR) Act (discussed in Section III.iii) suggested that courts are obligated to apply the Holocaust policy of the US. The court ruled that the case must be viewed in light of the HEAR Act, and in so doing, underscored that one of the two purposes of the HEAR Act, as noted in the legislative history, was 'to ensure that laws governing claims to Nazi-confiscated art and other property further United States policy as set forth in the Washington Conference Principles . . . and the Terezin Declaration',[25] and that, therefore, the HEAR Act 'compels us to help return Nazi looted art to its heirs . . .'[26] On appeal, the court affirmed this point, emphasising that Congress, in relevant part, enacted the HEAR Act 'in an effort to "ensure that laws governing claims to Nazi-confiscated art and other property further United States policy". . .'[27]

But this approach has not been uniformly applied by courts in the US. In a recent opinion issued by the United States Court of Appeals for the Ninth Circuit, *Cassirer v.*

22 www.state.gov/washington-conference-principles-on-nazi-confiscated-art/.

23 https://2009-2017.state.gov/p/eur/rls/or/126162.htm.

24 *Reif v. Nagy*, 175 A.D.3d 107 (1st Dep't 2019).

25 *Reif v. Nagy*, 61 Misc. 3d 319, 323 (Sup. Ct. Cnty. 2018).

26 id., at 324.

27 *Reif v. Nagy*, 175 A.D.3d 107, 131 (1st Dep't 2019).

Thyssen-Bornemisza Collection,[28] the Ninth Circuit noted that courts 'cannot order compliance with the Washington Principles or the Terezin Declaration'.[29] Thus, other jurisdictions in the US consider both the Washington Principles and the Terezin Declaration to be non-binding international agreements.

Another recent development concerning art misappropriated during the Nazi era involves the Foreign Sovereign Immunities Act (FSIA).[30] Under US law, foreign states and their agencies and instrumentalities are immune from jurisdiction in a US court unless certain exceptions apply, which are set forth in the FSIA. Since its enactment in 1976, these exceptions have been used as a basis for jurisdiction over foreign sovereigns being sued in the United States.

Of the enumerated exceptions, the 'expropriation exception' is most utilised in Nazi-era restitution cases. This exception provides that, where property has been taken in violation of international law, and either that property or any property exchanged for it is present in the US in connection with a commercial activity carried on in the US by the foreign state, or that property, or any property exchanged for it, is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the US, then that state will not be immune from suit where the rights to such property are at issue.[31]

Currently, there are two cases concerning the interpretation of the FSIA that are set to be heard by the US Supreme Court. The first, *Federal Republic of Germany v. Philipp*,[32] involves a restitution claim by the heirs to a collection of medieval artworks known as the Guelph Treasure, which was sold in 1935 by a consortium of Jewish art dealers to the Nazi-controlled state of Prussia, allegedly as agents of Hermann Goering. The Guelph Treasure is currently in the possession of the Prussian Cultural Heritage Foundation, a German agency. In its petition for certiorari, Germany presented two questions to the Supreme Court: (1) whether the expropriation exception 'provides jurisdiction over claims that a foreign sovereign has violated international human-rights law when taking property from its own national within its own borders, even though such claims do not implicate the established international law governing states' responsibility for takings of property'; and (2) whether 'the doctrine of international comity is unavailable in cases against foreign sovereigns, even in cases of considerable historical and political significance to the foreign sovereign, and even where the foreign nation has a domestic frame-work for addressing the claims'.[33]

This petition sets forth issues of exceptional importance to Nazi-looted art cases brought in the US against foreign sovereigns and their agencies or instrumentalities. In particular, the

28 No. 19-55616 (9th Cir. 17 August 2020). At issue in the case was a painting by Camille Pissarro, which was stolen from the claimants' ancestors by the Nazi regime in 1939. The Ninth Circuit affirmed that the possessor acquired title to the painting, which in that case was decided 'pursuant to Spain's law of prescriptive acquisition. . .' *Cassirer v. Thyssen-Bornemisza Collection Found.*, No. 19-55616, 2020 WL 4746626, at *1 (9th Cir. 17 August 2020).

29 *Cassirer v. Thyssen-Bornemisza Collection Found.*, No. 19-55616, 2020 WL 4746626, at *3 n.3 (9th Cir. 17 August 2020).

30 28 U.S.C. §§ 1605 (a)–(e).

31 28 U.S.C. § 1605(a)(3).

32 Supreme Court Docket No. 19-351, available at www.supremecourt.gov/docket/docketfiles/html/public/19-351.html.

33 Petition for Writ of Certiorari, *Fed. Republic of Germany v. Philipp*, Supreme Court Docket No. 19-351, available at www.supremecourt.gov/docket/docketfiles/html/public/19-351.html.

parties dispute whether property taken by a foreign state from its own nationals during the course of genocide, in this case the Holocaust, constitutes a 'taking' for purposes of the FSIA. Germany argues that a violation of the 'international law of takings' only addresses when a state has taken property from another state's national. Respondents, on the other hand, argue that any 'genocidal thefts' violate international law.

In the second case, *Republic of Hungary v. Simon*,[34] survivors of the Holocaust in Hungary filed suit against the Republic of Hungary and Magyar Államvasutak Zrt, Hungary's state-owned railway company, seeking compensation for the seizure of property that was allegedly taken as part of the Hungarian government's genocidal campaign. Before the Supreme Court is the question of whether the doctrine of international comity may apply where jurisdiction otherwise exists under the FSIA. Both cases were argued on 7 December 2020.

Cultural property

The US government combats trade in illicit antiquities using a variety of legal tools. The National Stolen Property Act (NSPA), which may also be employed in Nazi-looted art matters, is a statute that allows the government to both criminally prosecute those who knowingly possess, sell, receive or transport stolen goods valued at more than US$5,000 that have either crossed a state or United States boundary line or moved in interstate or foreign commerce, and to render such objects subject to forfeiture proceedings. To fall under the purview of the NSPA, an object must qualify as 'stolen'. As established by US jurisprudence, antiquities acquired in contravention of a foreign nation's valid patrimony law are considered stolen for purposes of the NSPA.[35]

One type of forfeiture proceeding that is commonly used in the context of looted cultural property is a civil action brought by the government pursuant to 19 USC Section 1595a. Section 1595a is a customs statute that authorises the forfeiture of any merchandise that is 'stolen, smuggled, or clandestinely imported or introduced' or attempted to be introduced into the United States 'contrary to law'.[36] A violation of the NSPA often serves as the basis of the 'contrary to law' prong of the law.

A recent forfeiture claim illustrates the application of this statute. On 18 May 2020, the US government filed a complaint for the civil forfeiture of the Gilgamesh Dream Tablet, which was purchased by Hobby Lobby Stores, Inc (Hobby Lobby) for donation to or display at the Museum of the Bible.[37] The government's complaint states that property is considered 'stolen' pursuant to 19 USC Section 1595a and the NSPA 'if it was taken without official authorisation from a foreign country whose laws establish state ownership of such cultural

34 Supreme Court Docket No. 18-1447, available at www.supremecourt.gov/docket/docketfiles/html/public/18-1447.html.

35 See, e.g., *United States v. Schultz*, 333 F.3d 393, 410 (2d Cir. 2003) (holding that 'the NSPA applies to property that is stolen in violation of a foreign patrimony law').

36 19 U.S.C. § 1595a(c)(1).

37 *United States v. One Cuneiform Tablet Known As The 'Gilgamesh Dream Tablet'*, No. 20-02222 (E.D.N.Y. 18 May 2020).

property'.[38] In the case of the Tablet, it was alleged to have been removed from Iraq in contravention of the country's patrimony law; therefore, it would constitute stolen property subject to civil forfeiture.[39]

iii Limitation periods

In the United States, statutes of limitations often vary in content and application from state to state, and differ depending on the type of claim being pursued. For example, if a buyer acquires an artwork that is subsequently determined to be inauthentic, the buyer may bring an action for fraud against the seller. In New York, the statute of limitations governing fraud claims is either six years from the date of the fraud (i.e., the date of purchase of the artwork) or two years from the date the fraud was discovered, or with reasonable diligence, could have been discovered.[40] In contrast, other states apply different limitation periods. For instance, under Florida law, a claim for fraud must be commenced within four years.[41] Accrual for the claim begins 'from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence'; however, the action 'must be begun within 12 years after the date of the commission of the alleged fraud, regardless of the date the fraud was or should have been discovered'.[42]

Where the cause of action involves claims for replevin or conversion of art, accrual may depend on whether the possessor holds the art in good faith. In some states, including New York, a 'demand and refusal' rule applies, under which the three-year limitation period does not begin to run until the owner makes a demand for the return of the property and the possessor refuses. The majority of states, however, follow a 'discovery rule'. In these states, the limitation period, which differs depending on the state, begins to run when the plaintiff discovers or, after the exercise of reasonable diligence, should have discovered the whereabouts of the artwork.

For art recovery cases involving art lost during the Nazi era, a special statute of limitations applies – the HEAR Act of 2016.[43] Under the terms of the Act, which establishes a uniform federal statute of limitations, the limitation period starts to run upon the actual discovery by the claimant of the identity and location of the artwork or other property and the claimant's possessory interest in that property. In the case of a possible misidentification, the Act provides that discovery is deemed to occur 'on the date on which there are facts sufficient to form a substantial basis to believe that the artwork or other property is the artwork or other property that was lost'.[44] For those who had claims already pending in court, the law deemed such claimants to have had the requisite knowledge as of the date of

38 id.

39 One day after the government's filing, Hobby Lobby initiated a separate civil claim against Christie's and the unknown consignor of the tablet to Christie's. See *Hobby Lobby Stores, Inc. v. Christie's Inc. and John Doe #*1, No. 20-CV-2239 (E.D.N.Y. 19 May 2020). Thereafter, it was reported in August 2020 that Iraq entered negotiations with Hobby Lobby concerning the return to Iraq of thousands of antiquities purchased for the Museum of the Bible. See www.npr.org/2020/08/20/886540260/in-iraq-authorities-continue-to-fight-uphill-battle-against-antiquities-plunder. This agreement, if reached, may ultimately include return of the Tablet.

40 See N.Y. C.P.L.R. § 213(1), § 213(8), § 203(g).

41 See Florida Statutes § 95.11(3)(j).

42 id., § 95.031(2)(a)

43 Pub. L. No. 114-308 (2016).

44 id., at Section 5(b).

enactment of the statute, unless the claimant was otherwise barred under an exception to the Act.[45] The law is set to expire on 1 January 2027, although it will still apply to claims already pending at that time.

In addition to state and federal statutes of limitations, the equitable doctrine of laches may also bar otherwise timely art claims. To establish the defence, a possessor must show that the claimant unreasonably delayed in bringing the action to the prejudice of the possessor. A court may also weigh the relative equities between the parties in determining whether to apply the defence.

iv Alternative dispute resolution

In the United States, there are no specialised ADR organisations dealing specifically in art matters. Moreover, as a general matter, art disputes that are resolved by ADR are almost always subject to confidentiality provisions; indeed, confidentiality is one of the top reasons for parties to avoid litigation. Consequently, the prevalence of ADR in resolving art disputes in the US is difficult to quantify.

