THE ART COLLECTING LEGAL HANDBOOK

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PREFACE

Bruno Boesch and Massimo Sterpi | General Editors

Three years can be a long time in the life of a book. Since the first edition of *The Art Collecting Legal Handbook*, the "art world" has travelled very far, especially the marketplace. Hence this updated and slightly revised second edition.

Few would dispute that the art market has expanded enormously. Buyers, sellers, dealers, intermediaries and advisers are multiplying and diversifying at an ever increasing pace. There seems to be no limit to the range of objects making it to the market. The primary market is going global, consolidating and branding. Auction houses are not at all what they used to be. Dealers and auction houses, private individuals and companies take financial positions in the market. Art is looked upon as an asset class. Public museums are uneasy about their new relationship to collectors and artists. Are they abdicating their curatorial judgement and responsibility, one hears it being asked. In other words, globalisation has hit the art market as it has other markets. Technology colludes to take it ever further from the cosy, old-time ritual where art moved from the studio, to the dealer, to the collector, and to the museum.

While the media entertain us with endless tales of glamour and mischief, law enforcement officers are becoming more active, helping to keep cultural heritage in some sort of check, catching money launderers, and fighting/uncovering fakes and forgeries. Collectors are bringing market participants to account. Consignors pursue auction houses for failing them in the investigation of the objects consigned. Buyers charge galleries for not being forthcoming with price-sensitive information. Nobody seems to know what to expect from artist authentication boards or catalogues *raisonnés*. There is considerable discontent about auction houses' alleged opacity in competing for the best lots by offering guarantees and other financial sweeteners.

Disputes involving major galleries and a new breed of intermediaries wearing conflicting caps have been attracting a great deal of attention. The paramount importance of clear provenance has come to the fore. How much information provided by market participants can be taken on trust? Provenance is central to the issue of property and good title. But also and more importantly, provenance is central to the reliability of our cultural heritage. Can we satisfy ourselves about the authenticity and origin of works of art and other cultural property without coming truly clear about the full chain of owners up to the last owner and the seller? Would some of the scandals have happened at all if the buyers had been more demanding in their enquiries about the source of the paintings up for sale, or if the gallery had not taken on trust the information provided by the supplier? Would the alleged deceptions have occurred if more transparency had been expected and elicited by all parties involved?

True, secrecy has been a feature of the art world and of the art trade as far back as one can remember – and in some countries very much more than in others. The recurrent calls for regulation, essentially for more transparency, have gone unanswered, not only by reason of the stubborn expectation of confidentiality, but also because of the great number of art market actors and their diversity, not to mention the multiplicity of the relevant markets. However, culture – the way we make sense of the world – has moved so much centre stage, and the stakes are so high, that one could be forgiven for thinking that the state may not be able to stay away for much longer. It is our duty to ensure the reliability of our cultural heritage, and the access to that heritage. Besides, in this era of surveillance and exchange of information, there is no question that the technical means exist to uncover and to record national treasures and even less worthy bits and pieces.

Given the challenges of governmental regulation, self-regulation seems the preferable way forward. Trade associations exist with enough clout. The self-interest of the big auction houses and other players may also come to

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bear. Art fairs cannot be seen any longer as mere venues for dealers. They have branded, too. As a result, they have acquired a position of authority and power. Accordingly, we are extremely proud that Marc Spiegler, Director of Art Basel, has agreed to pen an introduction to this book. And we are privileged to be able to add a foreword by Sarah Austrian, General Counsel of The Solomon R Guggenheim Foundation. Art institutions, private and public, are the bedrock of our cultural life.

In the preface to the first edition of *The Art Collecting Legal Handbook* we were referring to an art world and an art market that were coming to grips with a sprawling net of regulations. The rule of law was coming to the buyers, sellers, lenders and art lovers concerned with the eventual fate of their collections. Today, pending some requirements for due diligence, openness and trust brought in by those organisations with recognised authority, people are required to call on the law more than ever before. They are left to fend for themselves, and therefore they need to be clear on their rights and obligations – the expectations against which they will be judged – when dealing with a painting, a print, an antique bronze, a medieval ivory Virgin and Child, or other unique objects of particular pleasure. Our ambition in this second edition is to better equip collectors and their advisers in the pursuit of their passion.

Bruno Boesch and Massimo Sterpi

May 2016

INTRODUCTION

Marc Spiegler | Global Director, Art Basel

In 2005, working as journalist, I wrote an article predicting a surge of litigation in the art market, where going to court had traditionally been the rarest of recourses. Over the last decade, that article proved ever-more accurate: The last few years have featured cases pitting against each other every possible permutation of protagonist: consignors vs auction houses, artists vs collectors, collectors vs advisors, backers vs gallerists, gallerists vs auction houses … *ad infinitum, ad nauseam*.

Many factors catalysed this more litigious environment, including: the higher stakes involved, as prices rise; the influx of new players, many from real estate and finance, where "going legal" is the *modus operandi*; the growth of speculative "collecting" by people treating artworks as assets; and the rapid flow of information inherent to the transparency-driven digital age. While the halcyon days of handshake agreements are surely exaggerated, there is no question that contracts and lawyers have become far more prominent on today's artworld stage – and in the thinking of all its players, anxious to avoid landing in turgid legal headlines.

Granted, there are positives to these developments. The *Helge Achenbach* case, for example, underlined the need for transparency between collectors and their advisors. Gallerists have successfully stopped auction sales, citing sales agreements blocking buyers from "flipping" their artist's work. In some countries, Artist Resale Rights statutes allow artists to benefit when their work is re-sold by galleries or at auction. And the detailed provisions for contracts concerning repair and replacement of works in newer mediums have reassured potential patrons – especially museums, who bear a heightened responsibility toward history.

