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# ART LAW 2023

Contributing editors <u>Pierre Valentin</u> and <u>Mona Yapova</u>



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## Jurisdictions

#### Introduction

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	China	6
	Angell Xi (Minjie)	
	Jingtian & Gongcheng	
1	England & Wales	33
5	Pierre Valentin, Tom Christopherson, Fionnuala Rogers, Andreas Killi and Mona Yapova Constantine Cannon LLP	
	France	68
	Jean-François Canat, Laure Assumpçao, Line-Alexa Glotin and Philippe Hansen UGGC Avocats	
	Germany	92
	Arndt Tetzlaff, Dorothee Altenburg, Heiko Wunderlich, Johannes Schäufele and Sebastian Graf von Wallwitz SKW Schwarz	
	Greece	113
_	Phoebe Kouvelas and Theodore Rakintzis Kyriakides Georgopoulos Law Firm in collaboration with ArtSecure	
2	Hong Kong	138
Ą	Angus Forsyth Angus Forsyth & Co	
	Italy	162
	Giuseppe Calabi and Andrea Buticchi CBM & Partners – Studio Legale	
	Mexico	193
3)	Gabriela Pellón, Mario Valencia, Irma Ross, Cecilia Díaz de Rivera, Ana Elena Domínguez and Fernando Rodríguez Galicia Abogados SC	
	Switzerland	216
	Anne Laure Bandle and Arnaud Cywie Borel & Barbey	
	United States	238
	Lawrence M Kaye, Howard N Spiegler, Yaél M Weitz and Gabrielle C Wilson	

1

# Introduction

### Pierre Valentin and Mona Yapova

Constantine Cannon LLP

#### **RETURN TO CONTENTS**

This sixth edition of *Art Law* offers legal practitioners a snapshot of how the laws of other countries address some of the most common questions that arise when buying, selling and lending art and collectibles. While it is not a substitute for legal advice on specific situations, this volume aims to provide practitioners with a framework that will help them ask the right questions of practitioners in other jurisdictions and give them a flavour of how other legal systems might address those questions.

The year 2022 was another fascinating year for art lawyers.

The UK art trade welcomed the updated Anti-Money Laundering Guidelines published by the British Art Market Federation. The update was timely as HMRC began to hand over the first fines to art market participants who had failed to register for anti-money laundering supervision. The updated Guidelines clarify the definition of intermediary, and who, in a given transaction, should conduct Know Your Customer checks to help art market participants avoid duplication of verification of identity checks. While the development of the UK's AML framework is one step forward towards achieving increased transparency in the market, the US has taken two steps back. It was widely anticipated last year that antimoney laundering legislation aimed at the art market was around the corner in the US. Yet, in February 2022, the Financial Crimes Enforcement Network released a report explaining that while it is cognisant of the vulnerabilities of the art market to money laundering and terrorist financing, evidence is not sufficient to make tightened oversight a priority. New York then doubled up in a bid to stimulate business by abolishing auction rules introduced over 30 years ago. The rules imposed disclosure requirements on auction houses ahead of a sale, prevented the advertisement of price estimates below the reserve price and policed a practice known as 'chandelier bidding' where the auctioneer announces a series of fictitious bids on a lot to help build momentum among bidders. While auction houses initially said that they would continue to abide by the rules, let's wait a few more months to see if they really do so.

The restitution debate seems to be moving in the right direction. First came some internal audits by leading public institutions. Major museums geared up with teams of experts to clear the spiderwebs and examine their collections for items with tainted provenance. For example, after appointing the expert Emmanuelle Polack to investigate its collections for Nazi-looted works in 2021, the Louvre has teamed up with Sotheby's for a three-year project designed to fund research of the provenance of objects acquired by the museum during the 1933–1945 period. In Germany, items from the Ethnological Museum of Berlin and the Museum of Asian Art are subject to ongoing research feeding into animated debates regarding provenance and possible returns, and the Bavarian State Painting Collection

has been working to disclose the provenance of more than 1,200 works of art that were acquired during the Nazi era in a free online database. In Spain, the Prado publicly announced a commitment to review its collection for works potentially seized during the Spanish Civil War and has already released a list of 25 works that it identified as potentially acquired during the Franco years. In the UK, Tristram Hunt, director of the Victoria and Albert Museum, suggested last July starting 'a conversation' about laws that make it difficult for UK museums to return items in their collections to their country of origin. We are also witnessing something of a shift from the strict position that governments and public institutions have historically maintained by conveniently relying on the limitations of legal frameworks to decline restitution and repatriation claims. Recurrent arguments include the expiration of statutes of limitation, public institutions' limited powers to deaccession works from permanent collections, the old doctrine that property of the state cannot be disposed of and the alleged danger of opening the floodgates if a few artworks are restituted or repatriated, thereby setting a precedent for thousands of similar claims to follow resulting in the depletion of national collections. The number of repatriations and restitutions claims that were honoured this year show that these defences, while legally sound, have run out of steam in the face of the moral arguments and public pressure for greater accountability. A landmark statute passed by the French parliament last year allowed for the restitution of 15 works from national museums including paintings by Marc Chagall and Gustav Klimt to the heirs of Jewish families. This development has chipped away once more the sacrosanct principle of inalienability of state property that has applied in France since the 16th century. The multi-layered process to deaccession inalienable objects from public collections in France is lined with locks and safeguards that leave the final decision in the hands of parliament rather than individual institutions. This year's restitution of 15 Nazi-looted works closely follows last year's equally historic deaccessioning of 27 objects from the Musée du Quai Branly's public collection repatriated to Senegal and Benin. These landmark decisions prove that where the court of public opinion speaks out, politicians find a way. In the UK, the recent publication of Art Council England's new guidance on restitution and repatriation for museums is timely. There were whispers of a provision in the new Charities Act 2022 that would allow the trustees of national institutions to seek authorisation from the Charity Commission for ex gratia deaccessioning, a sharp turn from a 2005 decision from the High Court in Attorney General v Trustees of the British Museum in which the court made it clear that trustees could not rely on moral obligations to circumvent the restriction on disposals set out in the British Museum Act 1963. However, in October the government advised that it needed more time to consider the implications of the relevant sections of the new Charities Act 2022 and the granting of new discretionary powers to trustees. On the other side of the Atlantic, a landmark change to the Association of Museum Directors (AAMD)'s Guidelines was confirmed. During the covid-19 pandemic, the AAMD loosened its guidelines on an emergency basis to permit the use of proceeds from deaccessioned work for the direct care of collections. The rule is now made permanent albeit redrafted with a focused scope that expressly excludes the use of sale proceeds for capital expenses or operating costs, including the salaries of staff or the costs to mount temporary exhibitions. Market participants and art lawyers alike are carefully keeping track of these developments.

One topic that remained just as burning last year as in 2021 is the expansion – both geographical and digital – of the global art market. The comparison of London and Paris remains irresistible for commentators. It has been especially tempting after Paris' successful fairs last October with the transformation of Fiac into the new Paris+, the success of Paris Internationale, and the opening of a string of global galleries in Paris over the past couple of

years including David Zwirner, Skarstedt, Mariane Ibrahim, Galleria Continua, White Cube, Gagosian and soon Hauser & Wirth. Temptations aside, last year made us wonder whether it is still helpful to pit these two cities against each other while relying on century-old tropes? A lot has happened in the past years to show that Paris is not just chic and London not just edge. The former is certainly shedding its romantic insularity to embrace the global art scene and welcome international players. Institutions such as the Bourse de Commerce and the Louis Vuitton Foundation are curating exhibitions and showcasing contemporary talent that firmly evidences Paris' cultural renaissance. Whilst London is still arguably a stronghold of contemporary talent and continues to thrive despite economic and political challenges that many predicted would be fatal, both cities are nurturing incredibly rich art scenes and continue to have something different to offer. If the rivalry remains as irresistible as it has been for the past few centuries, it will be interesting to see what one city can offer that the other cannot. The mighty rivals for London, Paris and New York are now in Asia. While numbers show that the US market retained its dominance last year (with 43 per cent of worldwide sales by value), the Chinese art market was the second largest art market claiming 20 per cent of worldwide sales by value, pushing the UK to slip back to third place with 17 per cent. Big market players are not letting opportunities in booming Asian art hubs go to waste. Phillips expanded to China through a partnership with Chinese auction house Yongle, Frieze held its first fair on the continent in Seoul, and there are now whispers that Japan's art market is poised to expand.

The pandemic forced galleries to take social media seriously. We saw a flurry of online tours, virtual exhibitions, videos and new ways of buying art - some of it good, some of it a bit naff. Now the dust has settled, we shall see some of those offers mature, with online workshops and talks as standard but also experimentation in how we celebrate art through more interactivity, experimentation with AI, easier ways of shopping through social media and slicker, more dynamic videos. While the initial gold rush and fever have clearly cooled down, non-fungible tokens (NFTs), digital art and the use of the blockchain in the art market are here to stay. In many ways, it's only the real beginning now, as was the case after the initial dot.com bubble burst 20 years ago. Last year gave strong indications that the NFT market may have flatlined. Damien Hirst is still defiantly incinerating works from his NFT collection, but numbers show that the bubble has burst. Between May and August 2022, the average price of an NFT plummeted by 92 per cent. The rush for NFTs last year and resulting impulsive transactions and projects it inspired did, as expected, lead to disputes that gave art lawyers plenty of opportunities to ponder the implications of tokenising the ownership of art. Often, they proved that age-old intellectual property principles are still relevant to ultra-modern technologies and NFTs do not have the power to dissolve existing copyright protections. Examples include multiple cases of minting reproductions of art without the right to reproduce it, and unfortunate assumptions that ownership of art comes with an assignment of intellectual property rights. The legislator, too, has been trying to catch up. In June 2022, the Law Commission published a consultation paper on digital assets. Under the umbrella term digital assets, the reform it proposes would cover non-tangible assets in digital form. Beyond NFTs, this includes databases, software, digital records, domain names, crypto tokens, and cryptocurrencies. Blockchain technology may have a promising future in the art world and certainly offers possibilities for revolutionising the shape of art transactions for artists. While the NFT market is down, more technology companies providing diverse services to collectors and art market professionals continue to shake up the art market.