IV FAKES, FORGERIES AND AUTHENTICATION

In August 2019, after more than eight years of numerous legal disputes, the final lawsuit arising from one of the most well-known art forgery scandals in the US came to a close. The case, *Martin Hilti Family Trust v. Knoedler Gallery, LLC et al*, which ultimately settled, involved a fake Mark Rothko painting that was sold for US$5.5 million through the now-closed Knoedler Gallery in New York.[46] In 2011, after 165 years of operation, the Knoedler Gallery closed following the discovery that it had sold tens of millions of dollars' worth of paintings – including other supposed Rothko paintings, along with works purportedly by Jackson Pollock, Robert Motherwell and others – that turned out to be forgeries. In the civil litigations that followed, plaintiffs pursued various legal claims, including, inter alia, causes of action for fraud, mistake and breach of warranty.

As in the Knoedler Gallery litigations, where an artwork is discovered to be a fake, a forgery or otherwise inauthentic, claims based on fraud, mutual or unilateral mistake and breach of express or implied warranties are common. Under certain circumstances, an action for breach of warranty may be particularly useful because the buyer need not prove any fault by the seller. To establish a breach of a warranty, which can be either express or implied under the UCC,[47] the buyer need only prove that a warranty existed, the goods failed to conform to that warranty and he or she suffered a loss as a result. A successful breach of warranty claim allows a buyer to recover the difference between the value of the defective artwork and the value of the artwork as it was warranted (i.e., an authentic artwork).[48]

45 The exception limits the application of the Act from applying to 'any civil claim or cause of action barred on the day before the date of enactment. . . by a Federal or State statute of limitations if – (1) the claimant or a predecessor-in-interest of the claimant had knowledge of the elements set forth in subsection (a) on or after January 1, 1999; and (2) not less than 6 years have passed from the date such claimant or predecessor-in-interest acquired such knowledge and during which time the civil claim or cause of action was not barred by a Federal or State statute of limitation'. id., at Section 5(e).

46 See Docket No. 13-cv-00657-PGG-HBP (S.D.N.Y.).

47 See, generally, U.C.C. §§ 2-313-16.

48 U.C.C. § 2-714(2).

Pursuant to the UCC, an express warranty may arise from: (1) '[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain', and (2) '[a]ny description of the goods which is made part of the basis of the bargain'.[49] An express warranty may also arise from representations made in materials such as advertisements or catalogues, or from a seller's oral statements to the buyer.

A buyer may also bring an action against a gallery, art dealer, auction house or other art merchant for breach of an implied warranty of merchantability.[50] For art to be merchantable, it must, in relevant part, (1) be able to 'pass without objection in the trade under the contract description'; (2) be 'fit for the ordinary purposes' for which it is sold; and (3) 'conform' to the 'affirmations of fact' made in the sale catalogue or the bill of sale.[51] A buyer may be able to claim a breach of implied warranty of merchantability if he or she is able to demonstrate, for example, that (1) a work of art does not conform to its description; or (2) his or her investment or aesthetic purposes are compromised because the work is a forgery.

Some states have enacted laws specifically addressing art warranties. Under NY Arts and Cultural Affairs Law Section 13.01–13.21, an art merchant that sells an artwork to a non-merchant buyer creates an express warranty if, in its written description of the artwork, the merchant identifies the artwork with a particular author or authorship. According to this Law, whenever an art merchant furnishes a certificate of authenticity to a non-merchant purchaser, authenticity is presumed to be a basis of the bargain and creates an express warranty. The art merchant can temper this warranty by making the attribution clear. The dealer can say the art is by the artist, 'attributed to' the artist or from the 'school of' the artist.[52] To negate an express warranty of authenticity under this Law, a disclaimer must be conspicuously written and contained in a separate provision from the language creating the warranty. Words of 'general disclaimer' are not considered sufficient to 'negate or limit an express warranty'. To protect the buyer, however, a disclaimer of express warranty will be ineffectual if it is later shown that the work of art was counterfeit or if 'the information provided is proved to be, as of the date of sale or exchange, false, mistaken or erroneous'.[53]

V ART TRANSACTIONS

i Private sales and auctions

The UCC generally governs most issues related to the sale of artwork. This includes not only express and implied warranties, but also warranty of title and against infringement,[54] consignments and other requirements for agreements. Some provisions of the UCC apply only to auctions.[55]

Although the coronavirus pandemic, which began at the start of 2020, has caused a dip in art sales generally, it has caused a significant increase in online sales. Online-only auction sales by Christie's, Sotheby's and Phillips generated US$370 million in the first half of 2020, five times higher than the same period in 2019. For example, Sotheby's reports a 131 per cent

49 U.C.C. § 2-313.
50 U.C.C. § 2-314.
51 U.C.C. § 2-314(2).
52 N.Y. Arts & Cult. Affairs Law § 13.01.
53 id.
54 U.C.C. § 2-312.
55 See U.C.C. § 2-328.

increase in the number of lots sold online in the first half of the year (January to May 2020).[56] Galleries have also increased their online sales – online shares rose from 10 per cent of total sales in 2019 to 37 per cent in the first half of 2020.[57] In-person auctions, art fairs and other modes of traditional sale have been postponed or cancelled.

In many cases, physical vetting of artworks is not possible, with some purchasers forced to rely on digital vetting (e.g., digital photos or online viewing rooms to purchase artworks 'as is'). Accordingly, there are risks when purchasing artwork online. While the larger auction houses (e.g., Christie's and Sotheby's) tend to offer more information about the items they sell and more protection if there is an issue with an artwork after purchase than online-only platforms, the artworks are purchased 'as is'. These auction houses will most certainly have possession of the artwork being sold; other online-only platforms may not. If the purchaser is not able to view the work in person beforehand, they are forced to rely more heavily on condition reports and trust that the auction houses or sellers have done their due diligence.

Although online sales have increased, sales have decreased across the board and some galleries have remained closed or are in dire straits. For example, galleries in the first half of 2020 reported that the value of their sales fell by 36 per cent on average compared to the same period in 2019, with the majority of galleries believing sales will continue to decrease.[58] Bankruptcies are sure to become more common.

When a gallery files for bankruptcy, under the UCC and bankruptcy law, repaying creditors may supersede returning the consigned artwork to its owner if the work is not properly protected. Most consignments are governed by UCC Article 9.[59] Under this Article, consignors can protect their artworks by perfecting their security interest in the artwork and filing a UCC-1 financing statement – a legal notice filed by a creditor as a way to publicly declare its rights to seize property of a debtor, in this case the gallery, which may have defaulted on its loans. Many states also have enacted legislation to protect artists (although not collectors) who consign their works, and they receive priority of ownership ahead of a creditor's claim to it as an asset of the gallery.

ii Art loans

There are many reasons a private collector would want to loan a work of art to a museum. Museum loans present a philanthropic opportunity for lenders to share their works with the general public in a controlled and safe environment. Additionally, the borrowing museum may provide new scholarly information about the works. Inclusion in a museum exhibition could also bolster an artwork's provenance, potentially increasing the work's monetary value through public exposure. Many museums, however, frown upon the sale of a loaned work shortly after an exhibition. These museums often include a provision in their loan agreements that prohibits a sale within a specified period after the close of the exhibition. These periods can range from as short as three months to as long as two years after the conclusion of the loan.

56 Hiscox online art trade report 2020, available at www.hiscox.co.uk/sites/uk/files/documents/2020-07/Hiscox_online_art_trade_report_2020-new.pdf.

57 Clare McAndrew, footnote 3.

58 id.

59 U.C.C. § 2-326 or bailment law may also apply.

Before loaning a work of art, a potential lender must first consider whether it is appropriate to lend a particular work, taking into account safety and damage concerns. Once these issues are addressed, the potential lender must then determine what should be included in the loan agreement once a work is approved for exhibition.

Lenders should also consider if the loan creates a use tax liability. This tax applies on account of a property's use within a taxing jurisdiction (in contrast to the sales tax, which applies on account of a property's sale within a taxing jurisdiction). For example, if a painting is purchased in state A, and five years later is loaned to a museum in state B, the use of that painting in state B (i.e., its exhibition at a state B museum) may subject it to a use tax. Generally, sales tax paid on a property will be credited against the owner's use tax liabilities, if any. The challenge, therefore, is mainly for works that were protected from sales tax, whether on account of happenstance or creative tax planning. The circumstances that create a sales tax exemption or discount tend to vary from state to state, and a work that has not been subject to sales tax might become subject to use tax on account of a loan to a museum situated in an inhospitable taxing jurisdiction. In those circumstances, a lender may face a use tax that is prohibitively expensive.

Another preliminary issue for the lender to consider is whether there are any provenance questions regarding the artwork. If there are competing claims to a work, these may open the artwork to the risk of judicial seizure. In the United States, the Immunity from Judicial Seizure Statute[60] protects certain objects from seizure by the US government. Pursuant to the federal statute, any not-for-profit museum, cultural or educational institution may apply to the US Department of State for a determination that art to be loaned from abroad for exhibition is culturally significant and that the exhibition is in the national interest. If the application is granted, the art is immunised from judicial seizure by the federal government.

Unlike with individual collectors, where the lender is a cultural institution owned by a foreign state there are added issues to consider. Under the FSIA, a foreign state and its agencies and instrumentalities are immune from suit in US courts unless certain exceptions apply.[61] One of these exceptions is where rights in property taken in violation of international law are in issue. The Foreign Cultural Exchange Jurisdictional Immunity Clarification Act of 2016 added Section 1605(h) to the FSIA, which made clear that activities of a foreign state associated with the temporary exhibition or display of art determined to be immune from seizure shall not be considered 'commercial activity' within the meaning of the FSIA's expropriation exception,[62] which deals with cases in which rights in property taken in violation of international law are in issue.

Collectors lending to museums should also carefully consider the loan agreement with the museum. Although art loans raise legal concerns that touch on a variety of issues, the forms provided by the borrowing museum are often quite short and inadequate for purposes of the lender. To maximise protection, lenders should not hesitate to negotiate and add any terms reasonably necessary to protect their interests to the loan agreement. A few key areas to focus on include the following.

a Title: the loan agreement should make clear that the borrower does not have a right to sell or transfer title of the artwork.

b Insurance: the loan agreement should describe the insurance coverage for the artwork, including the work's insurance value. International loan agreements should also take

60 22 U.S.C. Section 2459.

61 See 23 U.S.C. §§ 1602, et seq.

62 28 U.S.C. § 1605(a)(3).

into account whether any government insurance will be provided. In the US, if the exhibition is insured through the Arts and Artifacts Indemnity Act of 1975, the US government will pay insurance claims in addition to the insurance coverage provided by the borrowing museum. This insurance applies to artworks loaned to US exhibitions, where the artworks are of educational, cultural or scientific value, and are certified by the Secretary of State as being in the national interest.

c Taxes: for international loans, the loan agreement should take into account any tax considerations that are specific to the host country. For example, in the US, the Internal Revenue Code, Section 2105(c), provides that artworks loaned to a public gallery or museum in the US will not be subject to estate taxes if such works remain on loan at the time of the owner's death, as long as the owner is a non-resident who is not a US citizen.

d Copyright: the loan agreement may need to include copyright provisions. If the borrowing institution plans to photograph the artwork for publicity materials or commercial purposes, and the artwork is under an existing copyright, the borrower will have to obtain permission from both the owner and the copyright holder.

e Force majeure: the loan agreement should address the lender's concerns about circumstances beyond the parties' control, including war, natural disaster and political unrest. Many loan agreements excuse performance of certain provisions where events of this kind make performance of the contract dangerous.

f Term: the agreement should specify a term; this may help to avoid problems that would arise if the lender relocates or loses contact with the museum.