But on balance, every public battle hurts the broader artworld, by casting vague aspersions upon an entire industry. Worse yet, several drawn-out lawsuits have had a chilling effect on expertise. In 2012, the Warhol Foundation announced it would no longer engage in authentication, having spent $10 million on legal fees despite winning a series of lawsuits by collectors whose works it refused to certify. Likewise the Haring, Basquiat and Pollock-Krasner estates stepped back from authentication, arguably the single most important aspect of assuring their namesake's legacy. Most recently, the grilling of art historians on the witness stand during the *De Sole vs Knoedler* forgery trial will scare experts from advancing their opinions, even informally.

In another negative development, attempts by politicians to regulate art-market activity have demonstrated how well-meaning outsiders can catalyse confusion and consternation. When Monika Grütters, the German Commissioner for Culture and the Media, proposed a law restricting the movement of any work in Germany older than 50 years and worth more than 150,000 euros, she achieved a rare miracle: the artworld united for a single cause, angrily predicting that artists and collectors would in reaction move their work outside Germany. If this seems histrionic, consider the Italian precedent: hundreds of Arte Povera pieces – many of them true masterpieces – have departed Italian soil in the last few years, just beating the 50-year rule established by the country's Leggi Bottai, whose dreaded "*notifica*" can lock an artwork within Italy, torpedoing its value overnight.

A little perspective would help here. In recent years, the absence of specific regulations has led the art market to be commonly characterised as a lawless, speculative casino, where multimillionaires act as middlemen for multibillionaires. The reality is different. Most importantly, the art trade is not the "Wild West," as proven by this very book you are holding. Every major country has a wide range of laws that apply to art transactions. Last year, for

example, the British Art Market Federation found that 167 different laws governed art transactions, some bespoke to the trade and others covering broader commercial and criminal issues.

Secondly, despite its extensive media coverage, the art market remains relatively minor. Its total 2015 worldwide sales were estimated at $64 billion by Dr. Clare McAndrews in her definitive TEFAF Global Art Market report – roughly the annual revenues of Dell Computers alone. And even the most successful galleries often remain precariously balanced, their businesses dependent on the support of a few core clients and their capital tied up in artworks that can be costly to produce, exhibit, insure and transport.

Coming to collectors: Yes, there are many more speculators than before, but there are also far more passionate collectors. And contemporary-art connoisseurs face complexities that never existed when owning relatively robust oil paintings and marble sculptures. Photography, for example, remains an art-insurance minefield, because a sun-bleached or scratched photo is a total loss – it cannot be restored but must rather be reprinted. If the artist is dead, then its value drops sharply, as posthumous printings are worth far less. Even if the artist is living, he may simply refuse to re-produce a work for any number of reasons. Similarly, if you lose a Dan Flavin certificate of authenticity, the estate will not replace it, making the work simply a pile of old neon tubes from a resale perspective. Just as worrisome, several prominent artists have chosen to strike some early works from their catalogues *raisonnées* altogether, throwing their value into doubt despite their perfect provenance.

Looking toward the future, the increasingly digital nature of artworks creates an entirely new dimension of problems. When you buy an Oculus Rift virtual-reality experience, or a sculpture "printed" via 3-D rendering, you are no longer collecting atoms and molecules but rather bits and bytes of software code. And that code can be copied, leaked, uploaded infinitely, with absolutely zero degradation. (Yes, Blockchain *et al* could have an impact, but they are many years – at best – from the artworld's *modus vivendi*.) At every level, thus, collecting is getting more complex as artistic practice refracts in myriad directions. And we need to avoid making it even thornier with onerous regulations.

Ideally, the artworld would self-regulate. There are many initiatives in that direction, such as the exhaustively detailed code of conduct issued in 2015 by France's *Comité Professionnel des Galeries d'Art*. But for self-regulation to work, many art-market actors will have to agree upon, and then live by, a precisely defined code. In a world currently ruled by unwritten laws and intermittently applied "standard practices," that would require a true paradigm shift.

If external regulations start to hit the artworld, one must pray that they will be as global as the art market itself. Otherwise, regional asymmetries will lead to regulatory arbitrage. There is precedent here: when the Netherlands raised its VAT on art, for example, Dutch galleries struggled greatly, while Hong Kong's zero VAT makes it an art-market nexus; and strong tax incentives encourage far more American than European collectors to donate great works to public museums.

In the end, therefore, the danger of national politicians wading into this market is that they ignore the ease with which transactions can simply shift to less-constricted environments – especially as international fairs and digital sales platforms rise in prominence. Here lies the danger for would-be regulators: If chasing a small percentage of bad actors collapses the commerce underlying their state's entire arts scene, and turns patrons away from collecting there, then those politicians will have scored a Pyrrhic victory: They will have traded their country's cultural past, present and future for a few headlines – a disastrous deal for everyone involved.

FOREWORD

Sarah Austrian | Deputy Director, Assistant Secretary and General Counsel, Solomon R. Guggenheim Foundation

The Art Collecting Legal Handbook is an invaluable resource for museums and collectors alike, and its international breadth is welcome in an art world that, increasingly, is a global one. The first edition provided long overdue guidance and was quickly embraced as an essential reference by lawyers within the museum community and those who advise collectors. Given how rapidly the law continues to evolve and how frequently this treatise proves to be essential, the second edition could not have arrived soon enough.