In England & Wales, *Feilding v Simon C Dickinson Ltd*, a worthy successor to the *Thomson v Christie Manson & Woods Ltd* and *Thwaytes v Sotheby*'s cases, saw the London art dealer, Simon Dickinson, being cleared of negligence for selling an 18th-century Chardin painting as a 'partially autograph'. Art dealer Simon Dickinson sold the Chardin painting as a partially autograph rather than as an autograph work by Chardin to the Stockholm-based art dealer Verner Amell for £1.15 million in 2014. The painting was then subsequently sent for a 'deep clean' by Amell who uncovered Chardin's previously unseen signature and resold the painting as an autograph work, along with a painting by Watteau, for a combined price of £6.9 million. The case provides valuable insights on the duties of professional art dealers in making judgments on attribution and in selling works of art. The court held that Dickinson's failure to fully attribute the work to Chardin was not negligent because it reflected the scholarly opinion at the time – including the description in the catalogue raisonné of Chardin by Pierre Rosenberg, the undisputed leading authority on Chardin. It was sufficient for Dickinson to rely on his experience and knowledge in the field rather than seeking confirmation from Rosenberg of his cataloguing before proceeding with the sale.

Christie's sale of Microsoft's co-founder and philanthropist Paul G Allen's collection will go down in history as 'a defining moment for the art market, for art and for philanthropy' (quote by Christie's CEO Guillaume Cerutti). Achieving a record-breaking US\$1.6 billion with all of the proceeds going to charity, the sale confirmed the art market's appetite for masterworks in times of economic uncertainty. The sale established the Allen collection as the most valuable private collection to be ever sold in history surpassing the previous record of US\$922 million set in May by New York real estate developer Harry Macklowe and his ex-wife, Linda Macklowe. Whereas the Macklowe collection was filled with mid-century masters and pop icons, Allen's collection covers over 500 years of art history from old masters to impressionists to contemporary art. Five paintings in the evening sale achieved prices above US\$100 million with records set for 24 artists, including works by Van Gogh, Cézanne, Gauguin, Seurat and Klimt.

Despite the challenges, 2022 was an energetic, innovative and growth-driven year for the art market. Art law does not fit easily within the usual boundaries of legal fields of expertise, but 2022 certainly showed the agility and expertise required of practising art lawyers. The multiplication of modes of trading on digital platforms and the new ways in which the blockchain is being applied to art requires that art lawyers become ever more fluent in technology. Advising increasingly sophisticated art market participants requires knowledge sharing of precisely the type that this publication encourages. We are honoured to edit the Art Law guide in the Lexology Getting the Deal Through series for the sixth year in a row with experts leading our field across the world.

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**RETURN TO CONTENTS** 

### Summary

BUYING AND SELLING	7
Passing of title	7
Implied warranty of title	8
Registration	8
Good-faith acquisition of stolen art	9
Acquiring title to stolen art through prescription	10
Risk of loss or damage	11
Due diligence	11
Other implied warranties	12
Voiding purchase of forgeries	12
Voiding inadvertent sales of works by masters	13
EXPORT AND IMPORT CONTROLS	14
Export controls	14
Import controls	15
Export and import tax	16
DIRECT AND INDIRECT TAXATION	17
Taxes	17
Tax exemptions	17
BORROWING AGAINST ART	18
Types of security interest	18
Consumer loans	18
Register of security interests	19
Non-possessory security interests	19
Sale of collateral on default	19
Ranking of creditors	19
INTELLECTUAL PROPERTY RIGHTS	20
Creator copyright	20
Copyright duration	20
Display without right holder's consent	20
Reproduction of copyright works in catalogues and adverts	21
Copyright in public artworks	21
Artist's resale right	21
Moral rights	21
AGENCY	22
Accounting to the principal	22
Disclosed agent commission	22

PAGE 7	RETURN TO SUMMARY
Undisclosed agent commission	22
CONSIGNING ITEMS	23
Protection of interests in consigned works	23
AUCTIONS	23
Regulation	23
SPOLIATION DURING THE NAZI ERA	24
Claims to Nazi-looted art	24
LENDING TO MUSEUMS	24
Responsibility for insurance	24
Immunity from seizure	24
CULTURAL PATRIMONY	25
National treasures Right of pre-emption	25 25
Automatic vesting in the state	25
Illegally exported property claimed by foreign states	26
NON-FUNGIBLE TOKENS	26
Regulation and case law	26
ANTI-MONEY LAUNDERING	27
Compliance	27
ENDANGERED SPECIES	28
CITES	28
Specific endangered animal products	29
CONSUMER PROTECTION	29
Cancelling purchases Duties of businesses selling to consumers	29 30
-	
REGULATION	30
Art market regulator Other regulators	30 31
UPDATE AND TRENDS	31
Key developments of the past year	31

#### **BUYING AND SELLING**

#### Passing of title

# 1 When does ownership of art, antiques and collectibles pass from seller to buyer?

In general, ownership passes to the buyer upon delivery, unless otherwise provided by the law or agreed by the parties. According to the <u>Civil Code</u>, the parties may prescribe in a sales

contract that ownership shall be retained if the buyer fails to pay full price or fully perform obligations.

If sale of a work of art, antique or collectible is concluded through an online judicial auction, ownership will be transferred only when the ruling confirming effectiveness of the auction is served on the buyer.

#### Implied warranty of title

## **2** Does the law of your jurisdiction provide that the seller gives the buyer an implied warranty of title?

In China, the concept of implied warranty of title does not exist. The Civil Code provides that the owner is entitled to dispose of the asset, as well as possess, use or benefit from it. Similar legislation also exists in the Auction Law and the <u>Administrative Measures for the Operation of Artworks</u>. The seller shall guarantee title of the object, unless the buyer knows or ought to know that a third party has rights on it, which will release the seller from that obligation.

If the seller is in breach of the obligation to guarantee title, the buyer may claim against the seller within three years from the date the breach is known or ought to have been known by the buyer, unless otherwise provided by law. Legal protection may be lost if 20 years have passed.

#### Registration

## **3** Can the ownership of art, antiques or collectibles be registered? Can theft or loss of a work be recorded on a public register or database?

There is no official register for ownership of art, antiques or collectibles. However, stateowned cultural relics must be registered with the authorities; therefore, ultimately all data will be sent to and be consolidated at the national level: the State Administration of Cultural Heritage (SACH).

The SACH has been building a consolidated nationwide database, with data from stateowned museums across China. For the general public, this database is not for registration but reference, where basic information on cultural relics can be found, such as name, category, dynasty and location.

Cultural relics owned by civilians are encouraged to be voluntarily registered; however, there is no nationwide official register at present. In 2016, a database was announced to be built, but it has not yet been launched.

Since 2018, the SACH has started a pilot project in Jiangsu province. It designated the Nanjing Museum as responsible for registering cultural relics to be auctioned in Nanjing and establishing the 'cultural relics registration and transaction management services system'. In Suzhou, the SACH designated Suzhou Cultural Relics Appraisal Services Centre as responsible for registering the sale and purchase of cultural relics in Suzhou.

For art and collectibles outside the scope of cultural relics, non-official registers exist.

In addition to ownership registration, registration is obligatory if:

- the art, antique or collectible is temporarily imported into or exported from China;
- the art, antique or collectible is confiscated in accordance with the law;
- the cultural relic is obtained from an archaeological excavation; and
- it is requested by legislation.

Regarding theft or loss of cultural relics, there is an official public register launched in 2017, the data of which will be uploaded into Interpol's database of stolen works of art.

#### Good-faith acquisition of stolen art

4 Does the law of your jurisdiction tend to prefer the victim of theft or the acquirer in good faith of stolen art?

If a stolen work of art, antique or collectible is identified as a cultural relic, which falls into any of the following categories, it is prohibited from any transaction:

- state-owned cultural relics, unless approved by the state;
- precious cultural relics in the collection of cultural institutions not owned by the state;
- mural paintings, sculptures and construction components identified as state-owned, except those approved for dismantlement, which are not collected by the institutional cultural relics collecting bodies; or
- cultural relics obtained through channels or resources that are non-compliant with the law.

Thus, in such a case, neither the victim nor the acquirer in good faith will be preferred.

If a stolen work of art, antique or collectible is stipulated as a state-owned cultural relic, it is owned by the state.

If a stolen work of art, antique or collectible was not obtained from an archaeological excavation, nor identified as falling into the aforementioned categories, if it is assigned to the acquirer without legitimacy or authorisation, the original legitimate owner (the victim) is entitled to claim for ownership. However, the acquirer retains the ownership if any of the following good faith conditions are met:

- the acquisition was made in good faith;
- the acquirer paid a reasonable price for it; and
- the object was already registered, or was already delivered to the acquirer if not registered.

The acquirer's claim for ownership will not be supported if any of the following occurs:

- the assignment contract is annulled owing to fraud, malicious collusion or unlawfulness; or
- the assignment contract is revoked owing to a reason attributable to the acquirer.