For every loan, there is a cost-benefit analysis that must be made. It is up to the lenders and borrowers to assess the risk and, if they decide to go forward with the loan, to ensure that steps are taken to maximise the safety and security of the artwork. This is even more important during the coronavirus pandemic where museums are closed and thus empty of patrons not only at night but during the day. Lenders should make sure that proper security measures are in place during this time.

iii Cross-border transactions

Countries whose borders encompass the rich culture of ancient lands have struggled for decades to prevent the unauthorised excavation and smuggling of their cultural artefacts, and to attempt to reclaim them after they are discovered in the possession of museums, auction houses, galleries and collectors. The United States is the top importer of art in the world and thus, although they may arguably be insufficient, it has laws in place to combat this issue.

Underlying any claim for the recovery of antiquities in the US is a single, fundamental rule: under US law, no one, not even a good-faith purchaser, may obtain good title to stolen property. When US law is applicable, a true owner always has the right to reclaim stolen property, unless barred by the statute of limitations or other technical defences. To exercise this right, a plaintiff must first establish that it owns the property in question.

First, the foreign government claimant must prove that the object in the defendant's hands is, in fact, the stolen item. A foreign government plaintiff must also demonstrate that at the time the objects were discovered in and removed from its territory, there were laws in place that clearly vested the government with ownership rights, or some other proprietary interest, in the objects. Virtually all 'art-rich' countries have enacted laws, mostly in the early twentieth century, declaring that anything found in or under the ground, even if not yet

discovered, is owned by the government. These laws, called 'patrimony laws', are usually the key to establishing the foreign government's ownership. Export laws are considered part of a country's internal policing regulations, and generally are not enforced by the courts of other countries. Only foreign laws clearly establishing that the government owns everything found in or under the ground will be applied in US courts.

To avoid this distinction, however, several countries have entered into special bilateral agreements with the US government pursuant to the Cultural Property Implementation Act of 1983,[63] which implements the international Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.[64] Pursuant to these agreements, the US agrees to enforce the export laws of these countries, and will therefore seize and return items brought into the US from these countries without an export permit, even without requiring proof that the government owns those items pursuant to patrimony laws. Twenty countries currently have such agreements with the US: Algeria, Belize, Bolivia, Bulgaria, Cambodia, Chile, China, Colombia, Cyprus, Ecuador, Egypt, El Salvador, Greece, Guatemala, Honduras, Italy, Jordan, Libya, Mali and Peru.[65] The US State Department has also recently announced it is considering requests for import restrictions from Nigeria.[66]

The NSPA criminalises, among other activities, the knowing transfer or transport in interstate or international commerce of stolen property, or possession of stolen property thus transferred or transported. Property proven to have been so transferred, transported or possessed may be seized and the individual violating the NSPA may be prosecuted. The NSPA also serves the basis for civil forfeiture actions that permit the US government to bring a civil *in rem* action to have property that is the subject of criminal conduct forfeited to the US.[67]

US import laws also give US Immigration and Customs Enforcement and US Customs and Border Protection authority to seize cultural property and art that are stolen or otherwise brought into the United States illegally, and the persons involved in such violations may be subject to civil and criminal penalties.

iv Art finance

US private banks will make loans to their clients and receive fine art as collateral. In general, banks are reluctant to require these clients to relinquish possession of their art collections. Lenders will only finance a percentage of the appraised fair market value of the artwork, typically 40 per cent to 60 per cent. They will also typically require proof of ownership from potential borrowers. There are also specialist art lenders, boutique lenders and auction houses that provide this service. A lender can perfect a security interest by filing a UCC financing statement that puts others on notice that there is a lien on the artwork and be just as protected from other creditors' claims as it would be had it perfected by taking possession.

Deloitte estimates that in 2019, between US$21 billion and US$24 billion in loans was outstanding against art globally, with the majority held by the US Bank of America. Private

63 Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601–2613.

64 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 U.N.T.S. 231.

65 See https://eca.state.gov/cultural-heritage-center/cultural-property-advisory-committee/current-import-restrictions.

66 See https://eca.state.gov/highlight/cultural-property-advisory-committee-meeting-october-27-29-2020.

67 See Section III.ii.

owners and collectors accounted for between 90 per cent and 92 per cent of the overall lending market.[68] On average, high-net-worth individuals have 6 per cent of their wealth in art. Since the covid-19 outbreak, wealthy clients and private business owners with existing credit lines against their art collections drew them down.[69]

An art fund, which is generally a privately offered investment fund that is managed by a professional investment manager, may be organised either in the United States or as an offshore vehicle, depending on where the fund's prospective investors reside. In the United States, art funds are typically structured as 'closed-end funds', more commonly known as private equity funds. In turn, private equity funds are usually organised as a limited partnership. The defining characteristics of a private equity fund are: (1) a fixed life, usually five to 10 years, with the option of a limited number of one-year extensions to permit the orderly liquidation of assets; (2) investments by limited partners of a fixed amount, called a 'capital commitment', that the investment manager 'draws down' from time to time over the fund's life to pay for the fund's investments, fees and expenses; and (3) limitations on investor withdrawals, except in extraordinary circumstances, prior to the end of a fund's life. What makes a private equity fund an 'art fund' is its strategy. Some art funds pursue a focused investment strategy (e.g., Old Masters or Chinese Imperial porcelain), while others seek a more diversified portfolio of artworks. While the individual strategies of art funds differ widely, at a basic level all art funds seek to generate financial gains through the acquisition and disposition of artworks.

An art fund seeks to wield its size to acquire a diversified portfolio of artworks at prices generally unattainable by individual investors. But, unlike other tangible assets held by many other types of private investment funds, art has no inherent value and, indeed, its valuation is highly subjective. Further, the art market can be extremely volatile with no certainty of liquidity. Thus, art funds rely on professional investment managers and art advisers to implement their strategies and realise investment returns. In light of the risks involved, it is important that investors consult with a professional adviser before investing in an art fund.

The US art market is not required by law to maintain anti-money laundering (AML) policies. While the large auction houses (Christie's, Sotheby's, Philips and Bonhams) do have written AML policies in place, on average, private art dealers do not.[70]

68 Deloitte Art and Finance Report 2019, 6th edition, available at www2.deloitte.com/content/dam/Deloitte/lu/Documents/financial-services/artandfinance/lu-art-and-finance-report-2019.pdf.

69 Carol Ryan, 'A Bad Year for Art Is Looking Like a Good Year for Art-Backed Loans' (17 July 2020), available at www.wsj.com/articles/a-bad-year-for-art-is-looking-like-a-good-year-for-art-backed-loans-11594978201.

70 United States Senate Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, Staff Report, 'The Art Industry and U.S. Policies That Undermine Sanctions', www.hsgac.senate.gov/download/majority-and-minority-staff-report_-the-art-industry-and-us-policies-that-undermine-sanctions.

VI ARTIST RIGHTS

i Moral rights

Moral rights, which are rights applying to authors irrespective of their economic rights, receive limited recognition in the United States. The United States acceded to the Berne Convention for the Protection of Literary and Artistic Works, an international treaty that governs and protects these rights (among others), in 1988.[71] In 1990, Congress enacted the Visual Artists Rights Act of 1990 (VARA).[72]

VARA offers an artist of a work of visual art[73] the right of attribution, specifically the right (1) to claim authorship of that work, (2) to prevent the use of his or her name as the author of any work of visual art that he or she did not create, and (3) to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation or other modification of the work that would be prejudicial to his or her honour or reputation.[74]

VARA also provides the right of integrity, specifically the right (1) to prevent any intentional distortion, mutilation or other modification of the work that would be prejudicial to his or her honour or reputation, and any intentional distortion, mutilation or modification of that work is a violation of that right, and (2) to prevent any destruction of a work of recognised stature, and any intentional or grossly negligent destruction of that work is a violation of that right.[75]

VARA rights extend for the life of the author for works created on or after its effective date, 1 June 1991, and for works created before 1 June 1991 to which the author still holds title on the same date, the life of the author plus 70 years.[76] For joint works (two or more authors), VARA rights endure for the life of the last surviving author.[77]

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71 Berne Notification No. 121: Berne Convention for the Protection of Literary and Artistic Works: Accession by the United States of America, World Intellectual Property Organization (17 November 1988), available at www.wipo.int/treaties/en/notifications/berne/treaty_berne_121.html. In particular, the Berne Convention's Article 6 *bis* provides: 'Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.' Berne Convention for the Protection of Literary and Artistic Works, Paris Act of 24 July 1971, as amended on 28 September 1979, available at www.wipo.int/edocs/lexdocs/treaties/en/berne/trt_berne_001en.pdf.

72 Pub L. No. 101-650, Title VI, 104 Stat. 5128 (1990).

73 A 'work of visual art' is: '(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author. A work of visual art does not include: (A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication; (ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container; (iii) any portion or part of any item described in clause (i) or (ii); (B) any work made for hire; or (C) any work not subject to copyright protection under this title.' 17 U.S.C. § 101.

74 17 U.S.C. §§ 106A(a)(1)–(2).

75 17 U.S.C. § 106A(a)(3).

76 17 U.S.C. §§ 106A(d)(1)–(2).

77 17 U.S.C. § 106A(d)(3).

Available remedies under VARA include injunctive relief, monetary damages, defendants' profits, statutory damages and, at the court's discretion, legal fees.

Recently, the United States Court of Appeals for the Second Circuit affirmed a decision to grant VARA rights to artists who created aerosol art on warehouse buildings at a site, well-known as 5Pointz. While some of the art at the site was more permanent, some of the works were painted over to make room for new work. Later, however, plans ensued to demolish the property to make way for luxury residential apartments, and after failing to secure cultural significance landmark status to prevent its destruction, the 5Pointz artists sued under VARA to prevent destruction of the site. Shortly after the District Court for the Eastern District of New York denied the plaintiffs' request for a preliminary injunction, the defendant building owner, in contravention of VARA's notice requirements that provided the artists an opportunity to salvage their work, destroyed almost all of the paintings by whitewashing them. Additional artists sued the defendant building owners and the lawsuits were consolidated for trial. Following the trial and verdict by an advisory jury, the District Court awarded the artists the maximum amount of statutory damages, totalling US$6.75 million (US$150,000 for each of the 45 works).[78]

The case was appealed and affirmed by the United States Court of Appeals for the Second Circuit. The Second Circuit held in its decision as amended on 21 February 2020 that:

a a work is of 'recognized stature' within the meaning of VARA when it is one of high quality, status or calibre that has been acknowledged as such by a relevant community;

b the District Court correctly determined that temporary artwork, including 'street art', may achieve recognised stature so as to be protected from destruction by VARA, and considered the well-known 5Pointz site itself as some evidence of recognised stature;

c the District Court correctly determined that the artists' works had achieved recognised stature;

d the District Court did not clearly err in finding owners' violations of VARA to be wilful where the defendant owner admitted he knew of VARA's notice provisions but decided not to wait before destroying the works; and

e the District Court's award of statutory damages was not an abuse of discretion where the Court carefully considered the six factors[79] relevant to such a determination, and found that the defendant owner acted in revenge when it whitewashed the artwork.[80]

The defendants' petition for certiorari filed in the United States Supreme Court was denied.[81]

17 USC Section 1202 of the Digital Millennium Copyright Act (DMCA) protects artists from the illegal use of their images on the internet. Specifically, the DMCA, in part, imposes criminal and civil penalties on anyone who (1) prohibits the knowing provision

78 *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 162–165 (2d Cir. 2020).

79 The six factors are: (1) the infringer's state of mind; (2) the expenses saved, and profits earned, by the infringer; (3) the revenue lost by the copyright holder; (4) the deterrent effect on the infringer and third parties; (5) the infringer's cooperation in providing evidence concerning the value of the infringing material; and (6) the conduct and attitude of the parties. *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 171–72 (2d Cir. 2020).