As Deputy Director, Assistant Secretary and General Counsel of the Solomon R. Guggenheim Foundation, I grapple with cross-border legal issues on a daily basis. At the core of the Solomon R. Guggenheim Foundation's holdings are collections that were originally built by private collectors, each of whom could have benefitted from the sage advice in this Handbook. Solomon R. Guggenheim's collection of non-objective painting (itself created through cross-border acquisitions) formed the founding collection of the Solomon R. Guggenheim Museum, and was joined over the years by a number of distinguished collections. The Guggenheim became an international institution in the 1970s when Peggy Guggenheim, Solomon's niece, donated her unparalleled collection and her palazzo on the Grand Canal in Venice to create the eponymous Peggy Guggenheim Collection. The foundation's transnational focus is a part of the fabric of the institution and has only continued to be more so though the addition of the Guggenheim Museum Bilbao, the planned Guggenheim Abu Dhabi, and the foundation's far-reaching acquisitions, commissions, exhibitions, lending and borrowing, programming and initiatives.

During the past decade, the Guggenheim has, in fact, been active in some way in each of the countries whose legal regimes are examined in this book. And the Guggenheim is not alone as other prominent art museums are increasingly looking outward as are the larger auction houses and galleries who have established presences on several continents and work with collectors around the world. Museums, collectors, auction houses and galleries and their advisers will undoubtedly find this book useful.

The Art Collecting Legal Handbook provides those contemplating acquisitions, gifts, loans and exhibitions with clear answers to fundamental questions. While several useful art law treatises have been written, this is the first to look at the essential questions in over 30 key jurisdictions using a country-by-country approach. Of particular importance to museums are the sections, written by leading art lawyers in each country, on public and private museums, obligations and rights of buyers and sellers, artists' rights, immunity from seizure, and tax considerations. Also welcome is the practical information provided for each country, including a list of the principal laws and regulations and the names of key governmental authorities. *The Art Collecting Legal Handbook* and the Guggenheim share a multi-lateral framework that is both interconnected and locally distinctive. Given the financial constraints and limited outside counsel budget of most museums, the well-organised and cogent advice provided by the contributors to this book is most welcome.

Having had the pleasure of receiving wise advice from Massimo Sterpi on countless occasions, I was delighted to see that the quality of his counsel is reflected on each page. I feel certain that this will prove a key resource for legal practitioners, collectors and members of the art world alike.

ENGLAND & WALES

Adrian Parkhouse and James Carleton | Farrer & Co LLP

1. CULTURAL PROPERTY AND ART MARKET

1.1 Does your country have regulations on national patrimony, cultural heritage, indigenous art and the like and, if so, what are the essentials?

There is no single concept of national patrimony but a significant range of legislation is applied specifically to art and other cultural objects and property (dealing with, for example, taxation, restrictions on export, release from national collections, changes to historic real property). In each case it is necessary to establish whether the object in question qualifies under the particular legislation.

1.2 Is your country a party to the 1970 UNESCO Convention? What are the most distinguishing features of your national implementation legislation?

The UK ratified the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property in 2002. It did so without enacting specific legislation, taking the view that in almost every respect the UK's existing legislation met the requirements of the Convention. The only exception was the need to strengthen the existing law of theft by creating a new criminal offence of dishonestly "dealing" in "tainted" "cultural objects" (The Dealing in Cultural Objects (Offences) Act 2003). In this statute, a "cultural object" is defined very broadly as "an object of historical, architectural or archaeological interest".

On acceding to the Convention, the UK reserved three matters, an important one being to stipulate that in interpreting the Convention, the UK would use the definition of "cultural object" used in the Annex to the EU Directive 1993/7/EEC on the return of unlawfully removed cultural objects (now Article 2(1) EU Directive 2014/60/EU). This is relatively restricted in scope and requires the object to have been classified by a member state as a "national treasure possessing artistic, historic or archaeological value". The other two reservations allow the UK to apply EU legislation to matters covered by the Convention as between EU member states and to apply its existing rules on limitation periods to certain claims made under the Convention.

1.3 Is your country a party to the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects and/or any other international conventions or bi-lateral treaties relating to cultural property and the relevant trading activities?

The UK is not a party to the 1995 UNIDROIT Convention.

As a member of the EU, Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a Member State applies. This provides a mechanism for requiring member states to assist other EU member states recovering cultural objects which are "national treasures" whether or not they have been in public collections.

The UK is also a signatory to several other international conventions relating to cultural property:

- The Paris Convention of 1954 (The European Cultural Convention).
- The Hague Convention of 1954 (The Convention for the Protection of Cultural Property in the Event of Armed Conflict – however, it has not ratified this Convention).

- The World Heritage Convention of 1972 (as a member of UNESCO).
- The Granada Convention of 1985 (The Convention for the Protection of the Architectural Heritage of Europe).
- The Valetta Convention of 1992 (The Convention for the Protection of the Archaeological Heritage of Europe).

There are no relevant bilateral treaties.

1.4 Is the art and cultural property market thriving in your country?

For many years the UK has been ranked as second (behind the US) in the list of the annual values paid for fine art at auction and it held this position in 2015 with the UK constituting 21% of the global art market by value behind the US at 43% (*source: TEFAF 2016 Art Market Report*). However, in line with the global trend of falling sales, UK sales were down 9% (to $13.5 billion) in 2015.

In addition to the main auction houses, there are several other established auction businesses both in London and in other major cities in the UK. In a study published in 2014, The British Art Market Federation reported that there were over 7,850 galleries, dealers and auction houses operating in the UK in 2013, including 6,850 fine and decorative art dealers with a turnover of approximately £4.8 billion that year.