In the event of unauthorised assignment, the victim is entitled to claim within three years of the date he or she knew or ought to have known about the infringement or the party causing the infringement. Limitation may be suspended or extended under certain conditions.

#### Acquiring title to stolen art through prescription

5 If ownership in stolen art, antiques or collectibles does not vest in the acquirer in good faith, is the new acquirer protected from a claim by the victim of theft after a period of time?

With regard to stolen art, antiques or collectibles that are not cultural relics, there is always a risk that the victim may claim for ownership. In this case, the new acquirer may use good faith as a defence. The limitation of actions is three years; however, if 20 years have passed since the infringement, protection from the people's court will not be granted.

Under certain conditions, the limitation may be suspended or extended. Upon expiry of the limitation, if the acquirer or the new acquirer agrees to return the ownership, the victim may recover it. The acquirer always has the opportunity to present an objection as well as the good-faith defence.

## **6** Can ownership in art, antiques or collectibles vest in the acquirer in bad faith after a period of time?

No. If ownership is acquired in bad faith, the acquirer will not be supported. The contract may also be annulled or revoked owing to bad faith.

## 7 Must the professional seller of art, antiques or collectibles maintain a register of sales?

Professional sellers of cultural relics or artworks must keep sales records for a certain period. According to the <u>Law on the Protection of Cultural Relics</u> (revised in 2017) and its <u>Implementing Regulations</u> (revised in 2017), when a cultural relic is sold or auctioned, a record must be made that includes information such as the name, pictures and origin of the cultural relic; the name or title, residence and valid ID card number of the seller; and the transaction price of each deal. The cultural relics record must, within 30 working days of the sale or auction, be reported to and filed with the provincial level authority, which must keep the record for 75 years.

According to a more specifically and recently promulgated Shanghai regulation, the e-commerce platform providing online cultural relics transaction services must keep the records for at least five years after the deal date.

For an artwork, the seller must keep a record of the original transaction-related documents for no less than five years.

#### Risk of loss or damage

**8** When does risk of loss or damage pass from seller to buyer if the contract is silent on the issue?

In general, the risk of loss or damage is passed to the buyer upon delivery, unless otherwise provided by law or agreed upon by the parties. The buyer bears the risk if:

- the artwork fails to be delivered within the agreed time limit because of a reason attributable to the buyer, who bears the risk from the date of breach of contract;
- the artwork was delivered to a transportation carrier and is in transit, the risk being passed to the buyer on the date when the contract was established, unless otherwise agreed by the parties;
- the artwork is delivered to a carrier according to the buyer and seller's agreement, at the place as the buyer designated, and if there is no reached or clear agreement and transportation is needed, the risk is borne by the buyer after the artwork is delivered to the first carrier; and
- the artwork is placed at the delivery place and the buyer fails to take the delivery, therefore resulting in a breach of the contract.

#### **Due diligence**

### **9** Must the buyer conduct due diligence enquiries? Are there non-compulsory enquiries that the buyer typically carries out?

No, there is no legal requirement. The buyer may use discretion to decide whether and how to carry out due diligence. Typically, a prudent buyer will pay attention to the title, authenticity, transferability, condition, appraisal and value of the work of art, antique or collectible to be acquired.

#### **10** Must the seller conduct due diligence enquiries?

Yes. Professional sellers of artworks must conduct due diligence upon the buyer's requests and provide one of the following:

- a document of originality recognised or issued by the artist;
- a document issued by the third-party appraisal institution; or
- a document that can be used to prove or trace the source of the artwork.

If an auction house is the seller, it must verify the documents submitted by the principal, including the identification of the principal and the certificate of title that proves the principal's lawful right. It must also conduct a preliminary appraisal and decide whether to accept the buyer's offer based on that. A second appraisal can also be conducted, if required.

If the outcome differs from the auction contract, the auction house may request to amend or terminate the contract.

When a cultural relic is auctioned, it must be reported to and approved by the SACH local office.

#### Other implied warranties

## **11** Does the law provide that the seller gives the buyer implied warranties other than an implied warranty of title?

No law in China specifically provides those implied warranties. The Law on the Protection of Consumer Rights and Interests (revised in 2013) is the most relevant. It provides that, besides title warranty, the seller also guarantees the quality, functionality, purpose and term of validity of the commodity or service, and that it is free from defects and meets the safety requirements.

For a commodity or service that may endanger safety, a truthful explanation and explicit warning must be given to the consumers. The seller's liability can be relieved or exempted if a defect is made known to the buyer before purchase, as long as the defect does not violate compulsory regulations. If, before auction, the auction house makes a disclaimer that it cannot guarantee authenticity or quality, it will not be held liable.

In respect of a claim against an auction house for failure to make a statement on the defect, the limitation period is one year from the date the claimant knew or ought to have known of the damage. For a claim against a seller or an auction house for cause of action different from the above, the limitation period is generally three years from the date the claimant knew or ought to have known of the damage, unless otherwise provided by law.

#### Voiding purchase of forgeries

## **12** If the buyer discovers that the art, antique or collectible is a forgery, what claims and remedies does the buyer have?

The buyer may file a civil lawsuit against the seller if forgery is found. To obtain the court's support, the buyer must prove that the artwork, antique or collectible was believed to be authentic and the price for an authentic work was paid or agreed to be paid, so there was a substantial breach of contract.

The buyer may claim for one or more of the following remedies: replacement of the forged item with the authentic piece, refund of the payment and payment for the liquidated damages, among other things.

If the buyer can prove there was fraud, coercion, undue influence or malicious collusion during the transaction owing to the seller, or the transaction was made as a result of serious misunderstanding or obvious unfairness, the buyer may seek to annul or revoke the transaction, without losing the right to claim for liquidated damages or compensation. The buyer may also claim against the seller in respect of consumer protection.

The buyer may report forgery to the cultural administrative authority or the comprehensive cultural market enforcement authority if the forged item is an artwork but not a cultural relic.

For proved forgery, punishments usually include confiscation of the unlawful income and the forged artwork and fines. If documents proving the source of the artwork, appraisal, etc, were also forged, the punishment may be increased.

The buyer may report a criminal case to the Ministry of Public Security or its competent branch if forgery, alteration, purchase, sale, theft, seizure or destruction of documents, certificates or seals of state organs is involved.

Whatever the buyer's choice, the right of economic indemnification will not be jeopardised.

If the seller records the artist's name on the sale documents, the documents can be used as evidence. The buyer may also involve the artist, who may claim infringement against the seller.

If the transaction is made through an auction and if, before the auction, the auction house disclaims that it does not guarantee authenticity or quality, the buyer may have difficulty making the claim.

#### Voiding inadvertent sales of works by masters

**13** Can a seller successfully void the sale of an artwork of uncertain attribution subsequently proved to be an autograph work by a famous master by proving mistake or error?

Yes. If any of the following can be proven, the seller may exercise the right to void the sale:

- the contract was concluded by fraud or coercion, which negatively affects the interests of the state;
- malicious collusion is involved, which negatively affects the interests of the state or the collective group;
- an illegitimate purpose is concealed;
- the interest of the public is negatively affected; or
- a mandatory legal provision has been violated.

If any of the following can be proven, the seller may revoke the sale:

- the contract was concluded as a result of serious misunderstanding; or
- there was obvious unfairness when the contract was concluded.

In civil litigation, the burden of proof is borne by the claimant; therefore, the seller must build a strong case if it wishes to be supported by the court.

If the court decides the sale is void or can be revoked, the artwork will be returned to the seller, and the price will be refunded.

If the original cannot be returned or return becomes unnecessary, the seller will be reimbursed at the evaluated price.

The seller or buyer will be compensated if it suffers loss or damage owing to fault of the other party. To exercise this right, the seller must comply with the limitation of actions.

#### **EXPORT AND IMPORT CONTROLS**

#### Export controls

**14** Are there any export controls for cultural property in your jurisdiction? What are the consequences of failing to comply with export controls?

Yes, there are two categories in China: cultural relics exit controls and artworks export controls.

For cultural relics, a licence is mandatory for every exit, subject to examination and approval by the competent authority. Where an exit is permitted, a licence will be granted, and the cultural relic will leave China from a port designated by the authority. Whoever transports, mails or takes the cultural relics out of China must declare it to customs, which will release the cultural relics in accordance with the exit licence. To obtain the licence, the detailed application procedures must be completed successfully.

State-owned cultural relics, precious cultural relics not owned by the state and other cultural relics restricted from leaving China may leave China only when approved for overseas exhibitions or other purposes approved by the State Council.

If the quantity of Grade I cultural relics exceeds the State Council's threshold, further approval from the State Council must be obtained. Grade I cultural relics that are unique or fragile cannot be exhibited abroad.

Once approval is granted, customs will release the cultural relics in accordance with the approval. When the cultural relics are returned to China after exhibition, verification will be conducted by the same authority.

In the event of failure to comply with exit control, there is a risk of liability under criminal law or administrative regulations. Punishments include imprisonment, fines, forfeiture of property, confiscation of unlawful income and revocation of the relevant licence, depending on the seriousness of the case.

Fossils of paleovertebrates and paleoanthropoids of scientific value are protected in the same way as cultural relics: exit control applies movable cultural relics and fossils.

Export of artwork requires an export licence. Similarly, the detailed application procedures must be completed successfully to obtain the licence. Once approved, the applicant must have the artwork cleared by customs.