80 *Castillo v. G&M Realty L.P.*, 950 F.3d 155 (2d Cir. 2020).

81 *G&M Realty L.P., et al., Petitioners v. Maria Castillo, et al.*, U.S. Supreme Court, No. 20-66, available at www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-66.html&mc_cid=276c203025&mc_eid=0b402b442a.

or distribution of false 'copyright management information' (CMI)[82] or (2) intentionally removes or alters CMI without authority, or disseminates CMI, knowing that the CMI has been removed or altered without authority.[83]

ii Resale rights

Resale royalty rights (or droit de suite, as they are known in Europe) grant artists a percentage of the proceeds from the resale of the original works of art. Although efforts have been made over several years to enact legislation, the United States does not recognise resale royalty rights. Under US copyright law's first sale doctrine, as codified in Section 109 of the Copyright Act, once an original copyright-protected work of authorship is sold, the buyer and all subsequent purchasers are free to resell that work (but not any underlying copyright rights in the work) without having to provide any compensation to the original artist or author.[84] Artists may contract for resale royalty rights, which has recently become a more popular practice.

iii Economic rights

Artists in the United States have economic rights provided by copyright law, which allow them to derive certain financial benefits from the use of their works by others. The United States Constitution Article 1, Section 8, Clause 8 is the origin for copyright law in the United States:

> *The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.*

Enacted by Congress on 19 October 1976, the Copyright Act of 1976 provides the basic framework for the current copyright law and provides copyright protection for works created on or after 1 January 1978.[85] The Copyright Act and all subsequent amendments to copyright law are contained in Title 17 of the United States Code.

Copyright, a form of intellectual property, protects original works of an author fixed in any tangible medium of expression, including 'pictorial, graphic and sculptural works'.[86] Published and unpublished works are both protected (with only some differences). Copyright

82 Such information includes '[t]he title and other information identifying the work', '[t]he name of, and other identifying information about, the author of a work', '[t]he name of, and other identifying information about, the copyright owner of the work', 'the name of, and other identifying information about, a performer whose performance is fixed in a work other than an audiovisual work', 'the name of, and other identifying information about, a writer, performer, or director who is credited in the audiovisual work', '[t]erms and conditions for use of the work', '[i]dentifying numbers or symbols referring to such information or links to such information' and '[s]uch other information as the Register of Copyrights may prescribe by regulation'. 17 U.S.C. § 1202(c).

83 17 U.S.C. §§ 1202–1204.

84 17 U.S.C. § 109.

85 The earlier Copyright Act of 1909 applies to works created before 1 January 1978.

86 17 U.S.C. § 102(a). '"Pictorial, graphic and sculptural works" include two-dimensional and three-dimensional works of fine, graphic and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic,

protection, however, does not extend to 'any idea, procedure, process, system, method of operation, concept, principle, or discovery'.[87] The requirement for originality is minimal. To be original, artwork must be created independently and must have at least a 'modicum of creativity'.[88]

Copyright in a work generally extends from creation of the work and endures for a term consisting of the life of the author and 70 years after the author's death.[89] Copyright of artwork does not automatically transfer with transfer of ownership of the artwork itself and vice versa. Transfers of copyright require an instrument in writing signed by the owner of the rights conveyed (or the owner's authorised agent).[90] A copyright holder may assign one or more of the exclusive rights or license its copyright interest.

Copyright protection is not international but protection outside of the United States can be extended depending on international conventions, treaties (e.g., the Berne Convention for the Protection of Literary and Artistic Works), other bilateral instruments of the United States with other countries, and the laws of that country.[91]

An owner of copyrighted artwork (with some limitations) has the exclusive rights to: (1) reproduce the copyrighted work in copies; (2) prepare works derived from the copyrighted work; (3) distribute copies of the copyrighted work; and (4) display the copyrighted work publicly.[92] While the copyright owner has the exclusive right to display a work publicly and the right of reproduction, copyright law carves out a special limited exception (tied to the first sale doctrine) for the display of a copy of a work rightfully owned without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.[93] This exception permits all displays of copyright-protected art by auction houses, galleries and museums.

If one or more of the artist's exclusive rights are violated, an artist may bring a lawsuit in a federal court, which has exclusive jurisdiction.[94] Criminal proceedings have a five-year statute of limitations and civil actions have a three-year statute of limitations. To establish copyright infringement, an artist must prove: (1) ownership of a valid copyright and (2) copying by the defendant of constituent elements of the work that are original.[95] A copyright registration certificate is presumptive evidence in favour of the plaintiff.[96] The second element can be demonstrated by direct evidence or indirect evidence. Direct evidence

or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.' 17 U.S.C. § 101. 'Architectural works' are also protected by copyright law (see 17 U.S.C. § 102(a)) but are outside the scope of this chapter.

87 17 U.S.C. § 102(b).

88 *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 346, 111 S. Ct. 1282, 1288 (1991).

89 17 U.S.C. § 302.

90 17 U.S.C. § 204(a).

91 www.copyright.gov/circs/circ38a.pdf.

92 17 U.S.C. § 106.

93 17 U.S.C. § 109(c).

94 28 U.S.C. § 1338.

95 *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 361, 111 S. Ct. 1282, 1296 (1991).

96 Nimmer on Copyright § 13.01[A], 13-8.

can be through a witness of the act of copying or an admission of actual copying.[97] While the former is rarer, copying is more frequently proven by proof that the defendant had access and substantial similarity between the copyrighted work and the claimed infringing work.[98]

Remedies for copyright infringement generally consist of injunction, impoundment of infringing articles, actual damages, profits or statutory damages, and attorneys' fees and costs.[99]

The fair use doctrine, which may provide a defence to copyright infringement, and is codified in the Copyright Act, seeks to strike a balance between a copyright owner's property rights in his or her creative works, and the ability of authors, artists and others to reference those copyrighted works as a means of expression.[100] Under the Act, a court must consider the following four non-exclusive factors in assessing fair use:

a the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;

b the nature of the copyrighted work;

c the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

d the effect of the use upon the potential market for or value of the copyrighted work.[101]

Particularly, the issue of fair use is most prevalent in cases concerning 'appropriation art' or art in which an artist uses another artist's work to create something new. In a July 2019 decision, the United States District Court for the Southern District of New York held that the Andy Warhol Foundation for the Visual Arts was entitled to a declaration that Warhol's use of Lynn Goldsmith's photograph of the late musician Prince to create a series of silkscreen paintings, screen prints on paper and drawings (the Prince Series) was a non-infringing fair use. In 1984, Lynn Goldsmith licensed her black-and-white photograph of Prince to *Vanity Fair* for the limited use as an artist's reference in connection with an article to be published in the magazine. She later learned the artist to be Andy Warhol, who created his series of works based on the Goldsmith photograph. In 2016, after Prince's death, *Condé Nast* issued a magazine commemorating Prince and used one of Warhol's silkscreens for its cover.[102]

The Court determined that the first fair use factor weighed in the Foundation's favour – that although the Prince Series was commercial in nature, they were 'transformative' of Goldsmith's photograph because, while Goldsmith's photo illustrated that Prince was 'not a comfortable person' and that he was a 'vulnerable human being', the loud, unnatural colours or rough sketching of Warhol's work transformed Prince into an 'iconic, larger-than-life figure'. The Court found that the *Prince Series* was immediately recognisable as a 'Warhol' and not a photograph of Prince.[103]

97 Nimmer on Copyright § 13.01[A], 13-12.

98 Nimmer on Copyright § 13.01[A], 13-13.

99 17 U.S.C. §§ 502–505.

100 17 U.S.C. § 107.

101 id.

102 *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312, 317–22, 331 (S.D.N.Y. 2019).

103 id., at 325–26.

In weighing the second factor, the Court found that although the photograph was a creative work and unpublished, which usually would weigh in Goldsmith's favour, the Court limited the importance of this factor because Goldsmith's photograph was licensed for an artist's reference and because the Prince Series was transformative.[104]

The third factor weighed in favour of the Foundation because the Court found that Warhol removed nearly all of the photograph's protectable elements; for example, the lighting, selection of film and camera, and evoking the desired expression, when creating the Prince Series.[105]

The Court held with respect to the fourth factor that the licensing market for Warhol prints is for 'Warhols', which is a market distinct from the licensing market for photographs like Goldsmith's, and thus this factor favoured the Foundation.[106]

The case was appealed to the United States Court of Appeals for the Second Circuit, and, after briefing was complete, argument was heard on 15 September 2020. The case has yet to be decided by the Court.

VII TRUSTS, FOUNDATIONS AND ESTATES

The importance of valuing artwork for US federal tax purposes and estate planning is apparent in three common scenarios: (1) when an owner donates artwork to a charitable organisation and wishes to claim a charitable contribution deduction; (2) when a donor's gift of artwork is subject to the gift tax; and (3) when a decedent's gross estate, which includes art, is valued for the purpose of calculating the estate tax. In each instance, the determination of 'fair market value' is critical. 'Fair market value' is the 'price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts'.[107] In determining the fair market value of art, an appraisal is typically sought; but, even with an appraisal, challenges to valuation may arise.

The issue of fair market value was at the forefront of a recent decision by the United States Court of Appeals for the Ninth Circuit. In *Estate of Eva Franzen Kollsman v. Commissioner of Internal Revenue*, the Court affirmed a tax court's rejection of an appraisal for estate tax purposes, resulting in a tax deficiency for the estate in the amount of US$585,836.[108] Central to the tax court's opinion in *Kollsman* was the importance of selecting an appraiser without conflicts of interests, such as 'financial incentive[s]' in providing 'fair market value estimates' that may benefit the interests of the estate or its beneficiaries.[109] In addition, the appraiser's failure to provide any 'comparables' to support his valuation meant it lacked 'any objective support'.[110]

In an effort to, inter alia, provide assistance to taxpayers in valuing artworks – and avoid the type of deficiency affirmed in *Kollsman* – the Internal Revenue Service (IRS) established

104 id., at 326–27.

105 id., at 327–30.

106 id., at 330–31.

107 See 26 CFR § 1.170A-1(c)(2) (for charitable contributions); 26 CFR § 20.2031-1(b) (for estate tax purposes); and 26 CFR § 25.2512-1 (for gift tax purposes).

108 *Estate of Kollsman v. Comm'r of Internal Revenue*, 777 F. App'x 870 (9th Cir. 2019).

109 The court noted that the appraisal had been presented to the estate's residual beneficiary simultaneously with a pitch for exclusive rights to auction the artworks at issue.

110 *Estate of Kollsman v. Comm'r of Internal Revenue*, T.C. Memo. 2017-40 (2017).

what is known as Art Appraisal Services (AAS). Prior to submitting an income, gift or estate tax return, a taxpayer may request a Statement of Value from AAS to review an appraisal of an object, which the taxpayer may then use to substantiate the value of an artwork included in the return.[111]

Under certain circumstances, a tax return must be referred to AAS. This occurs when a return selected for audit includes an art appraisal of a single artwork with a claimed value of US$50,000 or more; the local IRS office will then refer the case to AAS, which may submit the matter to the Commissioner of Internal Revenue's Art Advisory Panel (the Panel) for additional review. The Panel, which is made up of art dealers, scholars and museum curators, assists AAS in appraising works of art valued at US$50,000 or more. The Panel's recommendations are advisory and become the position of the IRS only with AAS's concurrence. In fiscal year 2019, AAS adopted 62 per cent of the Panel's recommendations.[112]

VIII OUTLOOK AND CONCLUSIONS

Covid-19 has rapidly transitioned the art world to a mostly digital marketplace. Digital sales rooms, online auctions and digital art fairs have become commonplace. With this rapid online growth, the art world faces unknown territory and a changing legal landscape. Perhaps, even after the covid-19 crisis subsides or ends, the art market may be disposed to maintain its current digital presence or at least a stronger one than pre-covid-19, but only time will tell the legal implications of the shift.