Another important point made in the same report is that the UK market continues to rely on cross-border trade. In 2013, art to the value of £3.7 billion was imported into the UK and exports totalled £4.5 billion.

Art fairs, such as Masterpiece and Frieze, have increased in popularity in recent years and the number of contemporary dealers opening new branches in London has continued to grow.

2. PURCHASE AND EXPORT

2.1 What due diligence is required from a buyer?

The law applying to the purchase of art is no different from the law which applies to the purchase of any item. In general, English law applies the principle of *caveat emptor* (buyer beware) so that there is no obligation imposed on the seller to volunteer information. However, if information is provided, then the seller owes obligations to make sure that it is a correct representation.

The buyer is not obliged to exercise any due diligence. However, in almost every case the buyer will want to have information concerning:

- The item's provenance: while (absent any clause to the contrary) the seller will warrant title, asking about and obtaining details of the history of the item may reassure that the item is not stolen and does not have a period of unknown provenance and may provide information about its previous sale history (including price).
- The item's condition: the buyer acquires the item in its actual condition (unless the seller gives any express description on which the buyer can rely). Sellers will often volunteer a condition report; if not, one should be obtained by the buyer.

In private treaty sales it is usual to carry out a search of one or more of the stolen art databases. The major auction houses will have conducted these before including the item in the sale. If it later emerges that the item was

previously stolen, it is possible that the buyer may not be in a position to establish the "good faith" of the purchase (if that is relevant) without a clear search result from a database. There are a lot of possible databases (including Interpol, the ICOM Red List, the FBI, the Art Loss Register and Art Recovery International). However, the extent of what a court will expect the purchaser to have done may depend on the importance or value of the transaction.

2.2 Are there any features of local law that particularly require a buyer's attention, whether in private treaty purchase or purchase at auction? What about a seller's warranty of title and warranty of authenticity? What about the moment of transfer of title?

Art purchases are subject to the general law of contract and in particular the Consumer Rights Act 2015. The Act provides that certain terms will be implied into sale contracts unless the contract expressly provides to the contrary. Relevant issues of which a purchaser might want to be aware include:

- The contract need not be in writing: an oral contract which includes the necessary offer, acceptance and consideration (value) is as binding as a written contract. For that reason preliminary correspondence can sometimes be headed "subject to contract" meaning that a formal written contract is necessary to complete the purchase.
- Unless the contract expressly provides to the contrary, the seller warrants: ownership of, and title to sell, the item and that the buyer may enjoy the item without interference and free of encumbrances. The buyer may be surprised that, without express agreement, this is the extent of the warranties.
- Unless the contract expressly provides, or the contrary can be implied from the circumstances, under the Sale of Goods Act 1979, title passes when the contract is made and not, if later, when the price is paid by, or the item is delivered to, the buyer. If the sale is made under deed rather than contract, title can also pass on the date of the deed.
- Risk (of damage or otherwise) to the item passes at the same time as title (which may be material for insurance cover).
- Unless the contract expressly provides to the contrary, the buyer does not warrant the authenticity of the item or (usually) that the description is correct. Several court decisions have established that it will rarely be the case that the fact that the item is described in the shop, the catalogue, or in other exchanges, as being, for example, "A Picasso", means that this is a sale by description. Unless circumstances point to the seller knowing otherwise, the use of the description is simply an expression of opinion.

All of these matters can be regulated through the express terms of the contract. If buying as "a consumer" it is possible that certain contract terms (for example terms purporting to limit the buyer's rights of recourse) may be themselves regulated by the unfair terms provisions of the Consumer Rights Act 2015.

It is advisable to retain the details provided to you by the seller concerning the item. It is possible that the seller may have made representations which were deliberately misleading or negligently so. These may give rise to remedies. If oral statements made by the seller (or its agent) to the buyer are important, then make a note of them; while evidentially more difficult to prove, they are still representations which if wrong and if relied on, may give rise to rights of redress.

2.3 Are there any consumer protection rules that apply?

The Consumer Rights Act 2015, which implements in part Directive 2011/83/EU on consumer rights, came into force on 1 October 2015 and has largely consolidated consumer rights legislation in the UK. The Act implies certain terms into contracts with consumers (that is, individuals who are acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession) such as that the items sold must be of satisfactory quality and as described (although as noted above, this latter requirement has generally not been held to encompass attributions).

Depending on whether a sale to a consumer is made on-premises or off-premises, different pre-contractual information must be provided to the consumer. Therefore within the context of the art market, dealers need to understand whether they are concluding a sale with a consumer on or off-premises and to ensure that they provide the correct information. In particular, for an off-premises contract the seller must notify the consumer that he has the right to cancel the contract within 14 days of receiving the items bought. Failure to do so results in the cancellation period being extended by a further 12 months unless the seller subsequently notifies the consumer of the right to cancel in the form prescribed in which case it runs for 14 days from the date of notification. However, the circumstances in which a contract is made on or off-premises are not always clear so if in doubt, a dealer should seek advice.

The unfair terms provisions of the Consumer Rights Act 2015 have the effect of rendering unenforceable any term of a contract with a consumer deemed to be unfair, that is, if it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer.

2.4 What are the statutory remedies in the event of fake, forgery or counterfeit?

While there are some statutory remedies available, these issues tend to fall to be dealt with under the general law. Where the forger is the seller, or connected to the seller, the buyer will be entitled to rescind the contract on the basis of fraudulent misrepresentation. This allows the buyer to return the item and recover damages.