Artwork considered to do any of the following cannot be exported from China:

- violate the basic principles of the Constitution;
- endanger the unity, sovereignty and territorial integrity of the state;
- divulge any national secret, endanger national security or impair national prestige or interest;
- incite ethnic hatred or discrimination, undermine the ethnic solidarity or injure ethnic customs or habit;

- advocate or disseminate cult or superstition;
- disturb the social order or undermine social stability;
- promote obscenity, violence or gambling, or abet the commission of a crime;
- insult or slander others or infringe others' legitimate rights;
- deliberately distort or misrepresent history;
- harm social morality or jeopardise national traditional culture; and
- be prohibited by laws or administrative regulations, or by the state.

If artwork export control is not complied with, administrative punishments may be imposed, ranging from orders to correct non-compliance to impositions of fines.

According to the Administrative Measures for the Operation of Artworks, the following types of artworks fall under the scope of administration:

- paintings;
- calligraphy and seal cuttings;
- sculptures and carvings;
- artistic photographs;
- installation art;
- industrial art; and
- limited replicas of the above.

Thus, export controls apply to each export of the above-mentioned categories.

#### Import controls

# **15** Other than in relation to endangered species, are there any import controls for cultural property in your jurisdiction? What are the consequences of failing to comply with import controls?

Yes, there are import controls for cultural property in China. Similar to export, there are two categories of controls: cultural relics entry controls and artworks import controls.

According to the Law on the Protection of Cultural Relics (revised in 2017), entry control is mandatory. Each entry must be declared to customs and reported to the competent authority.

Upon entry into China, the cultural relics will be sealed by customs. After verifying and confirming the intactness of customs' seals on the cultural relic, the competent authority will mark a temporary entry label and get the cultural relic registered and photographed.

When the cultural relic leaves China, the entry registration, the photographed records and the temporary entry label will be checked and verified by the same authority, and subject to consistency, an exit permit will be granted.

A cultural relic temporarily entering China cannot stay in China for more than six months, unless exceptionally approved by customs and the competent authority. When a cultural relic enters China for welfare exhibitions within the cultural relics system, the Tentative

Provisions for Administration on Exhibitions of Cultural Relics in China must be fully complied with.

If any cultural relic made of endangered species as prescribed in the Convention on International Trade in Endangered Species of Wild Fauna and Flora is involved, approval from the competent state authority must be attached to the application.

Within two months of the ending of the exhibition, the hosting museum or collecting entity must submit a closing report to the competent authority, submitting the same report to the State Administration of Cultural Heritage (SACH) for filing.

In the event of failure to comply with entry control, the SACH may decide any of the following punishments: issuance of a warning letter to the host, suspension of the exhibition or imposition of penalties. In China, there is no legislative base for seizure or confiscation of cultural relics for non-compliance.

During the examination and approval process, one of the focuses is legitimacy and authenticity of the cultural relics. If the applicant fails to provide adequate evidence to prove the legitimacy and legality of the cultural relics, its application will likely be denied.

For artwork, according to the Administrative Measures for the Operation of Artworks, prior written approval is mandatory for any import, show or exhibition when a foreign artwork or creator is involved.

The process and requirements for the import of artworks are similar to those requested for export.

Once approved, the applicant must have the artworks cleared by customs.

Similar to export, certain artworks cannot be imported into China (eg, artwork that violates the basic principles of the Constitution).

The application process and requirements for an artwork show or exhibition are slightly different. No sale or promotion is allowed for imported artworks without approval.

In the event of non-compliance, punishments will be imposed, ranging from orders of correcting the non-compliance, to fines of between 10,000 yuan and 20,000 yuan, if the illegal turnover is less than 10,000 yuan, or a fine of no less than twice but no more than three times the illegal turnover if the turnover is 10,000 yuan or more.

#### Export and import tax

## **16** Does any liability to pay tax arise upon exporting or importing art, antiques or collectibles?

There is no tax liability for the export of art, antiques or collectibles.

For import, there are two kinds of taxes: customs duty and import VAT. The import VAT rate is 13 per cent, and the rate of customs duty varies from artwork to artwork and is

revised from time to time – for example, effective from 1 January 2022, the customs duty was reduced from 1 per cent to zero per cent for the following artworks, provided they are at least 100 years old: oil paintings; pastels and other hand-made paintings; mosaic paintings; collages; and decorative panels.

For collectibles imported by state-owned public welfare collecting institutions as a result of overseas donation, return, restitution or purchase, the customs duty and import VAT can be exempted if the purpose is a permanent collection, an exhibition, research or other social welfare activities.

#### DIRECT AND INDIRECT TAXATION

#### Taxes

**17** Outline the main types of tax liability arising from ownership and transfer of art, antiques and collectibles.

In China, owning art, antiques and collectibles does not generate tax liability.

However, transferring artworks, antiques and collectibles will create tax liability for the parties. If an artwork is sold:

- directly by the artist, the tax liability includes income tax and VAT;
- by an individual collector, the tax liability includes income tax and VAT;
- by a company or a gallery incorporated as a limited liability company, corporate income tax and VAT apply; and
- through auction, the auction house's tax liability includes corporate income tax and VAT.

If an artwork is acquired through inheritance, there is no tax liability for the heir.

If an artwork is acquired through donation, the acquirer must pay corporate income tax, unless otherwise provided by law.

If the transferred artwork is precious jewellery or jade, consumption tax will also be imposed.

#### **Tax exemptions**

## **18** Outline any tax exemptions or special conditions applicable to art, antiques and collectibles.

When a state-owned public welfare collecting institution imports collectibles that have been donated from abroad, returned, restituted or purchased for a permanent collection or exhibition, or for research and other social welfare activities, customs duties, import VAT and consumption tax will be exempted.

To encourage donations for public welfare, company donors are entitled to preferential corporate income tax, and the individual donors are entitled to preferential income tax treatment.

The Charity Law provides that, charitable organisations, natural persons, legal persons and other organisations that donate to charity and beneficiaries receiving donations are eligible for tax benefits; therefore, when art, antiques or collectibles are involved in charitable donations, tax benefits may apply.

In February 2018, the State Administration of Taxation promulgated a new regulation that allows a corporate donor to deduct its costs for charity and public welfare donations from its taxable income within the amount equivalent to 12 per cent of its annual profits for that year, and to deduct the costs exceeding 12 per cent of the profits for that year within a three-year term carried forward.

In addition, museums in China are entitled to tax preferences as provided by law, and any corporate or person establishing museums or making donations to museums are also entitled to tax preferences.

#### **BORROWING AGAINST ART**

#### Types of security interest

### **19** In your jurisdiction what is the usual type of security interest taken against art, antiques and collectibles?

Among the general types of security (guarantees, mortgages, pledges, liens and deposits), pledges are the most common security interest taken. However, securities are not widely used in practice in China, owing to challenges and risks arising from uncertainty, complexity and a lack of transparency about the appraisal and storage of art, as well as the costs and processes involved. In some cases, liens may be used in the transportation of artwork, storage, custody, repair and restoration, or in a brokerage relationship.

#### **Consumer loans**

**20** If the borrower borrowing against art assets in your jurisdiction qualifies as a consumer, does the loan automatically qualify as a consumer loan, and are there any exemptions allowing the lender to make a non-consumer loan to a private borrower?

No. In China, consumer loan has a clear legal definition: it is a loan for consumption granted by a consumer finance company. A loan will not automatically qualify as a consumer loan just because the borrower is a consumer.

There is no legal restriction prohibiting the lender from granting a loan to acquire art assets; however, the laws provide that each loan must be granted with a legitimate purpose and the facilities must be used only for that purpose.

In practice, a loan is not usually for art, mainly because most lenders are concerned about uncertainty and risk control complexity, unless sufficient security is provided.

According to the <u>Administrative Measures for Pilot Consumer Finance Companies</u>, the balance of a consumption loan borrower granted by a consumer finance company cannot exceed 200,000 yuan.

#### **Register of security interests**

**21** Is there a public register where security interests over art, antiques or collectibles can be registered? What is the effect of registration? Is the security interest registered against the borrower or the art?

No. Although the law does not prohibit mortgage or pledge of artworks, antiques or collectibles (prohibited cultural relics are excluded), there is no official public register for this; however, if copyright vested in the artworks is pledged, it is possible to have it be registered.

#### Non-possessory security interests

**22** Can the lender against art collateral perfect its security interest without taking physical possession of the art?

In general, it is difficult for the lender against art collateral to perfect its security interest without taking physical possession of the art.

#### Sale of collateral on default

**23** If the borrower defaults on the loan, may the lender sell the collateral under the loan agreement, or must the lender seek permission from the courts?

If the borrower defaults on the loan, the lender cannot directly sell or take the collateral; however, it may, negotiate with the mortgagor or pledgor, cash the mortgage or pledge, or seek preferential payment from the proceeds from sale or auction of the pledged or mortgaged artwork. If agreement cannot be reached, the lender may file a lawsuit to seek remedy and enjoy the proceeds when the collateral is encashed, auctioned or sold.

#### **Ranking of creditors**

**24** Does the lender with a valid and perfected first-priority security interest over the art collateral take precedence over all other creditors?

In general, a lender with a valid and perfected first-priority security interest may have priority over other creditors. However, the tax authority enjoys priority over the lender if the borrower has outstanding tax liability.

In the event of bankruptcy of the debtor, the priority the lender enjoys will not be impacted.

#### **INTELLECTUAL PROPERTY RIGHTS**

#### **Creator copyright**

**25** Does copyright vest automatically in the creator, or must the creator register copyright to benefit from protection?

Copyright is automatically generated when a work is created. Copyright registration is voluntary in China; however, for copyright protection purposes, it is advisable to register it.