111 Rev. Proc. 96-15. The reviewed appraisals most generally exceed US$50,000 in value.

112 www.irs.gov/pub/irs-pdf/p5392.pdf.

Appendix 1

ABOUT THE AUTHORS

KEREN ABELOW

E Landau Law Offices

Keren Abelow is a senior associate in the litigation department of E Landau Law Offices and serves as a member of the firm's cultural assets, art and restitution practice.

Prior to joining the firm as an associate in 2013, Keren worked as an attorney at Frimer Gellman & Co after joining the bar in 2006. After completing her legal studies with honours, she interned for Judge Menachem Hacohen at the Jerusalem Family Court.

Keren's practice includes representation of the firm's clients in commercial and civil litigation in all judicial instances as well as in arbitration and mediation proceedings. Keren is experienced in inheritance and probate proceedings and has represented clients in complex international estate administrations. In addition, Keren specialises in tenders, contract litigation, and the restitution of lost and looted art.

Keren has served as a board member of The Art Cube Artists' Studios, a centre for contemporary culture that offers work environment for visual artists and supports local talents.

During her law and criminology studies at Bar-Ilan University, Keren served as a teaching assistant and was actively involved in a legal clinic providing pro bono legal aid to those in need.

TATYANA ALIMOVA

Levant & Partners Law Firm

Tatyana Alimova is an attorney at Levant & Partners Law Firm. In 2012, she graduated from Ulyanovsk State University with a law degree. After university, Tatyana worked as a litigation lawyer, specialising in providing legal assistance to citizens and legal entities.

In 2016, Tatyana passed the bar exam. She specialises in business law, tax planning and arbitration disputes. In 2020, Tatyana furthered her studies at Russian New University and was certified as a tax consultant. Tatyana is also a member of the Chamber of Tax Advisers.

LEILA A AMINEDDOLEH

Amineddoleh & Associates LLC

Leila A Amineddoleh is the founder of Amineddoleh & Associates LLC, an art and cultural heritage law firm based in Manhattan, New York. With nearly a decade and a half of experience in both litigation and transactional law, Leila A Amineddoleh is an expert in the field of art and cultural heritage law. She represents major art collectors, museums, galleries, dealers, non-profits, artists, estates, foundations and foreign governments in a variety of legal disputes. She has been involved in matters related to multimillion-dollar contractual disputes, international cultural heritage law violations, the recovery of stolen art and antiquities, complex fraud schemes, authentication disputes, art-backed loans and the purchase and sale of hundreds of millions of dollars' worth of art and collectibles.

As a leading specialist in art authentication, Leila collaborates with the world's foremost forensic scientists and art historians to assist collectors and arts institutions through the complex authentication process. She also advises clients on the acquisition and sale of arts and cultural heritage works, and has been involved in the return of valuable stolen art and looted antiquities. Leila also works with artists and entrepreneurs to protect their works and artistic rights and to develop intellectual property portfolios.

An internationally recognised expert on art and cultural heritage crime and law, Leila has lectured at esteemed institutions, including the Frick Collection, Victoria and Albert Museum, the Neue Galerie, Christie's Education and the Philadelphia Museum of Art. She also frequently presents for legal and academic audiences, both domestically and internationally. Leila has appeared in major news outlets, including the *New York Times*, ABC News, *Los Angeles Times*, *Forbes* magazine, *The Guardian*, *Time* magazine and the *Wall Street Journal*. She has been published in legal journals and arts publications and she has had scholarly contributions published in books, including *Nazi Law: From Nuremberg to Nuremberg* and *The Provenance Research Handbook*.

As an advocate for the protection of cultural heritage, Leila has proudly served as a cultural heritage law expert for the New York District Attorney's Office. She served as an expert on a number of high-profile cultural heritage matters, including the repatriation of human mummy remains to Egypt; the return of a rare fourth-century BC marble bull's head looted from Libya during the nation's civil war; the seizure and return of an Achaemenid limestone bas-relief looted from Persepolis and returned to Iran; the seizure of a Hellenistic statue stolen from Libya by a terrorist organisation; and the repatriation of a number of Etruscan and Roman objects to Italy, including amphorae, other pottery pieces and a marble mosaic belonging to Emperor Caligula.

Leila teaches international art and cultural heritage law at Fordham University School of Law, in addition to art crime and the law at New York University. She served as the executive director of the Lawyers' Committee for Cultural Heritage Preservation from 2013 to 2015.

LAURE ASSUMPÇAO

UGGC Avocats

Laure Assumpçao is a senior associate in the litigation department at UGGC, with a specialisation in art law. She is a registered attorney in Paris and New York. Laure regularly represents and advises a wide range of domestic and international clients within the art sector. She frequently handles actions to void sales of inauthentic artworks, restitution cases and criminal cases dealing with the illicit traffic in cultural goods. Laure is also involved in complex cross-border litigation and commercial arbitration cases.

GERT JAN VAN DEN BERGH

Bergh Stoop & Sanders

Gert Jan van den Bergh is an attorney, mediator and arbitrator focused on art law, copyright, entertainment and commercial law. He is a founding member of the law firm of Bergh Stoop & Sanders and is a board member of several cultural institutions in the Netherlands. He teaches and writes regularly on issues relating to art law, ethics and policy. Gert Jan van den Bergh has litigated a wide range of art law and commercial disputes at both the domestic and international level since 1991. He has served as a deputy judge at the Amsterdam Court of Appeals, and has conducted legal training in postgraduate legal programmes. He was appointed to the original arbitration and mediation pools of the Court of Arbitration for Art in August 2019.

In general, Gert Jan van den Bergh handles cases with challenging questions surrounding authenticity, restitution, contract law and ownership issues. He gives an annual lecture at the International Association of Lawyers Congress and has given various lectures for Sotheby's Institute of Art and the British Library Conference. He is a past board member of the Rembrandt House Museum, the Amsterdam Sinfonietta Orchestra, the Prins Bernhard Culture Fund and the Flemish Culture House De Brakke Grond, and is currently on the supervisory board of the Holland Festival.

Gert Jan van den Bergh's educational background includes studying at the Ecole Normale Conservatory (Paris, 1984), Radboud University Nijmegen (JD, 1991) and Columbia Law School, New York (LLM, 1991).

FILIP ČABART

Havel & Partners

Filip Čabart specialises in banking, finance and capital markets, including art finance. In the course of his career, he has managed over 300 international and domestic financing transactions, advising leading international and Czech financial institutions and corporations. Filip has been an avid art fan and collector for a long time, and has particular interest in contemporary Czech art.

GIUSEPPE CALABI

CBM & Partners – Studio Legale

Giuseppe Calabi is managing partner at CBM & Partners.

After graduating in law at the University of Milan, he earned a master of laws at Harvard University.

He has successfully developed an art law practice in which his firm is widely recognised as a leader both nationally and internationally. He is currently a member of a government-appointed working group in charge of drafting a reform of the artwork export licence regime in Italy.

He regularly assists Italian and international art market operators, including artists, auction houses, dealers, art galleries, artists' estates, cultural foundations and associations, and private collectors.

He is the co-chair of the Art, Cultural Institutions and Heritage Law Committee of the International Bar Association. He is also a member of the Harvard Law School Leadership

Council of Europe and the Copyright Commission of the Italian Publishers Association and a non-executive board member and Italian representative of the European Association of Cultural Property Lawyers.

He frequently publishes articles and gives lectures in Italy and abroad on art law. He speaks fluent English and French.

JEAN-FRANÇOIS CANAT

UGGC Avocats

Jean-François Canat has been a lawyer for the best part of his life and, after having gained considerable experience in various other law firms, contributed to founding UGGC Avocats in 1993. Jean-François is mostly involved in litigation, matters of commercial law and art market law, the latter being the predominant focus of his practice. Jean-François represents many different types of clients: public institutions (government ministries, public bodies, etc.), private institutions (museums, foundations), art collectors, dealers and artists, among others.

WILLIAM L CHARRON

Pryor Cashman LLP

Bill Charron is a partner and co-chair of the art law practice at Pryor Cashman LLP in New York, where he represents both institutional and individual clients in a wide range of art authenticity, title and related matters. Bill has consistently been recognised as a Band I attorney in *Chambers* for art and cultural property law, and was recently named a 'New York Trailblazer' by the *New York Law Journal* for his groundbreaking work developing the Court of Arbitration for Art. Currently the president of the US arm of Professional Advisors to the International Art Market, a leading industry group, Bill also serves as an adjunct professor of art law at the University of Virginia School of Law.

TOM CHRISTOPHERSON

Constantine Cannon LLP

Tom Christopherson is a solicitor and consultant for Constantine Cannon LLP and Bonhams auctioneers, and was previously European General Counsel at Sotheby's.

In the City of London, Tom worked at Freshfields Bruckhaus Deringer LLP and Withers LLP before moving to Sotheby's and the art world in 1996. Tom is a consultant lecturer at Sotheby's Institute of Art and a member of the executive committees of the British Art Market Federation and the Society of Fine Art Auctioneers and Valuers. Tom is a member of Professional Advisors to the International Art Market, a Past Master and current trustee for the Worshipful Company of Arts Scholars, chairman of the Treasures Committee of the Worshipful Company of Tylers and Bricklayers and a trustee of the Rolls Building Art and Education Trust.

TALILA DEVIR

E Landau Law Offices

Talila Devir is an associate in the litigation department of E Landau Law Offices, and serves as a member of the firm's cultural assets, art and restitution practice.

Talila joined the firm in 2019 after completing her internship in the Civil Division of the State Attorney's Office. She graduated from the Hebrew University of Jerusalem with honours in law and international relations.

Talila's practice focuses on litigation in civil and administrative law, particularly environmental and cultural property disputes.

During her law studies, Talila served as a teaching assistant in both torts and the course on Israeli and international law. Talila also coached the Hebrew University's team for the Philip C Jessup International Law Moot Court Competition.

PATRICIA FERNÁNDEZ LORENZO

Ramón & Cajal Abogados

Patricia Fernández Lorenzo is an art and cultural property consultant at Ramón & Cajal Abogados. She has a law degree, specialising in the law of economics, an advanced studies diploma and a PhD in history. She combines her work at the firm with her teaching activities as honorary guest professor of modern and contemporary history at the Complutense University of Madrid.

As an academic researcher in the history of art collecting and patronage, she has recently published the biography, *Archer M Huntington, The Founder of the Hispanic Society of America in Spain*. She has also been an executive in the insurance sector and an associate director of the legal firm Belzuz Advogados in Lisbon. In the public sector, she has held the position of director-general of European affairs of the regional government of Bizkaia, with responsibilities for managing regional development funds, as well as the position of counsel of the venture capital firm Seed Capital and of the business incubator, Beaz Bizkaia. Patricia is a member of the European Research Network on Philanthropy and of several cultural associations. She has recently collaborated with cultural foundations, including the Francisco Giner de los Ríos Foundation and the Ortega y Gasset – Gregorio Marañón Foundation.

ANGUS FORSYTH

Angus Forsyth & Co

Angus Forsyth has represented a wide range of private and corporate clients in all aspects of company, M&A, regulatory law of insurance, securities and futures, immigration, intellectual property, information technology, advertising, personal data privacy and commercial and residential tenancy matters.