Otherwise as outlined above (in *Question 2.2*), where the seller is innocent but mistaken, in the absence of any express warranty of authenticity, whether or not English law will provide a remedy is not clear. Those cases which have been decided by the courts in recent years (including *Drake v Thos. Agnews* (2002), *Taylor Thomson v Christie's* (2005) and *Thwaytes v Sotheby's* (2015)) have generally found that, provided the view expressed by the seller is reasonable and is genuinely held, there is no contractual remedy against the seller. However, there have been other decisions which suggest that a dealer or international auction house may owe a more demanding duty when selling an item within the scope of their advertised expertise. Each case will depend on its own facts.

In many cases it is likely that the seller could not reasonably have misrepresented the item's authenticity in which case the court might find the seller liable for misrepresentation and (depending on the circumstances) allow the contract to be rescinded or require the seller to compensate the buyer with a sum representing the difference in values.

It is worth drawing attention to the practice of the major auction houses whose terms for buyers usually contain some form of limited warranty against forgery, allowing the buyer to return the goods and to be repaid the price in the event that a claim is made within a specified period following the sale which is accepted by the auction house.

2.5 Is there any VAT or sales tax?

VAT is levied at a standard rate of 20% on sales of art and antiques by dealers and auction houses and also by artists, if they qualify to register for VAT. Many dealers operate under the "margin scheme" and VAT may not be shown separately on the sales invoice. VAT may be charged on sales for export but the VAT can be reclaimed from the seller when the item is being exported.

2.6 Is there an artist's resale right (*droit de suite*) and, if so, how does it apply?

Yes. Under Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art, the UK introduced the artist's resale right (ARR) in 2006. In January 2012 it was extended to apply to the sale of works by living artists and any who have died in the previous 70 years. The ARR applies in effect to all visual art and concerns a sale of a work above EUR1,000. The seller or the buyer (and the obligation can be allotted by contract between them) must then pay an additional sum as a percentage of the sale price, on a sliding scale from 4% on the first EUR50,000, to 0.25% on anything over EUR500,000. The maximum payable is EUR12,500 (which equates to a purchase price of EUR2 million).

In the UK the ARR is collected by authorised collecting societies who then account to the artists or their estates.

2.7 Are there any export restrictions and for what kinds of works of art/cultural property? Are there any prior export notification or licence requirements?

Export restrictions fall into two types (both of which may apply to any item).

Nature of the item

The most obvious export restrictions are applied under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) to which the UK is a party. Some art and antique items incorporate elements of material originating from endangered species (for example, as ivory inlay in furniture). For some material, international trade is banned and export is impossible. In other cases, export licences may be granted or granted subject to conditions. The CITES licensing system is operated by the Department for Environment, Food and Rural Affairs to whom licence applications should be made.

Firearms made since 1897 (and some made earlier) may also require an export licence. This system is operated by the Department for Business Enterprise and Regulatory Reform.

Importance of the item

The UK operates both an EU and non-EU export licence system to deal with the export of cultural objects from the UK. The export licensing system for cultural objects seeks to strike a balance between keeping nationally important items within the UK on the one hand and respecting the rights of owners and the freedom of movement of goods within the international art market on the other.

The EU system allows export to other EU states and remains valid for movement around the EU. For most categories of items an individual licence is required if its value exceeds certain financial thresholds and is over 50 years old. For some items (for example, archaeological items) the value thresholds are zero. In all cases, the detailed values for the item in question should be checked against the Arts Council's guidance when contemplating an export.

The domestic system applies to exports outside the EU. A licence is likely to be required if the item is valued at the same thresholds as the EU system and is more than 50 years old.

An application for export should be submitted to the Export Licensing Unit of the Arts Council using the appropriate export forms. Most licences are granted. However, applications may be brought to the attention of an Expert Adviser (acting on behalf of the Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest). If the object is considered likely to be of "national importance" under what are known as the Waverley Criteria, the export application will likely be deferred. The Committee determines whether or not an item is deemed to be of national importance, and if so, will stop the export licence from being granted for a set period of time in order to allow a "matching offer" at a "fair market price" to be made either by a UK public institution or a private purchaser (who has agreed to keep the object in the UK and to provide reasonable public access to it at a public institution). If no matching offer is received from either public or private purchasers the export licence will be granted at the end of the deferral period.

2.8 Are there any "free ports" and, if so, what is their regime?

There are no "free ports" in the UK. There are "customs free zones" and bonded warehouses but these are not generally used for art transactions in the same way as free ports in other non-EU jurisdictions.

3. PEACEFUL ENJOYMENT

3.1 What are the rules on import clearance, customs and VAT?

In the case of the import of artworks to the UK for free circulation from outside the EU, VAT at a reduced rate of 5% is normally payable by the importer ("import VAT"). No customs duty would normally be payable. There are various provisions which result in reduced liability or complete exemptions for some works of art, antiques and other cultural property. In addition, items can be imported under a temporary admission scheme (see *Question 4.4*). No import VAT is generally due for items imported to the UK from within the EU although other rules will apply.

Much will turn on the completion of the Customs entry and ensuring that the correct Customs Procedure Codes are used. Proof of age will be required where exemption or reduced valuation is claimed: such proof may be in the form of a declaration by the importer. Most importers use agents to complete such details and to ensure Customs formalities are observed.

3.2 Does a buyer have protection against title claims, in general? Is there protection of the acquirer in good faith?

Under the Sale of Goods Act 1979, title passes when the contract is made (see *Question 2.2*). However, in most cases the seller can only pass the title that the seller has: if the seller's title is capable of challenge, then the same is true of the buyer's title. The buyer's remedy lies against the seller who has warranted title.