#### **Copyright duration**

#### **26** What is the duration of copyright protection?

For moral rights such as authorship, right of modification and integrity, the protection is unlimited.

For moral rights such as right of publication, if the author is a legal person or if it is a work made for hire, the protection lasts 50 years, ending on 31 December of the 50th year after the date of first publication. If the work is not published within 50 years, it is no longer protected.

If the author is an individual, the protection lasts for the duration of his or her life, plus 50 years after his or her death, ending on 31 December of the 50th year. If it is a joint work, protection ends on 31 December of the 50th year after the death of the last surviving co-author.

For audiovisual work, the audiovisual producer enjoys 50 years' protection and has the right to charge third parties fees for reproduction, distribution, lease and communication through information networks for a period from the date when production is completed to 31 December of the 50th year after the production completion date.

For economic rights such as right of reproduction, distribution, rental, exhibition, performance, projection, broadcasting, communication via information networks, cinematisation, adaptation, translation, composition and other rights to which a copyright owner is entitled, if the author is a legal person or other organisation, or if it is a work made for hire, the protection lasts 50 years, ending on 31 December of the 50th year after the date of first publication. If the work is not published within 50 years, it is no longer protected. If the author is an individual, the protection lasts for the duration of the author's life, plus 50 years after his or her death, ending on 31 December of the 50th year.

#### Display without right holder's consent

### **27** Can an artwork protected by copyright be exhibited in public without the copyright owner's consent?

The owner of the original fine art or photography artwork has the right to exhibit the original without the copyright owner's consent; otherwise, consent must be obtained in advance.

#### Reproduction of copyright works in catalogues and adverts

# **28** Can artworks protected by copyright be reproduced in printed and digital museum catalogues or in advertisements for exhibitions without the copyright owner's consent?

The rights of reproduction, distribution and communication through information networks are economic rights of the copyright owner; therefore, consent must be obtained before reproduction, distribution or communication via information networks, unless usage is purely internal only. The owner's consent is also needed in the case of advertising.

#### Copyright in public artworks

#### **29** Are public artworks protected by copyright?

Yes, public artworks are protected by copyright.

#### Artist's resale right

#### **30** Does the artist's resale right apply?

Artist's resale right does not apply in China.

#### **Moral rights**

#### 31 What are the moral rights for visual artists? Can they be waived or assigned?

In China, moral rights include the right of publication, authorship, modification and integrity. Moral rights cannot be waived.

Protection is unlimited in duration for the following moral rights:

- the right of authorship;
- the right of modification; and
- the right of integrity.

After the death of the author, the right of authorship, modification and integrity will be protected by the heir in title or another beneficiary. If there is no heir or other beneficiary, the rights will be protected by the copyright administrative authority.

In the case of a posthumous work, the right of publication may be exercised by the heir or other beneficiary within a period of 50 years after the author's death, unless the author had expressly stated not to publish it. In the absence of an heir or other beneficiary, the right will be exercised by the owner of the original work.

In case of work of an unknown author, the copyright, excluding right of authorship, may be exercised by the owner of the original work. If the author is identified, the copyright will be exercised by the author or the heir.

There is no legislation in China on whether moral rights can be waived or assigned. In general, they are deemed as unable to be waived or assigned.

#### AGENCY

#### Accounting to the principal

# **32** Does the law require the agent to account to the principal for any commission or other compensation received by the agent while conducting the principal's business?

There is no legislation in China that requires the agent to account to the principal for commission or compensation received; however, in accordance with the Civil Code, it is considered fair and reasonable for that to be the case.

The agent shall be paid remuneration for completing an entrusted task, and if a civil juristic act is performed by an agent in the principal's name and within the scope of agency power, it is binding on the principal.

If a contract is signed with a third party in the agent's name, within the scope of agency power, if the third party is aware of the agency relationship, the contract will be binding on the third party and the principal, unless there is conclusive evidence proving that the contract is binding on the third party and the agent.

#### **Disclosed agent commission**

**33** Does disclosure to the principal that the agent will receive a commission allow the agent to keep the commission unless the principal objects?

There is no legislation in China on this.

#### Undisclosed agent commission

**34** If a third party pays a commission to an agent that is not disclosed to the principal, can the principal claim the commission from the third party?

It is not easy for the principal to claim the commission from the third party. It must build a very strong case with solid evidence.

#### **CONSIGNING ITEMS**

#### Protection of interests in consigned works

**35** How can consignors of artworks to dealers protect their interest in the artwork if the dealer goes into liquidation?

To protect a consignor's interest when a dealer goes bankrupt, it is necessary to prevent the consigned artworks from being disposed as the dealer's property. For that purpose, the consignor must sign a consignment sale contract that protect its interests and makes the consigned artworks marked and recognisable as the consignor's property rather than the dealer's.

In the event of bankruptcy, as soon as the court accepts the bankruptcy application, the consignor must request to take back the consigned artworks through the bankruptcy administrator. If the administrator objects, the consignor has a remedy to file a lawsuit to claim for the ownership.

#### **AUCTIONS**

#### Regulation

**36** Are auctions of art, antiques or collectibles subject to specific regulation in your jurisdiction?

In China, the auction of art, antiques or collectibles is highly regulated by auction-related legislation, such as the Auction Law (revised in 2015) and its Measures (revised in 2015), as well as legislation regulating artworks and cultural relics. The auction of cultural relics is the most strictly regulated – by the Law on the Protection of Cultural Relics (revised in 2017) and its ancillary regulations.

Cultural relics can be auctioned only by auctioneers that have been approved for cultural relic auction. To be qualified, the auctioneer must meet various requirements and conditions.

Only approved cultural relics are eligible for auction. The relics must be reviewed and approved in advance by the provincial level authority of the State Administration of Cultural Heritage (SACH) and be filed with the SACH.

The state enjoys right of first refusal to purchase precious cultural relics that are being auctioned. Foreign investment is also prohibited from cultural relics auctions.

# **37** May auctioneers in your country sell art, antiques or collectibles privately; offer advances or loans against art, antiques or collectibles; and offer auction guarantees?

There is no legislation prohibiting auctioneers from selling art privately, except for cultural relics, for which transactions are highly regulated. However, auction houses are prohibited from auctioning artworks or cultural relics that they own.

The financial services industry is highly regulated. An auction house is not a financial services provider and is, therefore, not eligible to provide financial services.

#### **SPOLIATION DURING THE NAZI ERA**

#### **Claims to Nazi-looted art**

**38** In what circumstances would the heirs of the party wrongly dispossessed typically prevail over the current possessor, if a court in your country accepted jurisdiction and applied its own law to a claim to art lost during the Nazi era?

There is no legislation in China that specifically addresses spoliation during the Nazi era. China is a state party to the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, which provides a limited legal basis for cases claiming stolen or illegally exported art.

It is not easy to initiate the action in practice, however, mainly because of the lack of sufficient jurisdiction and appropriate cause of action. Nevertheless, if a case were accepted by the court and were successfully supported, there is still possibility of success.

#### **39** Is there an ad hoc body set up to hear claims to Nazi-looted art?

No.

#### **LENDING TO MUSEUMS**

#### **Responsibility for insurance**

**40** Who is responsible for insuring art, antiques or collectibles loaned to a public museum in your jurisdiction?

In China, there is no specific legislation on the insurance of art, antiques or collectibles on loan. According to the Regulation on Museums, the legal representative of a museum is responsible for the safety of the collections. In practice, insurance is arranged in accordance with the agreement between the lender and the borrower.

#### Immunity from seizure

## **41** Are artworks, antiques or collectibles loaned to a public museum in your country immune from seizure?

There is no legislation in China that renders art, antiques or collectibles loaned to a public museum immune from seizure. Property seizure must be based on a legitimate cause of action, through requested legal proceedings. If the owner objects to seizure, legal procedures can be initiated to verify the legitimacy.

#### **CULTURAL PATRIMONY**

#### **National treasures**

#### 42 Is there a list of national treasures?

No. The law does not define national treasures.

Cultural relics are classified into ordinary and precious, with the latter further classified into Grade I, Grade II and Grade III. Movable cultural relics include important material objects, artworks, documents, manuscripts, books and materials and typical material objects. Immovable cultural relics include sites of ancient culture, ancient tombs, ancient architectural structures, cave temples, stone carvings, mural paintings, important historical sites and important modern and contemporary architecture.

Numerous restrictions are applied to precious cultural relics, which are mostly relevant to their sale, transfer, loan or exit from China. When a precious cultural relic is to be auctioned, the state enjoys the right of first refusal.

In an opinion issued by the State Administration of Cultural Heritage in 2012, it is strictly prohibited to use terms such as 'national treasures', 'rare' and 'the only existing' to describe auctioned objects in auction catalogues to avoid misleading.

#### **Right of pre-emption**

**43** If the state is interested in buying an artwork for the public collections, does it have a right of pre-emption?

When a precious cultural relic is to be auctioned, the state enjoys the right of first refusal. For artworks, there is no legislation in China granting the state a right of pre-emption.

#### Automatic vesting in the state

**44** In what circumstances does ownership in cultural property automatically vest in the state?

All cultural relics that are underground, in inland waters or territorial seas within Chinese territory are owned by the state. Sites of ancient culture, ancient tombs and cave temples are owned by the state.

Immovable cultural relics that are designated for protection by the state, unless otherwise provided by the state, are owned by the state. The ownership of state-owned immovable cultural relics remains unchanged when ownership or the right to use the land to which the relics are attached changes.