He has written articles and publications extensively on various topics covered under commercial law, trademark law, intellectual property law, personal data privacy protection under the law generally and on the internet and on the Electronic Transactions Ordinance.

Angus Forsyth was admitted as a solicitor in England in 1970 and in Hong Kong in 1971. He was one of the four original founders of the Hong Kong law firm of Stevenson, Wong & Co, established in 1978, and from which he retired in 2017.

MARCÍLIO TOSCANO FRANCA FILHO

Marcílio Toscano Franca Filho is a professor of art law at the Federal University of Paraíba (Brazil) and a prosecutor in the prosecution office of the Audit Court of Paraíba, where he is head of the Task Force on Cultural Heritage Protection. He was a visiting professor at the law department of Turin University and a research fellow at Turin's Collegio Carlo Alberto. Mr Franca is an alternate arbitrator at the Permanent Review Tribunal of Mercosur (Paraguay) and arbitrator at the Court of Arbitration for Art (the Netherlands) and at the World Intellectual Property Organization's Arbitration and Mediation Center (Switzerland).

He has a PhD in comparative law (University of Coimbra, Portugal) with a post-doc in law (European University Institute, Florence, under the Calouste Gulbenkian Fellowship). He is a member of the Executive Council of the International Law Association (UK) and of the International Art Market Studies Association. He is involved in the 1995 UNIDROIT Convention Academic Project (Italy) and is a former senior legal adviser to the UN mission in Timor-Leste. He can be contacted by telephone (+55 83 3208 3368) or by email (mfilho@tce.pb.gov.br).

KATHARINA GARBERS-VON BOEHM

Büsing Müffelmann & Theye

Dr Katharina Garbers-von Boehm is a lawyer focusing on art law, intellectual property law and technology-related matters.

In her art law practice, her clients include family offices, private individuals, artists, galleries, art dealers and advisers, banks, corporate collections, artists' heirs, collectors' heirs and authors (advisory work and litigious matters as well as mediation). She has been recognised by *Best Lawyers* for art law since 2017 and is ranked in Band 1 of the *Chambers HNW* guide to art and cultural property law advisers.

She is a co-author of *Praxishandbuch Recht der Kunst* (C H Beck Verlag, 2019), for which she wrote chapters on looted art, export restrictions and auctions, as well as a chapter on financial transactions relating to artworks. In addition, she is a co-author of what is still the only commentary on the German Cultural Property Protection Act (C H Beck Verlag, 2018), for which she wrote the chapters on the import of cultural goods and on listing proceedings. Katharina has also published extensively in relevant journals.

She is a frequent speaker and panellist at international conferences (e.g., at the IBA's Art, Cultural Institutions and Heritage Law Committee, at UIA's art law committee, at the art law conference of the Venice Chamber of Arbitration and the annual conference of the German Arbitration Institute, as well as the art law conference of the Federal Bar Association).

For many years, her practice has included arbitration and mediation in different domestic and international matters in relation to intellectual property and art law. She was appointed to the original CAfA arbitration and mediation pools in January 2020.

She is a member of various legal and cultural national and international institutions, in some of which she has board functions. She was elected to the advisory board of a midsize industrial company in Germany in 2019.

Katharina's educational background includes: law studies in Heidelberg and Berlin followed by a doctorate on the digitisation of museum archives; an LLM in international studies in intellectual property (Exeter and Dresden); a master of laws (specialisation in business law) from Paris II Panthéon-Assas University; and completion of the diploma in art law offered by the Institute of Art and Law (United Kingdom).

LINE-ALEXA GLOTIN

UGGC Avocats

Line-Alexa Glotin, after initially gaining experience in an American firm, joined the tax and private client practice at UGGC, where she has been a partner since 2011. She advises private clients and institutions in a domestic and international context. She has extensive experience in assisting individuals, family businesses, family offices, charities, trustees and foundations, including art foundations, notably in regard to the transfer and restructuring of private assets and estate planning. Line-Alexa devoted her early years of practice to 'general' taxation, dealing with the full range of taxes and taxpayers, and assisting in restructurings and transfers of businesses. She then made the choice to advise managers and their families, foreign investors, artists and sportspersons in their private and professional projects. In this context, Line-Alexa developed a particular expertise in private internal law, tax and litigation. She is regularly contacted to advise and assist clients during international court proceedings, and tax litigation and controls, as well as for voluntary disclosures. She is a member of the International Academy of Estate and Trust Law, STEP and the International Bar Association. She publishes regularly and lectures in her field of expertise abroad in private client forums.

NIV GOLDBERG

E Landau Law Offices

Niv Goldberg is formerly collections manager of the Yad Vashem Museum of Holocaust Art. An expert on Holocaust art, Nazi-looted art and restitution, he is completing his final year of law school at the Hebrew University of Jerusalem.

Niv recently joined the firm of E Landau Law Offices, where he will be taking articles, and where he serves as a consultant to the cultural property, art and restitution practice in his field of expertise.

PHILIPPE HANSEN

UGGC Avocats

Philippe Hansen became a partner at UGGC Avocats in 2011. Philippe's practice has expanded over the years to cover several fields and areas of activity. To his initial practice that focused on urban and spatial planning law, Philippe quickly added a specialisation in public property law, a subject he is passionate about and to which he dedicates much of his time. He also devotes a lot of work to railway law and railway regulations. Finally, Philippe is extremely active in art law, working primarily for public institutions and museums. In addition to his legal practice, he is a very frequent contributor to law journals. He is also the author of a book on public property and co-author of a book on art law.

MEIR HELLER

E Landau Law Offices

Meir Heller is a senior partner and heads the litigation department of E Landau Law Offices. Meir also serves as head of the firm's cultural assets, art and restitution practice, which, in addition to serving a variety of private clients, including heirs of Holocaust victims, also represents Israel's National Library and the Tel Aviv Museum of Art.

Meir joined E Landau Law Offices in 1998. He was admitted to the bar in 1997, after graduating from the faculty of law at the Hebrew University of Jerusalem, where he has also completed master's degrees in both business administration and law.

Meir has extensive experience in representing Israeli and international clients in complex litigation in a range of international and domestic matters, including energy and infrastructure, financing, commercial contracts, tenders, restitution of lost and looted art, inheritance, trusts, defamation, administrative law, real estate, environmental law, maritime law and private international law.

Meir is one of Israel's leading experts on cross-border disputes and has represented clients in complex matters involving multiple jurisdictions, such as the United States, Canada, Germany, Italy, China, Switzerland, South Africa and the United Kingdom. He is often appointed by Israeli courts to administer large and complex estates with multiple heirs. Meir has an extraordinary record of success in the Israeli courts, including in complex appeals and precedent-setting cases before the Israeli Supreme Court.

Meir has lectured before the Israel Bar Association and other professional and topical forums on the subject of cultural assets and restitution.

ALEXANDER HERMAN

Institute of Art and Law

Alexander Herman is the assistant director of the Institute of Art and Law. Prior to this, he practised law in Montreal, Canada and worked with renowned art law barrister Norman Palmer QC CBE. He has written, taught and presented on an array of topics in relation to art and cultural property, including on art transactions, restitution, international conventions, copyright, exports and art collecting. His writing appears frequently in the press and he has been quoted widely on art law topics, including in *The Guardian*, the *Art Newspaper*, the *New York Times* (online), ArtNET, Bloomberg, *Le Devoir*, *National Post* and *Globe and Mail*. He helped develop a unique masters programme in the discipline – the Art, Business and Law LLM at the Centre for Commercial Law Studies at Queen Mary University of London – and currently serves as the programme's co-director. Alexander regularly contributes on art law issues to the quarterly journal *Art Antiquity and Law*. You can follow him on the Institute of Art and Law blog and on Twitter at @artlawalex.

AUKE VAN HOEK

Bergh Stoop & Sanders

Auke van Hoek is an associate within the art law and intellectual property section of Bergh Stoop & Sanders. Auke earned his LLM degree in private law at Leiden University and studied at the Queen Mary University London for a semester where he completed IP and art history courses. During his LLM, he specialised in the area of intellectual property law, including writing a thesis on the moral rights of artists, for which he received an honourable mention at the International Association for the Protection of Intellectual Property symposium in the Netherlands in 2018. Auke has been practising as an attorney since June 2019.

LAWRENCE M KAYE

Herrick, Feinstein LLP

Lawrence M Kaye is co-chair of the firm's art law group. Larry has a diverse commercial art practice, advising dealers, collectors, artists, museums and estates in transactional matters, including the acquisition and sale of world-renowned works of art, art loan and exhibition agreements, Section 1031 (of the United States Internal Revenue Code) exchanges, insurance and authentication issues, and financings using art as collateral. Larry also represents a wide range of domestic and international clients in all types of complex art litigation and dispute resolution, including issues about authenticity and authentication, artist/dealer relationships and contractual disputes related to the purchase and sale of artworks. Larry has represented foreign governments, victims of the Holocaust, families of renowned artists and other claimants in the recovery of art and antiquities. Larry also advises and represents foreign governments in matters related to cultural property and, in that regard, among other things, served as legal adviser to the Republic of Turkey's delegation to the diplomatic conference where the UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects was adopted. He has written and lectured extensively on mediation and arbitration of art law disputes.

GREGOR KLEINKNECHT

Hunters Law LLP

Gregor Kleinknecht is a German *Rechtsanwalt* and an English solicitor and partner at Hunters Law LLP, specialising in art and cultural heritage law. Having started his career at two leading international City of London law firms and at a US law firm, Gregor founded and led the award-winning boutique firm of Klein Solicitors before joining Hunters following the merger of the two firms in February 2014. Gregor is also a mediator and arbitrator with Art Resolve, the dedicated dispute resolution service for art and cultural heritage claims. He conducts both transactional and dispute resolution work for a wide range of national and international artists, collectors, galleries, dealers, auctioneers, art consultants, funding organisations and landed estates. Gregor also advises and has successfully acted for claimants in Holocaust restitution claims. He is recommended as a leading individual in art and cultural heritage law by the main legal directories. He chairs the board of the Professional Advisors to the International Art Market and is a member of numerous other professional and arts organisations. He frequently speaks and publishes on a wide range of legal topics.

VLADEK KRÁMEK

Havel & Partners

Vladek Krámek focuses on providing advice to private clients, the structuring of private property protection, and company, finance and capital markets law, including financial product regulations.

LUCIE LAMBRECHT

Lambrecht Law Office

Lucie Lambrecht is the founder and managing partner of Lambrecht Law Office. She has been practising as a lawyer at the Brussels Bar since she obtained her law degree from the University of Leuven (KUL, 1986) and her master's degree in law from the University of London (LLM, 1987).

Before she set up her own legal practice, Lucie worked at the banking and corporate practices of Linklaters' and Allen & Overy's Brussels offices for more than 20 years; she also worked as a lawyer in London for a couple of years. However, art law has always been Lucie's main area of interest and she has further developed this since her time in London.

Lucie has been an independent adviser for the Flemish government for many years and was thus involved in the preparation of a number of pieces of important legislation in cultural property matters.

She has been a speaker at various legal seminars and has published diverse articles in specialist legal periodicals in her different areas of expertise.

She is a member of several professional associations and groups, including Collections Legal, the Institute of Art and Law, Professional Advisers to the Art Market, the Art Law Foundation and the Belgian Copyright Association.

Lucie has been a substitute judge at the Court of Appeal of Brussels since 2014. She was appointed as an arbitrator in the original arbitration pool of the Court of Arbitration for Art in January 2020.