However, in limited circumstances the buyer can acquire greater protection against the alternative claimant by reason of limitation of actions. Section 3 of the Limitation Act 1980 provides that a person who has been dispossessed of property must bring an action within six years of the dispossession, failing which the title of the claimant is extinguished. Section 4 of the Act deals with stolen items: in that case the six year period begins only

when there has been a good faith purchase of the item. The onus of proving the good faith purchase is on the buyer. However, six years after that purchase, the victim of the theft's title is extinguished.

In practice, while this offers some protection to a buyer, it is possible that its good title may rely on a previous transaction (relied on as the good faith purchase) about which there is little available information. Further, works of art may innocently change hands for a variety of reasons which do not involve a sale: for example a work, alleged to have been stolen may have passed in the thief's will and then been gifted to a museum and then moved into another collection. In that case those transactions remain "related to the theft" and time has not started to run.

Note that the Limitation Act 1939 applied a slightly different regime and if the relevant provenance of an item pre-dates the 1980 Act it is necessary to consider the earlier legislation.

3.3 What is the buyer's protection against Holocaust based claims?

The general law of limitation applies, see *Question 3.2*.

In the case of national collections, the government has set up the Spoliation Advisory Panel (SAP) which considers claims from the Nazi era and can recommend outcomes founded on consideration of both the legal and the moral positions. The SAP can also advise on a claim to an item in a private collection where both the owner and claimant request it.

3.4 What is the buyer's protection against repatriation claims for breach of foreign export restrictions ("looted property")? Please explain briefly the conditions and recent practice on when your jurisdiction grants assistance to foreign countries seeking repatriation of cultural objects.

The consequence of a previous violation of foreign export controls need not be limited to a claim in restitution. The alternatives include:

- A claim for a court declaration that the object was exported in contravention of the source nation's export controls (as in *Kingdom of Spain v Christie's* (1986)) – which can have consequences for the marketability of the object.
- Criminal liability under The Dealing in Cultural Objects (Offences) Act 2003 (see *Question 1.2*). This Act criminalised dealings with "tainted" objects and includes importing and exporting within the definition of "deals in". However, the buyer is protected if he is unaware that the object is tainted.

More generally the UK government will assist foreign governments to recover objects pursuant to its obligations under either or both of the 1970 UNESCO Convention and the Directive 2014/60/EU. In such circumstances the UK government (acting through the Department for Culture Media and Sport (DCMS)) will require evidence that the conditions in the relevant convention are met before taking steps to contact the current owner.

While action under the 1970 UNESCO Convention must be taken by government authorities, the same is not true of Directive 2014/60/EU. This contemplates that, while the local government is bound to assist in locating and recovering the item if asked, it is possible for the claimant government/institution to commence proceedings in the UK court for an order of restitution.

As yet the UK has not ratified the Hague Convention of 1954 (The Convention for the Protection of Cultural Property in the Event of Armed Conflict) and its two protocols, the First Protocol of 1954 and the Second Protocol of 1999. In 2004 the UK Government announced its commitment to ratify the Convention and the Draft Cultural Property (Armed Conflicts) Bill was published in January 2008 to enable this. Again in 2015 the Government indicated an intention to ratify the Convention. However, at the time of writing, the Government has announced no specific plans to proceed with the Bill through the legislative process.

3.5 What are the policies, regulations and practices when your country seeks the repatriation of its own illegally exported cultural property?

No policy is extant.

3.6 Is there a regime of anti-seizure guarantee ensuring the safe return to the lender abroad of items on loan to local institutions or other exhibitors?

Yes. An immunity from seizure law was introduced by Part 6 of the Tribunals, Courts and Enforcement Act 2007 to provide protection from orders of court (including foreign courts) permitting seizure or forfeiture of objects on temporary loan to "approved" museums and galleries. To gain approval requires the borrowing institution to satisfy DCMS that its provenance procedures are adequate. It is usually required that the objects are advertised and provenance details provided some weeks in advance of the loan being made.

While not tested, the immunity does not exclude any seizure order made by a UK court pursuant to obligations under an EU obligation or international treaty.

3.7 Can the owner of a work of art still covered by copyright freely exhibit it in public, or is the consent of the author or copyright owner required?

Yes. Copyright is only infringed where the work in which the copyright subsists is copied. The simple act of displaying a work in public does not involve or require any copying to take place and so the consent of the author or copyright owner is not required for this activity. That said, the more publicly accessible an artwork, the greater the chances that someone will create a copy of the work (for example, sketching the artwork or taking a picture of the work on their smartphone). When displaying such works, it is good practice to state clearly that such activities are not permitted. Alternatively, and if the entity organising the exhibition wishes to allow photography and sketching to take place, then it should seek the copyright owner's permission to do so in advance. This latter approach is one which is increasingly being adopted by the UK's leading museums and galleries.

3.8 Can a work of art still covered by copyright be freely reproduced (i) in museum catalogues or websites or (ii) in auction catalogues?

No. As this amounts to copying and issuing copies of the work to the public, it will amount to copyright infringement unless permission from the copyright owner is obtained. Where dealing directly with the copyright owner it is good practice to obtain their permission to this intended reproduction at the time the work is transferred to you (whether by sale, loan or consignment).