The state also owns cultural relics that:

 have been unearthed within Chinese territory, unless otherwise provided by state regulations;

- have been collected and preserved by state-owned cultural relics collecting institutions and other state organs, armed forces, state-owned enterprises, public institutions, etc;
- have been collected and purchased by the state;
- have been donated to the state by citizens, legal persons and other organisations; and
- are owned by the state, as provided for by law.

Ownership by the state remains unchanged when institutions for preservation or collection cease to exist or are replaced. Ownership is protected by law and brooks no infringement.

Ownership of memorial buildings, ancient architectural structures, cultural relics handed down from ancestors and other cultural relics obtained in accordance with the law, which belong to collectives or individuals, are protected by law.

#### Illegally exported property claimed by foreign states

**45** How can a foreign state reclaim in your jurisdiction cultural property illegally exported from its territory?

China became a state party to the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (the Convention) in 1997. If the foreign state is a party to the Convention, theoretically it may apply to a Chinese court or competent authority to order return of the stolen or illegally exported cultural objects. To successfully establish the case, the foreign state must convince the court or competent authority of the limitation of actions, the sufficiency of jurisdiction, the applicability the Convention.

To succeed in the claim, the foreign state must meet all requirements of the Convention, complete all necessary legal proceedings and provide all sufficient evidence within the valid limitation of actions. Although the Convention may allow the case to be resolved by a court or authority outside China, a foreign judgment may not be enforceable in China, unless there is a bilateral judicial agreement between the country and China.

Besides the Convention, China is also a state party to the UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954 and the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970. It has also entered into numerous bilateral agreements with various countries for the protection of culture and heritage.

#### **NON-FUNGIBLE TOKENS**

#### Regulation and case law

**46** How are non-fungible tokens (NFTs) regulated in your jurisdiction? Is there any case law on NFTs in your jurisdiction?

Answer pending.

#### **ANTI-MONEY LAUNDERING**

#### Compliance

## **47** What are the anti-money laundering compliance obligations placed on the art trade?

In China, there is no specific legislation on anti-money laundering in respect of art. The most relevant are the following pieces of anti-money laundering legislation for banks and financial institutions:

- the Anti-Money Laundering Law;
- the <u>Administrative Measures for Anti-Money Laundering and Counterterrorism</u> <u>Financing for Banking Financial Institutions;</u>
- the Provisions on Anti-Money Laundering by Financial Institutions (revised in 2006); and
- the <u>Administrative Measures for Anti-money Laundering and Counterterrorism</u> <u>Financing by Internet Finance Service Agencies (for Trial Implementation)</u>.

According to China's anti-money laundering legislation, financial institutions must establish and implement identification policies and processes that require clients to provide identity verification documents.

With regard to art agents, dealers, beneficiaries or guarantors, their identities must be verified by financial institutions in monetary transactions. If suspected or unidentified, the institution may decide not to provide services to it. If identification is conducted through a third party, the institution must ensure the third party's compliance.

Financial institutions must immediately report suspicious transactions to the headquarters, which will subsequently be reported to the China Anti-Money Laundering Monitoring and Analysis Centre.

Financial institutions must provide training to their clients and business partners, and they must strictly protect their clients' data and information.

In addition to financial institutions, buyers, sellers, dealers and other players in the art business must follow anti-money laundering requirements at the request of financial institutions, auction houses, galleries, services providers or government authorities. Requirements include know-your-customer questionnaires, contract signing and payment consistency.

In practice, art transactions in China are frequently concluded with payment in cash or on a barter basis, which raises concerns. In the <u>People's Bank of China's Guidelines for</u> <u>the Assessment of Money Laundering and Terrorism Financing Risks and Categorised</u> <u>Management of Clients of Financial Institutions</u>, art collection and auctions were categorised as 'cash-intense industries' that may lead to a high risk of money laundering.

#### **ENDANGERED SPECIES**

#### CITES

## **48** Is your jurisdiction a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)?

Yes, China is a party to the CITES Convention. The <u>Regulation on the Administration</u> of the Import and Export of Endangered Wild Animals and Plants came into effect on 1 September 2006 and was further revised in 2019, which implemented the CITES Convention in China. The Endangered Species Scientific Commission is the enforcement body in China, and the Administrative Office of the Import and Export of Endangered Wild Animals and Plants was set up under the State Forestry Administration, serving as the enforcement administration.

## **49** Is the sale, import or export of pre-CITES endangered species subject to a licence?

It is prohibited to import or export for commercial purposes endangered wild animals, plants and the products made of them that are prohibited by the CITES Convention. If there are justified reasons, such as scientific research, training and breeding, and cultural exchange, approval must be obtained from the state authority or the State Council. If the species is recognised as endangered, approval must be obtained in advance, regardless of whether it is pre-CITES.

For import, the following conditions must be met:

- utilisation of the goods is compliant with state requirements;
- the control measures are effective and compliant with ecological safety requirements; and
- the submitted documents are true and valid.

From time to time, the state wildlife and plants administrative authority may publicise additional conditions and requirements.

For export, the following conditions must be met:

- the ecological safety requirements and public interests are satisfied;
- the source of the goods is lawful;
- all submitted documents are true and valid; and
- the species is not prohibited from export by the State Council or the state authority.

## **50** Is the sale, import or export of post-CITES worked or antique endangered species authorised? On what conditions?

The same regulations apply to pre-CITES and post-CITES endangered species.

#### Specific endangered animal products

### **51** Are there any special rules for works of art made of elephant ivory, rhino horn or other specific endangered animal products?

Various laws and regulations protect endangered animals and prohibit abuse of endangered animal products. In the event of non-compliance, the responsible party may face for civil, administrative or criminal liabilities.

The <u>Circular</u> of the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security and the Ministry of Justice on issuing the guiding opinions on punishing crimes of illegal wild animal trade in accordance with the law was promulgated on 18 December 2020. It provides that, crimes of illegal wild animal trade will be seriously punished. Any person who knowingly does any of the following as support will be punished as a joint offender:

- provide a loan, fund, account number, vehicle, equipment, technology or licence or permit;
- provide premises for production, operation, transportation, storage, custody, express courier delivery, mailing or online information exchange or other facilitating conditions or services; or
- provide advertising or other form of aid.

The <u>Circular</u> on progressively stopping the commercial processing and sale of ivory and ivory products specifically provides that ivory processing should be totally stopped by 31 December 2017. Ivory and ivory products are prohibited from being sold or traded on the market or through the internet. Ivory and ivory products with a legitimate source will be given a specific mark. Cultural relics with a legitimate source can be auctioned under strict monitoring, once a licence is obtained.

In addition, the following restrictive laws and regulations also apply:

- the Law on Protection of Wildlife (revised in 2018);
- the Implementing Rules of the Law on the Protection of the Land Wildlife;
- the <u>Implementing Rules of the Law on the Protection of Water Wildlife;</u>
- the <u>Criminal Law</u> (revised in 2015); and
- the Administrative Measures for the Operation of Artworks.

#### **CONSUMER PROTECTION**

#### Cancelling purchases

### **52** In what circumstances may consumers cancel the sale of art, antiques or collectibles?

Consumers may cancel the sale under various circumstances and pursuant to different laws; for example, a sale can be null and void under the Civil Code if fraud, coercion, malicious collusion, illegitimate purpose concealed by a legitimate purpose or violation of mandatory

laws and regulations is identified or proved, or if the sales contract was signed because of serious misunderstanding, with obvious unfairness or under undue influence.

Under the Law on the Protection of Consumer Rights and Interests (revised in 2013), if the purchased object fails to meet quality requirements, the consumer may request for the return, replacement, repair or cancellation of the contract. If the purchase is deemed substandard by the competent authority, the seller must agree to return it if requested by the consumer.

#### Duties of businesses selling to consumers

#### **53** Are there any other obligations for art businesses selling to consumers?

There is no specific legislation on art-related obligations in China. Buyers have the following rights:

- right to know;
- right to choice;
- right to safety;
- right to fair trade;
- right to compensation; and
- right to privacy.

#### REGULATION

#### Art market regulator

## **54** Is there a specific regulatory body overseeing the art market or certain business activities carried out within the art market in your jurisdiction?

The Ministry of Culture and Tourism and its branches at different administrative levels throughout China oversee the art market, cultural relics protection and related matters. Its major responsibilities include:

- making strategies, drafting legislation and policies;
- structuring and leading development, promotion and innovation of the industry;
- leading and managing important nationwide cultural events and activities;
- guiding and managing culture and art business development;
- promoting and leading public culture and tourism services;
- guiding, promoting and leading culture and tourism development through technology innovation;
- promoting information infrastructure and the establishment of standards in culture and tourism;
- being responsible for intangible cultural heritage protection;
- promoting protection, promotion, publication and innovation of intangible cultural heritage;
- structuring and planning culture and tourism industries;

- guiding and administrating market development, supervising operation and management, promoting integrity and compliance and building integrity and credit systems;
- leading nationwide enforcement, investigating cases and serving punishments for violations;
- guiding and managing external affairs;
- organising culture and tourism activities to promote Chinese culture in the world;
- managing the State Administration of Cultural Heritage; and
- other responsibilities and assignments as ordered by State Council and the government.