JANINE LAPWORTH

Simpsons Solicitors

Janine Lapworth joined Simpsons Solicitors as a senior consultant after running her own entertainment law practice for several years. She has broad corporate, commercial, intellectual property, entertainment and litigation experience, gained at national and international law firms and in senior in-house legal positions at the Australian Broadcasting Corporation in Sydney and ESPN Star Sports in Singapore. She has worked with a wide range of clients based in Australia and overseas, including international studios, industry groups, tech start-ups and other creative businesses. In addition to her legal experience she brings both a practical and academic grounding in various art forms including music and dance. Her interest in the visual arts is long-standing and she has been a member of various gallery associations over many years. She is currently deputy chair of Australian Theatre for Young People.

Janine's current areas of practice are diverse, from television production and distribution to publishing and general intellectual property advice and contracting.

Janine holds arts and law degrees from the Australian National University and a graduate qualification in book publishing from the University of Technology Sydney.

MATVEY LEVANT

Levant & Partners Law Firm

Matvey Levant is managing partner of Levant & Partners Law Firm. Matvey graduated from the Smolensk Humanitarian University with a degree in civil law and from Smolensk Teachers' Training University, Faculty of Philology.

Matvey is the author of Russian and foreign publications on Russian law and co-author of the monograph *Procedural legal grounds for forensic expertise*. Since 2001, he has been president of the International Legal Fund, which renders free legal assistance to social and religious organisations of national minorities. In 2008, Matvey was admitted to practise in New York. Matvey is a member of the Public Council within the Russian Patent Office.

RAFAEL MATEU DE ROS

Ramón & Cajal Abogados

Rafael Mateu de Ros, one of the founding partners of Ramón & Cajal Abogados, specialises in corporate and commercial law, corporate governance, and Spanish and international tax law, as well as litigation and arbitration. As a government lawyer, Rafael worked for several years for the Spanish Ministry of Economy and Finance, where he served as director of the Central Resource Service, head of the Technical Cabinet of the Sub-secretariat and deputy director general. Subsequently he focused his career on the private sector, acting as secretary to the board of directors and general counsel of diverse companies (Endiasa, Eniepsa, Hispanoil) and as secretary to the board of directors of Bankinter, where he currently serves as independent director and chairman of the Corporate Governance Committee.

Rafael is a permanent arbitrator of the Madrid Civil and Mercantile Arbitration Court and the Madrid Arbitration Court, and is a member of the Banking and Finance Arbitration Committee of the European Association for Arbitration. Rafael has authored numerous monographs and articles and frequently contributes opinions on legal and art issues in Spanish national newspapers such as *El País*, *Cinco Días* and *Expansión*.

SAMUEL MILUCKY

Constantine Cannon LLP

Samuel Milucky is a trainee solicitor at Constantine Cannon in London. Competition law, including antitrust litigation, dominates Samuel's work. He assists the antitrust litigation, commercial litigation and art and cultural property groups in advising clients on a broad range of contentious and non-contentious matters. Samuel's experience includes assisting teams advising art collectors, galleries and art financiers. Previously he also assisted teams advising (ultra) high-net-worth individuals and family offices. Prior to joining Constantine Cannon, Samuel acquired experience in regulatory aspects of competition law under the Blue Book Traineeship programme at the European Commission's Directorate-General for Competition in Brussels. Samuel also interned at leading law firms in the CEE region, mainly in competition and corporate practices. Samuel holds an LLB from the University of Groningen and an LLM from University College London. He speaks Czech and Slovak.

PETER MOSIMANN

Wenger Plattner

Peter Mosimann is a founding partner of Wenger Plattner, and has been of counsel with the firm since 2016. Mr Mosimann is a member of the intellectual property, art and entertainment law, and life sciences and health law teams. He has extensive experience in advising private and public sector arts and cultural organisations, as well as governments, on art law matters, including theatre, musicals, the visual arts, film and publishing. He advises companies on intellectual property issues, especially with respect to health law and life sciences. He is particularly adept at handling contentious work involving copyright and art law.

Mr Mosimann has been the chair of the Association of Copyright and Neighbouring Rights Users (1993–2014); chair of the Basel Art Museum (2008–2017); a lecturer at the law faculty of the University of Basel (IP law and art law) (2005–2014); a member of the board of the Swiss Foundation for Photography (since 1982); a member of the Swiss Federal Arbitral Commission on the Exploitation of Copyrights and Neighbouring Rights (1995–2011); and a legal adviser for the Union of Swiss Theatres (1981–2012).

He has authored, co-authored, edited or contributed to multiple publications, including *Kultur Kunst Recht*, *Das revidierte Urheberrecht*, *Kunst & Recht Bulletin*, *Art & Law 2014*, *KUR 2018* and *Fluchtgut – Geschichte, Recht und Moral*.

KAMALA NAGANAND

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Kamala Naganand studied law at the University Law College, Bangalore and achieved her master's degree in intellectual property law at the George Washington University Law School. Her principal practice areas are corporate advisory, intellectual property law, insolvency and bankruptcy and private client practice.

She started her career at her family-run law firm, Sundaraswamy Ramdas and Anand, after which she co-founded Justlaw. She went on to set up Aarna Law with her partner Shreyas Jayasimha. As managing partner, Kamala has initiated various measures to bring women back to the workforce, including flexible hours, working from home and maternity leave.

Kamala heads the intellectual property, media, technology and data protection practice, working on management of intellectual property, licensing and branding exercises for start-ups and companies. She has a passion for art and has been instrumental in building the firm's art law practice.

With a keen interest in economics, Kamala has helped institutions establish and enforce codes of conduct prohibiting fraud. She has worked on internal investigations and asset tracing and recovery and has built a team within the firm that specialises in insolvency and bankruptcy.

Kamala has also been working on case management for large and complex arbitrations and disputes. She has advised high-net-worth individuals and private individuals, over the years, on succession. Kamala is a trained mediator and has represented clients as counsel in commercial mediations and is available to sit as a neutral.

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Carl Dominik Niedersüß is an attorney-at-law at Polak & Partner Attorneys-at-Law. He studied law at the University of Vienna School of Law (*mag iur* 2010), at the Université Paris V, where he completed a term abroad, and at the Max-Planck-Institute for Innovation and Competition (LLM in intellectual property law). In 2016, he was admitted in Austria.

Prior to joining Polak & Partner, Carl Dominik worked as an associate with Lattenmayer, Luks und Enzinger Rechtsanwälte (2010–2016) and gained further considerable experience in several internships with Viennese law firms (SCWP, Schramm-Öhler) and with the European Parliament in Brussels.

His main areas of practice comprise intellectual property law (trademark, copyright and unfair competition law, as well as the management of global IP portfolios), antitrust law and civil law.

LUKE NIKAS

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Luke Nikas is a partner in the New York office of Quinn Emanuel Urquhart & Sullivan, and co-chair of the firm's art litigation and disputes practice. He is a leading litigator with extensive experience representing clients in complex disputes. His clients entrust him with their most significant legal challenges, in both trials and appeals. He has been named in *Lawdragon*'s '500 Leading Lawyers in America' and '500 Leading Plaintiff Financial Lawyers' in business litigation, *Benchmark Litigation*'s 'Under 40 Hot List', the *New York Law Journal*'s 'Rising Stars', *Best Lawyers in America* and 'New York Super Lawyers' by *Super Lawyers*.

Luke represents individuals and companies in almost every type of litigation across the globe, including in an array of industries, such as banking, law firm business, insurance, pharmaceutical, healthcare, professional sports, media and entertainment, and real estate.

JOHAN CAMILO ALSTAD-ØHREN

Johan Øhren is an independent legal counsel and compliance officer. He earned an LLM from the University of Oslo's Faculty of Law. His thesis on appropriation art and copyright infringements compares Norwegian and US copyright law. Johan also holds a BA in art history from the same *alma mater*. He has gained experience working in art galleries, museums and art publishing, and in curating exhibitions and through collecting art. Today he provides pro bono legal support to artists and foundations, and writes a monthly column on art and finance in the consumer magazine *Dine Penger*. He can be contacted by telephone (+47 99 239 484) or by email (johanohren@gmail.com).

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Dimitris Paraskevas is the managing partner of Paraskevas Law Firm, which was established by his father in 1933. He has represented museums, artists, collectors and galleries on a wide range of matters, as well as ultra-high-net-worth individuals, banks and leading international companies in transactions and litigation in cases worth in excess of US$400 billion over

the past 35 years. He has been named as a 'super salesman' by the *Financial Times* and a 'legal genius' by the *The Legal 500*. He is known for his commercial approach, efficiency and utmost integrity.

EMELYNE PETICCA

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Emelyne Peticca is a trainee solicitor in the London office of Constantine Cannon. Emelyne Peticca assists the art and cultural property law, the commercial litigation and the antitrust litigation groups. Within the art and cultural property law group, she helps represent a broad range of clients, including international collectors, galleries, auction houses and artists, on both domestic and cross-border, contentious, non-contentious and regulatory matters. Prior to joining Constantine Cannon, Emelyne Peticca interned in the restitution department of Christie's London and separately gained experience in London City and Paris law firms. Emelyne holds an LLB in English law and French law from King's College London, a master's degree in law from the Sorbonne Law School, an MSc in art, law and business from Christie's Education, London and the University of Glasgow and an LPC from the University of Law. Emelyne speaks French and has a proficiency in Italian and Spanish.

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Marc-André Renold, who studied in Geneva and Basel in Switzerland and at Yale in the United States, is a full professor at the University of Geneva Law School. He teaches art and cultural heritage law, and holds the position of UNESCO Chair in International Law for the Protection of Cultural Property.

Mr Renold is also a practising attorney, and a member of the Geneva Bar, practising, in particular, in the fields of art and cultural heritage law, public and private international law, civil and commercial law and intellectual property law. He is of counsel for the Swiss law firm Wenger Plattner.

He is also the director of the University of Geneva's Art-Law Centre, which is dedicated to research and teaching on legal issues relating to works of art and cultural property. He established the ArThemis database on the resolution of disputes relating to cultural heritage (www.unige.ch/art-adr).

He has also been associate professor and lecturer at the University of Geneva, visiting lecturer at the Graduate Institute of International Studies of Geneva and the Duke-Geneva Institute in Transnational Law, and visiting professor at the University of Paris II.

He has authored or co-authored numerous publications in the field of art and cultural property law at Swiss and international levels, including *Kultur Kunst Recht*, and is co-editor of the Studies in Art Law series published by the Art-Law Centre.

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Charlotte Sartori is an associate at Lambrecht Law Office. She has a bachelor of laws degree from Saint-Louis University (trilingual programme) and a master of laws degree from Université Catholique de Louvain (UCL).

During her master's degree, she spent one semester at the University of Bologna and wrote her master's thesis on the issue of restitution of cultural goods. She also attended lectures on cultural heritage law at the University of Geneva.

Charlotte began her Bar internship in the litigation department of the Benelux law firm NautaDutilh between 2014 and 2016. From 2015 to 2019, she was a teaching and research assistant in the international and European law department of the UCL, mainly focusing on private international law. She accordingly participated in various publications on court jurisdiction in international conflicts.

She has been practising art and cultural property law at Lambrecht Law Office since 2017, where she has contributed or co-authored various articles and publications in this area.