4. SALE

4.1 What is the due diligence procedure required from the seller?

A seller has no particular duties of due diligence. See *Question 2.2* for the terms which can be implied into a contract including in particular those matters which may be the subject of a warranty. Given that without express provision to the contrary, the seller warrants that he has title to the item, he may wish to investigate his own title if he has any concerns about it.

Without any express contractual provision, the seller may be liable for misrepresentation if any statement made relating to the item is not an honest and reasonable opinion (where the statement relates to an opinion) or is incorrect (where the statement is a matter of fact). The buyer must prove that the statement was relied on in purchasing the item. A successful claim may entitle the buyer to rescind the contract or to claim damages.

Depending on the value of the contract, a seller may also want to check whether the buyer can provide proof of funds.

4.2 Are there any particular standards of due diligence applicable to the trade (dealers and auction houses) that extend to collectors?

As noted in *Question 2.4*, some court decisions support the proposition that a greater degree of skill is expected from a professional than from an amateur. It is likely that the same reasoning would support an argument that a knowledgeable collector should also be expected to exercise a greater degree of care.

However, as the cases mentioned in *Question 2.4* show, the standard is not necessarily absolute: the expert may still be wrong, but provided the error is reasonable and honest, the standard is met.

The criminal offence of dealing in tainted cultural objects (see *Question 1.2*) requires knowledge or belief of the object's status. The statute does not allow prosecution on the ground that the person should have known, suggesting that special knowledge cannot be imputed to dealers and collectors.

4.3 What anti-money laundering rules apply to individual sellers, dealers and auction houses, and agents?

Individual sellers, dealers, auction house or agents will commit a criminal offence if they become concerned with a transaction or arrangement which involves the proceeds of crime or the financing of terrorism or if they handle stolen goods. The offence requires there to be a basis on which the transaction was suspicious.

In addition, the Money Laundering Regulations 2007 (which implement the EU Third Money Laundering Directive (2005/60/EC)) impose obligations of due diligence, record-keeping and education on those engaged in transactions within the "regulated sector". If auction houses or dealers receive or make payments for items in cash of at least EUR15,000 in total then they will fall within the regulated sector and must comply with the Regulations. When the EU Fourth Money Laundering Directive (2015/849/EU) has been implemented (which could be by the end of 2016), the threshold will be reduced to EUR10,000. The business in question must register with the UK tax authorities for supervision under the Regulations and carry out customer due diligence procedures on the buyers and sellers with which it does business as well as complying with various ongoing monitoring and record-keeping requirements.

There are also criminal offences for failing to report suspected money laundering and for tipping off persons who are under investigation for suspected money laundering.

The British Art Market Federation which represents many of the UK's auction houses, dealers and fine art and antiques businesses and associations has published guidelines for its members on complying with their anti-money laundering obligations, especially for those businesses that do fall within the regulated sector.

Generally, regulators are taking an increasing interest in money laundering risks in the art market so this is an area where the regime may well be tightened in future.

4.4 Is there a regime of temporary import for sale?

Yes. Cultural objects, like most other goods, can be imported free of customs duties and VAT against a Temporary Admission Declaration, for up to two years, and security equal to 5% of the value of the object (corresponding to VAT due in event of eventual import).

Cultural property can also be imported into the UK for less than one year (for example, for exhibitions and fairs).

4.5 What are the remedies against a defaulting buyer (private treaty sale and public auction)?

Private treaty sale

The remedies available to a seller in the event of default by the buyer are those generally applicable to the sale and purchase agreement. In case of delivery prior to payment, rescission and restitution are available to the seller only if expressly agreed; specific performance will be the seller's remedy otherwise. The seller has a claim for damages in compensation of any loss suffered. A dealer, and active collectors too, can recover damages equal to the difference between the price under the unfulfilled contract and the price obtained from a substitute buyer, without there being an obligation to make a substitute sale.

Public auction

The remedies are similar (unless there is special provision in the auction terms). Usually the terms provide that the auction house, at its discretion, may follow up and collect unpaid amounts or rescind the contract.

5. ART PHILANTHROPY

5.1 What are the essential rules (other than tax rules) and practices in relation to loan, deposit and donation to public museums?

The UK has a long established tradition of art philanthropy. This usually takes the form either of financial support or loan or outright gift of cultural property to museums and galleries, both public and private. In the case of an individual donor, such support can be given either during their lifetime or on death under the terms of their will.

Public museums and galleries take a variety of legal forms and with a few notable exceptions are capable of accepting objects either by donation or on loan.

While most museums and galleries will have standardised loan and gift documentation, the terms of any particular loan or gift vary and will be dependent on a number of factors. For example, loans to collections of public museums

and galleries will usually be covered by the Government Indemnity Scheme thus negating the need for commercial insurance. Understandably, public institutions are increasingly particular about the terms on which they accept objects on loan and funding and will carefully consider unusual terms and conditions.

In considering a donation of cultural objects the donor should consider the institution's de-accessioning policies and whether specific trusts should attach to a bequest.

Museums are developing effective due diligence processes before accepting antiquities on loan and deposit. Public museums and most other museums abide by ICOM Guidelines in relation to loans and donations.

5.2 What is the legal regime for private foundations and private museums?

Other than the collections of national or public institutions held in a museum or gallery context and whose overriding purpose is to conserve, preserve and exhibit objects held in the public interest, it is possible for anyone to set up an art-owning charitable foundation and/or a private museum whose purposes include the holding, preservation, study and promotion of cultural property. The majority of such organisations are established as charitable companies limited by guarantee although some are established as charitable trusts. In order to enjoy the full range of tax exemptions and reliefs, the cultural property must be of sufficient merit and charities in England and Wales are obliged to register with the Charity Commission and HMRC and to demonstrate public benefit, typically by granting public access to the property/collection.