#### Other regulators

**55** What other forms of regulation are professional art market participants in your jurisdiction subject to?

Other applicable laws and regulations include:

- the <u>E-Commerce Law</u> and the Cybersecurity Law and the ancillary regulations and judicial interpretations;
- the <u>Advertising Law</u> (revised in 2018), the <u>Interim Measures for the Administration of</u> <u>Internet Advertising</u> and the <u>Anti-Unfair Competition Law</u> (revised in 2017);
- the Interim Measures for the Supervision and Administration of Private Investment Funds;
- the Instructions for the Record-Filing of Private Investment Funds and the Trust Law;
- the <u>Interim Measures on Registration and Management of the Civil and</u> <u>Non-Enterprise Unit;</u>
- the Charity Law, the Civil Code and the related tax laws and regulations; and
- the legislation related to insurance, transportation and customs.

#### **UPDATE AND TRENDS**

#### Key developments of the past year

## **56** Are there any other current developments or emerging trends that should be noted?

In 2021, the online art business continued to boom in China as a result of the covid-19 pandemic. Artists, galleries, art fairs, museums and almost everyone involved in the art sector explored new opportunities online, which proved to be a smart approach. For example, there were over 2,000 online exhibitions held throughout China in 2020, which were visited more than 5 billion times. Figures for 2021 were understood to be higher, but the data has not been released. Using an online platform has proven to be successful for all kinds of art businesses, including exhibitions, shows, sales, auctions, promotions, advertisements, publications, events and activities through various Chinese and global online platforms and tools, such as web pages, WeChat, Weibo, Douyin, Facebook, Twitter and TikTok. As a result, business players need to be aware of the legal and compliance risks involved, such as regulatory compliance requirements in respect of the art business operator and the approval requirements for the art business (eg, exhibition, auction) and regarding imported artworks. Additional laws, such as the Advertising Law, the E-Commerce Law and the Personal Information Protection Law, must also be complied with.

In 2021, the non-fungible token (NFT) art business boomed in China, as it did around the world, following Christie's unprecedented auction of Beeple's NFT *Everydays: The First 5000 Days* for US\$69.3 million in March 2021. In May 2021, the auction house China Guardian made the first NFT art auction in China, both online and offline, and in June 2021, Poly Auction held China's first NFT art special auction session, both of which were advised by Jingtian & Gongcheng as the sole legal adviser. NFTs have introduced promising opportunities to the art sector, as well as new challenges from legal and compliance perspectives, including copyright protection and licensing, cybersecurity and data privacy, anti-money laundering and cryptocurrency compliance.

It was expected that significant changes would be made to cultural relics legislation and practice in 2021, but this did not occur. It is hoped that these changes will take place in 2022.

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# **England & Wales**

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**RETURN TO CONTENTS** 

### Summary

BUYING AND SELLING	34
Passing of title	34
Implied warranty of title	35
Registration	35
Good-faith acquisition of stolen art	36
Acquiring title to stolen art through prescription	36
Risk of loss or damage	37
Due diligence	37
Other implied warranties	38
Voiding purchase of forgeries	38
Voiding inadvertent sales of works by masters	39
EXPORT AND IMPORT CONTROLS	39
Export controls	39
Import controls	41
Export and import tax	42
DIRECT AND INDIRECT TAXATION	44
Taxes	44
Tax exemptions	44
BORROWING AGAINST ART	45
Types of security interest	45
Consumer loans	45
Register of security interests	45
Non-possessory security interests	46
Sale of collateral on default	46
Ranking of creditors	46
INTELLECTUAL PROPERTY RIGHTS	47
Creator copyright	47
Copyright duration	47
Display without right holder's consent	48
Reproduction of copyright works in catalogues and adverts	48
Copyright in public artworks	48
Artist's resale right	49
Moral rights	49
AGENCY	50
Accounting to the principal	50

PAGE 34	RETURN TO SUMMARY
Disclosed agent commission	50
Undisclosed agent commission	51
CONSIGNING ITEMS	51
Protection of interests in consigned works	51
AUCTIONS	52
Regulation	52
SPOLIATION DURING THE NAZI ERA	52
Claims to Nazi-looted art	52
LENDING TO MUSEUMS	53
Responsibility for insurance	53
Immunity from seizure	54
CULTURAL PATRIMONY	54
National treasures	54
Right of pre-emption	54
Automatic vesting in the state	55
Illegally exported property claimed by foreign states	55
NON-FUNGIBLE TOKENS	56
Regulation and case law	56
ANTI-MONEY LAUNDERING	57
Compliance	57
ENDANGERED SPECIES	60
CITES	60
Specific endangered animal products	62
CONSUMER PROTECTION	63
Cancelling purchases	63
Duties of businesses selling to consumers	64
REGULATION	64
Art market regulator	64
Other regulators	65
UPDATE AND TRENDS	66
Key developments of the past year	66

### **BUYING AND SELLING**

### Passing of title

# 1 When does ownership of art, antiques and collectibles pass from seller to buyer?

Seller and buyer are free to agree when ownership passes. It is common practice to agree that ownership passes when payment is received by the seller (reservation of title clause).

Unless otherwise agreed by way of contract, or unless the circumstances point to the parties having agreed that ownership will pass at a different point in time, ownership passes from seller to buyer when the contract is concluded, regardless of whether payment has been made or delivery has occurred.

### Implied warranty of title

# **2** Does the law of your jurisdiction provide that the seller gives the buyer an implied warranty of title?

In a contract of sale, there is an implied term on the part of the seller that he or she has a right to sell the goods, and in the case of an agreement to sell, he or she will have this right at the time when the property is to pass. There are two additional implied terms in a contract for sale. The first is that the goods are free (and will remain free until the time when property passes) from any charge or encumbrance not disclosed or known to the buyer before the contract is made; and the second is 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.

These implied terms cannot be excluded by way of contract. Most business contracts fall within the scope of the <u>Unfair Contract Terms Act 1977 (UCTA)</u>, with a few specific exceptions set out in the Act. In the likely event that the UCTA applies to a business contract, or if the contract is with a consumer, the seller cannot exclude its liability under the implied terms specified in this question. Any clause attempting to do so is void.

However, the seller can limit the title that he or she transfers to the buyer to the title that he or she possesses. This limitation can be expressed in the contract, or title may be limited if it can be inferred from the circumstances of the transaction that it was the intention of the parties that the seller only intended to transfer the title that he or she possessed.

The statute of limitations provides that the buyer shall have six years from the date of the breach (which for an implied term will be the date of the contract) to bring a claim. If the contract was made by deed, the limitation period is extended to 12 years from the date of the breach.

### Registration

# **3** Can the ownership of art, antiques or collectibles be registered? Can theft or loss of a work be recorded on a public register or database?

There is no register of ownership of art, antiques or collectibles in England and Wales, with some exceptions such as cars.

However, owners and insurers can register art, antiques or collectibles on a positive database held by the Art Loss Register (<u>www.artloss.com</u>). This is done on a purely voluntary basis. The positive database cannot be searched by the public.

If an art, antiques or collectables are stolen, the owner or insurer can register them as such with any of the lost or stolen art databases, such as the Art Loss Register or Interpol. The

Interpol database of stolen works of art can be searched by accredited users using login details provided on request.

# Good-faith acquisition of stolen art

4 Does the law of your jurisdiction tend to prefer the victim of theft or the acquirer in good faith of stolen art?

English common law prefers the dispossessed owner from whom the artwork was stolen. This is illustrated by the legal principle 'no one gives what he does not have'. The thief cannot acquire ownership, and in principle, nor can anyone who derives possession of the stolen artwork from the thief.

However, the statute of limitations comes to the rescue of the buyer in good faith: the ownership of the dispossessed owner whose artwork was stolen is extinguished after six years from the date of the first acquisition in good faith. This applies regardless of when the dispossessed owner discovered (or could have discovered) the whereabouts of the artwork. If the dispossessed owner's title has expired, the current possessor will typically have possessory title to the artwork; accordingly, he or she will prevail. Note that it is sufficient if the defendant in a recovery action by the dispossessed owner shows that someone in the chain of possession acquired the artwork in good faith more than six years before the claim was made, even if the defendant cannot show that he or she, himself or herself, bought the artwork in good faith.

The party relying on his or her or another possessor's good faith has the burden of proving good faith. Good faith is a matter of fact left to the discretion of the courts. In assessing good faith, a court will typically consider the circumstances of the buyer's acquisition, including the due diligence carried out with regard to the buyer's expertise and resources. If a buyer did not exercise any due diligence, discharging the burden of proving good faith may be difficult.

# Acquiring title to stolen art through prescription

5 If ownership in stolen art, antiques or collectibles does not vest in the acquirer in good faith, is the new acquirer protected from a claim by the victim of theft after a period of time?

If there is no good-faith acquisition on which the current possessor can rely (or the six-year period following a good-faith acquisition has not yet expired), the dispossessed owner has a right to reclaim the artwork. However, if the dispossessed owner discovers (or ought reasonably to have known) the whereabouts or possessor of the artwork, he or she must bring a claim for the stolen artwork without unreasonable delay. The current possessor could defend his or her possession of the artwork by arguing that the dispossessed owner has unreasonably delayed bringing a claim, despite the fact that he or she knew (or ought reasonably to have known) the whereabouts or possessor of the artwork. This is known as the equitable doctrine of laches.

**6** Can ownership in art, antiques or collectibles vest in the acquirer in bad faith after a period of time?

In English law, the thief and subsequent possessors in bad faith cannot acquire ownership.

7 Must the professional seller of art, antiques or collectibles maintain a register of sales?

Generally, there is no requirement for professional sellers of art, antiques or collectables to maintain a register of sales under English law. However, the <u>Money Laundering and</u> <u>Terrorist Financing (Amendment) Regulations 2019</u> have created requirements for certain art market participants to identify and verify the identity of parties to the transaction.