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Maaren A Shah is a partner in the New York office of Quinn Emanuel Urquhart & Sullivan, and co-chair of the firm's art litigation and disputes practice. She has extensive experience handling complex commercial disputes, including litigation, arbitration and appeals, with a focus on the financial services and art sectors. Ms Shah has represented companies, investment funds and corporate officers and directors in high-stakes, high-dollar disputes, and frequently works with activist hedge funds in advising on and pursuing her clients' litigation-driven investment strategies. She has a thriving trial practice, often participating in one or more trials or arbitration hearings each year. She also leads the firm's premier art litigation practice representing clients in art-related disputes involving issues such as copyright/fair use, provenance and authenticity, art forgery, art contracts and transactions and art financing, and has handled matters relating to landmark contemporary artists including Andy Warhol, Robert Indiana and Peter Max.

MAKOTO SHIMADA

SAH & Co

Makoto Shimada, a partner at SAH & Co, is a lawyer admitted to the Bar in Japan in 1981. He majored in law at Keio University and obtained judicial qualification before studying at University College London, where he was awarded a master's of law degree in 1986. Since 2004, he has been a professor of law at Keio University Law School where he teaches art business law, English commercial law, commercial arbitration and negotiation. He is also an honorary visiting professor at City Law School, University of London. Prior to the above appointment he practised international commercial law and dispute resolution at several law firms, including Nagashima Ohno & Tsunematsu in Tokyo (1981–1985) and Norton Rose Fulbright in London (1986–1989). He is a member of the Dai-ichi Tokyo Bar Association, the International Association of Lawyers, the Institute of Art and Law (diploma in art profession law and ethics) and the Chartered Institute of Arbitration. He is particularly interested in arbitration in art and cultural heritage.

HOWARD N SPIEGLER

Herrick, Feinstein LLP

Howard N Spiegler is a partner and co-chair of Herrick, Feinstein's art law group. He handles all types of art transactions, often with the assistance of other attorneys at Herrick, including counselling its clients on international trade issues, loans, museum and private exhibitions, organising and structuring business entities, trust and estate matters, insurance issues, tax questions and criminal law concerns. Howard has also been involved in several significant cases recovering stolen artwork or other cultural property, including rare books stolen from the Swedish National Library; the full value of a Schiele painting confiscated by a Nazi agent from Lea Bondi Jaray in Austria in the late 1930s; 200 artworks looted by the Nazis from the Jacques Goudstikker Gallery in the Netherlands; numerous antiquities for the Republic of Turkey; and valuable Malevich paintings recovered for the Malevich family from Amsterdam in the Netherlands. Among other commendations, he has received the Award for Lifetime Achievement in the Defence of Art by the Association for Research into Crimes Against Art and the Prix Monique Raynaud-Contamine by the International Association of Lawyers. He is on the editorial board of the *Journal of Art Crime* and has served as president and vice president of the Art Law Commission of the International Association of Lawyers and chair of the Art Law Committee of the New York City Bar Association.

MASSIMO STERPI

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Massimo Sterpi is a partner and head of the IP and art law departments in the Rome office of Gianni & Origoni. A passionate art collector, he has gained internationally recognised experience in art law. In this field, he addresses various topics including problems of authenticity, recovery of stolen or looted artworks, commissions of artworks, management of artists' estates, licences and merchandising, unauthorised reproduction, sales and exports of works of art and declaration of works of art as national treasures. In recent years, he has focused on the impact of disrupting technologies on the creation, distribution and trade of art. He has authored and edited numerous publications on intellectual property, art law and art tech, including *The Art Collecting Legal Handbook* (published by Thomson Reuters), which covers the laws on art in 30 different jurisdictions. He also frequently speaks on art law subjects at international conferences.

Massimo is on the WIPO lists of mediators and referees in matters of IP and art and cultural heritage. He has been chairman of the IBA Committee for Art, Cultural Institutions and Heritage Law and is currently the president of the UIA's Art Law Committee. He is also a member of the advisory board of the Peggy Guggenheim Collection in Venice and sits on the board of directors of Fondazione Prada and of the US Friends of the MAXXI Foundation.

He speaks Italian, English, French, Spanish, German and Japanese.

GUSTAVO TANOUSS DE MIRANDA MOREIRA

Gustavo Tanouss de Miranda Moreira is a researcher in art law and cultural heritage law at the International Laboratory of Investigations into Transjuridicity at the Federal University of Paraíba (Brazil). He has a bachelor of laws degree from the Federal University of Paraíba. He can be contacted by telephone (+55 83 98146 0330) or by email (gtanoussmm@gmail.com).

IRINA TARSIS

Center for Art Law

Born in Kiev, Ukraine, Irina Tarsis is an art historian and a practising attorney admitted to the bar in New York State. She earned her master's degree in art history from Harvard University (Massachusetts) and her JD from the Benjamin N Cardozo School of Law (New York). Ms Tarsis launched the Center for Art Law as a blog in 2008/2009. In 2012, she began offering internship opportunities to interested law students, invited guest writers to publish research articles with the Center for Art Law website and organised events to bring lawyers and artists together for meaningful conversations and exchanges of ideas. Under her leadership, the Center was incorporated as a stand-alone non-profit organisation in December 2017. Ms Tarsis has served on the faculty of the Teachers College, Columbia University (2020), the Benjamin N Cardozo School of Law (2012, 2017–2018) and the European Shoah Legacy Institute's provenance research training workshops in Lithuania (2013), Greece (2014) and Italy (2014).

An active member of multiple bar associations and art law committees in the US and Europe, she contributes to scholarship through regular publications and lectures on various topics, including resale royalty rights, due diligence in provenance research and fair use issues affecting visual arts. Her written publications include articles in the *IFAR Journal*, *Entertainment, Arts and Sports Law Journal*, *Cultural Heritage & Arts Review*, *Libraries & The Cultural Record*, the *ArtWatch UK Journal* and the Institute of Art and Law's journal, *Art Antiquity and Law*.

TAKU TOMITA

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Taku Tomita, a partner at SAH & Co, is a lawyer admitted to the Bar in Japan in 2002. He has 17 years' experience in the field of intellectual property, including in copyright in connection with arts, and advises Japanese and international clients on all matters arising therefrom.

YULIANNA VERTINSKAYA

Yulianna Vertinskaya has been employed in the energy sector of a US company for approximately 10 years and was recognised as a leading corporate lawyer by *The Legal 500 – GC Powerlist: Russia 2017*. She holds a diploma in the doctrine of Russian law (civil and corporate law) as well as a diploma in common law (University of London). Her main practice areas include private commercial law, corporate law and compliance. In addition to her work in the energy sector, since 2016 she has focused her personal studies on legal issues pertaining to the art world. She publishes art law articles and is currently pursuing a further course of study in art history at the Moscow State Stroganov Academy of Design and Applied Arts. She can be contacted by email (vertinskaya_yul@mail.ru).

MARTHA VISSER

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Martha Visser has been involved in several high-level (international) cases in art-related matters, handling court proceedings as well as claims for restitution of artworks before the Dutch Restitution Committee, which advises the Dutch government on the return of Nazi-looted art. She focuses on the fields of art law and intellectual property law and

is a skilled litigator. Martha studied law at the University of Maastricht, and earned her LLM degree after completing her masters in private law at the University of Amsterdam. Her thesis regarded the international law aspects of the restitution of cultural property in the Netherlands.

During her studies, she also completed courses at the University of Salamanca in both the law and history faculties. She also completed an internship in the permanent delegation of the Netherlands at UNESCO in Paris, where she specialised in the UNESCO cultural heritage conventions. Martha has been practising as an attorney since August 2015.

PETRA WARRINGTON

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Petra Warrington is a senior associate at Hunters Law LLP, practising art and cultural property law and intellectual property law. She advises collectors, artists, trustees and members of the art trade in relation to both non-contentious matters and disputes. Petra obtained a BA and MA in history of art before pursuing a legal career and held research, collection management and business roles at museums, galleries and auction houses in the United States and London. Petra is an accredited mediator and a member of Art Resolve, an officer on the IBA Art, Cultural Institutions and Heritage Law Committee and a member of the Professional Advisors to the International Art Market. She is recommended in the art and cultural property section of *The Legal 500* and *Chambers HNW*.

YAEL M WEITZ

Herrick, Feinstein LLP

Yael M Weitz's practice includes a wide range of domestic and cross-border art and cultural property matters. Yael has represented claimants seeking restitution of art misappropriated during the Holocaust, and claimants seeking the recovery of looted or stolen cultural patrimony. She has represented art dealers and galleries in various art transactions. Among other representative matters, Yael has successfully assisted the National Library of Sweden in recovering stolen rare books. Yael also represents Marei von Saher in her efforts to recover hundreds of Nazi-looted artworks from the collection of her father-in-law, the renowned Dutch art collector and dealer, Jacques Goudstikker. Yael is a member of the Art Law Committee of the New York City Bar Association and an advisory board member of the Center for Art Law. In 2017, Yael received Herrick's Milton Mollen Pro Bono Award.

BARRY WERBIN

Herrick, Feinstein LLP

Barry Werbin is counsel at Herrick, Feinstein LLP and a member of its intellectual property group. His practice is focused on intellectual property and online issues (including trademarks, trade dress, copyrights, unfair competition, false advertising, publicity and privacy rights, trade secrets, domain name issues and UDRP arbitrations, digital rights protection, trademark and content licensing, marketing and sponsorship agreements, publishing, IP due diligence and exploitation rights) and technology (including software licensing and development, cloud and SaaS services, IT support, website development and hosting, and data breaches). Barry handles IP-related complex commercial litigation and transactional matters.

Barry is the current chair of the New York State Bar Association's Entertainment, Arts & Sports Law Section. Barry was a prior chair of the Copyright & Literary Property Committee of the NYC Bar Association and prior NY Chapter co-chair of the Copyright Society of the USA. He is a member of INTA's Commercialization of Brands Committee and a prior member of INTA's Online Use/Web 2.0 Working Group. Barry is co-chair of Fordham Law School's Intellectual Property Alumni Affinity Group and an advisory board member of the Fordham Art Law Society.

Barry has been recognised multiple times as a top IP litigation lawyer by *Super Lawyers*.

GABRIELLE C WILSON

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Gabrielle C Wilson focuses her practice on commercial disputes involving art, intellectual property and insurance-related issues. She also advises clients on a variety of matters relating to art and cultural property law. Experienced in both state and federal courts, Gabrielle has represented foreign governments and families of renowned artists in the recovery of art and antiquities. She graduated *cum laude* from the Benjamin N Cardozo School of Law, where she served as associate notes editor of the Cardozo *Public Law, Policy & Ethics Journal*, and received her undergraduate degree from Princeton University. Gabrielle is also a member of the Copyright Society of the USA, was selected to join the National Black Lawyers Top 40 Under 40 in New York in 2020 and 2021 and was recognised by *Best Lawyers in America* 'Ones to Watch 2021' in New York for intellectual property.

MONA YAPOVA

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Mona Yapova is a paralegal at Constantine Cannon, where she assists the art and cultural property law group. Mona Yapova has assisted with regulatory, commercial and contentious matters involving a broad range of clients, including government entities, collectors, galleries, auction houses, artists and antique dealers, in both domestic and cross-border matters. Prior to joining Constantine Cannon, Mona Yapova acquired experience internationally while working at the Peggy Guggenheim Collection in Venice and the State Hermitage Museum in Saint Petersburg. Mona also researched and studied the collections of leading UK museums while completing her graduate studies at the Courtauld Institute of Art, where she focused on fifteenth century Persian arts and contemporary art. Mona holds an LLB in English law and French law from King's College London, a Maîtrise en Droit from the Sorbonne Law School, and a graduate diploma in the history of art from the Courtauld Institute of Art. She speaks French and Bulgarian and has proficiency in Italian and Spanish.

Appendix 2

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