6. TAX

6.1 Is wealth tax imposed on art and other cultural property assets?

No (but see *Question 6.3*).

6.2 Is there capital gains tax on their disposal and similar transactions?

Individuals who are both UK resident and domiciled pay capital gains tax on profits on the disposal of chargeable assets anywhere in the world (see the Taxation of Chargeable Gains Act 1992). Not all assets are chargeable however and a number of exemptions apply such as chattels bought and sold for less than £6,000 and "wasting assets" (that is, chattels with a predictable life of less than 50 years). The "wasting asset" exemption includes cars, watches, clocks, yachts and motorbikes.

Gifts between spouses or civil partners and outright gifts to charity are deemed to be made on a no gains/no loss basis and no charge to capital gains tax would arise.

6.3 Is there any applicable gift and/or inheritance tax?

Individuals who are domiciled or deemed domiciled in the UK will be liable to pay inheritance tax at a rate of 40% on the value of their chargeable estate above the current nil rate band of £325,000. Gifts to registered charities or exempt institutions on death pass inheritance tax free and since 6 April 2012 a reduced rate of inheritance tax is payable on estates that leave 10% or more of the net estate to a charity registered in the UK.

6.4 What are the tax breaks, if any, available when lending/depositing, gifting or bequeathing art or any other cultural property to public institutions or other charitable entities?

Other than the usual capital gains tax, income tax and inheritance tax reliefs available for gifts of art and other assets to charitable organisations registered with the Charity Commission for England and Wales and HMRC, there are three specific schemes geared towards offering tax incentives in connection with donations of cultural property to tax exempt UK public institutions.

Acceptance in Lieu

The Acceptance in Lieu scheme enables UK taxpayers to transfer important works of art and other important heritage objects into public ownership while paying inheritance tax (or one of its earlier forms). The taxpayer is effectively credited with the full open market value of the item offered to the nation which then becomes the property of a public museum, archive or library.

Cultural Gifts Scheme

The Cultural Gifts Scheme enables UK taxpayers to donate, during their lifetime, important works of art and other heritage objects to be held for the benefit of the public or the nation by a public institution. In return, donors receive a tax reduction based on a set percentage of the value of the object they are donating.

Private Treaty Sales

A Private Treaty Sale involves the purchase by a public museum or gallery in the United Kingdom and Northern Ireland of an item that has been granted conditional exemption from inheritance tax (or one of its earlier forms), at a price that is beneficial to both the public purchaser and private vendor.

6.5 What is the taxation of private foundations and private museums, upon creation/ endowment and thereafter?

If the private museum or foundation is an organisation which is recognised as a charity for UK tax purposes it will benefit from a number of generous tax reliefs and exemptions. The main exemptions from tax relating to the income of a charity are:

- An exemption from corporation tax for charitable companies.
- An exemption from income tax for charitable trusts. Such relief relates to income derived from land and property, bank interest, Gift Aid payments, investments, and certain trading income.

In addition a charity is also exempt from tax on most capital gains it makes and is generally exempt from stamp duty.

As noted above, gifts to registered charities on death are inheritance tax free and since 6 April 2012 a reduced rate of inheritance tax is payable on estates that leave 10% or more of the net estate to a charity registered in the UK.

Dependant on their structure, non-charitable museums or private foundations will be taxable like a business or partnership.

7. USEFUL PRACTICAL INFORMATION/REFERENCES

7.1 Principal laws and regulations

- Consumer Rights Act 2015.
- Sale of Goods Act 1979.
- Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.
- Dealing in Cultural Objects (Offences) Act 2003.
- Limitation Acts 1939 and 1980.
- Tribunals Courts and Enforcement Act 2007 (Part 6).
- Taxation of Chargeable Gains Act 1992.
- Inheritance Tax Act 1984.

7.2 Selected law enforcement authorities

- Department for Culture, Media and Sport: *www.gov.uk/government/organisations/department-for-culture-media-sport.*
- Arts Council England: *www.artscouncil.org.uk*.
- Metropolitan Police Art and Antiques Unit: *www.met.police.uk/artandantiques*.
- The Art and Antiques London Stolen Art Database: *http://content.met.police.uk/Article/London-Stolen-Arts-database/1400011390417/1400011390417.*
- HMRC Money Laundering homepage: *www.hmrc.gov.uk/mlr/reportsuspicion.htm.*
- HM Revenue & Customs: *www.hmrc.gov.uk*.
- Information on temporary admission: *www.gov.uk/guidance/temporary-admission*.

7.3 Selected collector and trade associations

- BAMF: The British Art Market Federation: *http://tbamf.org.uk*.
- LAPADA: The Association of Art & Antiques Dealers: *www.lapada.org*.
- Museums Association: *www.museumsassociation.org/home*.
- Society of London Art Dealers: *www.slad.org.uk.*
- Design and Artists Copyright Association: *www.dacs.org.uk/home*.

7.4 Selected publications

- Michael Bridge, Louise Gullifer, Gerard McMeel and Sarah Worthington: *The Law of Personal Property* (Sweet and Maxwell, 2013).
- Norman Palmer: *Art, Adventure and Advocacy: Contracts, Claims and Controversies in the World of Cultural Property – Some Legal Questions of Interest to Governments, Museums, Dealers and Collectors* (Institute of Art and Law, 2015).
- Norman Palmer (ed.): *Palmer on Bailment*, 3rd edition (Sweet and Maxwell, 2009).