# Risk of loss or damage

8 When does risk of loss or damage pass from seller to buyer if the contract is silent on the issue?

Seller and buyer are free to agree when risk of loss of, or damage to, art, antiques and collectibles passes from seller to buyer. In practice, they often agree that risk will pass when ownership passes or upon delivery of the artwork by seller to buyer.

Unless otherwise agreed by contract, or the circumstances point to the parties having agreed that risk will pass at a different point in time, risk passes with ownership in business-to-business contracts. In consumer contracts, however, the artwork remains at the trader's risk until it comes into the possession of the consumer (or someone identified as taking possession for the consumer).

# Due diligence

**9** Must the buyer conduct due diligence enquiries? Are there non-compulsory enquiries that the buyer typically carries out?

In general there are no mandatory due diligence enquiries that a buyer must legally carry out, but the burden of due diligence rests with the buyer (in accordance with the 'buyer beware' doctrine) unless otherwise agreed by the parties. Buyers typically search the stolen art database of the Art Loss Register and conduct enquiries on the ownership, authenticity, condition, provenance and lawful export of art, antiques and collectibles prior to completing a transaction. Due diligence depends on the type of asset, its value and the information volunteered by the seller. Buyers of cultural property, particularly antiquities and items removed from monuments and sites, should be mindful of the following legislation relating to cultural property: the <u>Dealing in Cultural Objects (Offences) Act 2003</u>; the <u>Cultural Property (Armed Conflicts) Act 2017</u>. It is a criminal offence in England and Wales to deal in 'tainted' cultural property, including cultural property that has been unlawfully excavated or removed from a building, structure, monument or site after the Dealing in Cultural Objects (Offences) Act came into force.

The buyer should also ensure that they are not acting in contravention of any UN security council resolutions or UK sanctions enacted from time to time restricting the import or trade

in cultural property – for example, the <u>Iraq (United Nations Sanctions) Order 2003</u>, the <u>Export</u> <u>Control (Syria Sanctions) Order 2013</u>, and the Russia (Sanctions) (EU Exit) Regulations 2019.

A buyer should also be mindful not to acquire criminal property as defined in the <u>Proceeds</u> of <u>Crime Act 2002</u>, which sets out money laundering offences.

# **10** Must the seller conduct due diligence enquiries?

Sellers of cultural property are subject to the Dealing in Cultural Objects (Offences) Act 2003, the Cultural Property (Armed Conflicts) Act 2017 and any UN security council resolutions enacted from time to time restricting the import or trade in cultural property. They should, therefore, carry out due diligence to ensure that they are not in breach of the relevant legislation by dealing in such cultural property. However, by making these enquiries, sellers protect themselves rather than the buyer. It is good practice for professional sellers (such as galleries and auction houses) to conduct due diligence on the owner before accepting property on consignment for sale. Professional sellers subject to the Money Laundering and Terrorist Financing (Amendment) Regulations 2019 must also identify and verify personal details of buyers.

### Other implied warranties

# **11** Does the law provide that the seller gives the buyer implied warranties other than an implied warranty of title?

The <u>Consumer Rights Act 2015</u> states that goods must be of satisfactory quality, fit for purpose and if the sale is a sale by description, the goods must be as described (including in any presale material or representations). These warranties cannot be excluded or limited by way of contract. The Consumer Rights Act is not specific to artworks or second-hand goods, and therefore satisfactory quality for artworks is likely to be a relatively low standard. Similarly, 'fit for purpose' is unlikely to give a buyer much protection in relation to an artwork, unless for example it was an artwork that was intended for a specific purpose (such as an outdoor artwork).

In business-to-business contracts, the <u>Sale of Goods Act 1979</u> requires the seller to provide similar implied warranties as to satisfactory quality and fitness for purpose. These warranties can be excluded or limited by way of contract and it is common practice to do so.

The main English auction houses typically offer buyers a five-year after-sale guarantee that the lot is not a forgery as defined in the auction terms, or some other limited guarantee, subject to the buyer meeting certain conditions.

#### Voiding purchase of forgeries

# **12** If the buyer discovers that the art, antique or collectible is a forgery, what claims and remedies does the buyer have?

Unless the contract expressly states otherwise, authenticity is not guaranteed by the seller. This is usually the case even if the name of the artist is stated on the invoice. However, if the sale is considered to be a sale 'by description', and the name of the author of the artwork is

part of that description, the buyer may have the right to cancel the sale if the artwork turns out to be a forgery or not by that artist. Judging by the case law, it is unlikely that a statement by the seller that the artwork is by a named artist would be considered as more than a statement of opinion (although each case will depend on its facts) and therefore provided the opinion is reasonable and genuinely held, the buyer is unlikely to have any recourse against the seller.

If the seller has represented to the buyer that the artwork is authentic, and the statement is deemed by the court to amount to a statement of fact rather than a mere statement of opinion (even if such statement is oral), the buyer may have a claim that the seller is liable for misrepresentation. Misrepresentation can result in the rescission of the sale, or an award of damages for the difference in value.

There may be circumstances where the seller has assumed a duty of care towards the buyer, in which case the buyer may succeed in showing that the seller was negligent in discharging that duty when attributing the artwork to a given artist. This is more unusual because in an arm's-length transaction, such as one between seller and buyer, in principle the parties do not owe each other a duty of care.

### Voiding inadvertent sales of works by masters

**13** Can a seller successfully void the sale of an artwork of uncertain attribution subsequently proved to be an autograph work by a famous master by proving mistake or error?

The seller is unlikely to have a good claim against the buyer if he or she sold an artwork believing, for example, that it was a copy when it turns out that it was authentic. The doctrine of mistake is notoriously difficult to rely upon in subjective art-related matters, and the concept of 'fundamental error' at the root of the contract does not exist in English law. However, the seller may well have a claim against his or her professional selling agent. The seller may succeed against the selling agent in a claim in negligence or misrepresentation. There is case law on this point. The standard of due care is set higher for specialist selling agents than generalist selling agents. Recent leading cases on the point include *Countess of Wemyss and March & Anor v Simon C. Dickinson Ltd* [2022] EWHC 3091 (Ch) and *Lancelot Thwaytes v Sotheby's* [2015] EWHC 36 (Ch).

# **EXPORT AND IMPORT CONTROLS**

### **Export controls**

**14** Are there any export controls for cultural property in your jurisdiction? What are the consequences of failing to comply with export controls?

Certain cultural goods that reach or exceed specific age and monetary value thresholds require an individual licence for export out of the UK – whether on a permanent or temporary basis. The age and value thresholds depend on the type of artwork.

Exporters must apply for a UK export licence to export objects that reach or exceed specific age and monetary value thresholds from England and Wales. Northern Ireland follows special rules. A licence is not required to move objects of cultural interest from Great Britain to Northern Ireland; however, exports from Northern Ireland to EU member states require a UK export licence, while exports from Northern Ireland directly to non-EU countries require an EU export licence. Exports from Northern Ireland to Great Britain do not require a UK export licence; objects being exported to a non-UK destination through a port or airport in Great Britain only require a UK licence for their final export.

In England, export licences are issued by the Export Licensing Unit. EU and UK licences for objects of cultural interest from Northern Ireland are also issued by Arts Council England. The application for a UK export licence may be referred to an expert adviser, usually a museum curator. The expert adviser will consider if the artwork meets one or more of the Waverley criteria (see below), which are used to decide if an artwork is sufficiently important to warrant being 'saved for the nation'. If the exporter can show that the artwork has been in the UK for less than 50 years, an export licence must be obtained if the artwork requires one, but the application will not, in principle, be referred to an expert adviser. Accordingly, in such cases, the export licence will be granted.

The Waverley Criteria are as follows:

- 1 Is the object closely connected with the history and national life [of the UK]?
- 2 Is the object of outstanding aesthetic importance?
- 3 Is the object of outstanding significance for the study of some particular branch of art, learning or history?

If the expert adviser considers that the artwork meets one or more of the Waverley criteria, the export licence application is referred to the Arts Council Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest. The Reviewing Committee will consider the application and hold a meeting during which the applicant has the opportunity to argue that the artwork does not meet the Waverley criteria. If the Reviewing Committee concludes that the artwork meets one or more of the Waverley criteria, it will recommend to the Secretary of State for the Department of Digital, Culture Media and Sport that the export licence be deferred for an initial period (usually two to four months) to allow a UK institution or a private buyer to come forward and make an offer to buy the artwork. The Secretary of State can extend the deferral period if a UK institution has a reasonable prospect of raising the funds to acquire the artwork; however, if funds cannot be raised by the end of the maximum deferral period (including any extension), an export licence will be granted, and the owner will be free to export the artwork.

The Secretary of State, on the advice of the Reviewing Committee, will set the fair market price, which a UK buyer should offer. If the applicant bought the artwork recently at auction, the fair market price is typically the hammer price plus the buyer's premium. Certain costs incurred by the applicant are excluded from the fair market value – for example, insurance and storage costs.

During the first deferral period, an owner is free to withdraw its export licence application. At the end of the first deferral period, the owner will be notified of serious expressions of interest to purchase the object, and the owner will be expected to decide whether or not it

wishes to sell to the interested party. As a result of rules introduced in January 2021, if the owner agrees to sell the object, the second deferral period will commence on the date the option agreement is entered into. This is a legally binding agreement made between the owner and the interested party. Under the option agreement, the interested party will have a contractual right, an option (but not an obligation), to buy the object from the owner at the purchase price, by serving a notice in writing before the end of the option period (ie, the end of the second deferral period). If the buyer chooses not to exercise the option because it fails to raise the necessary funds, or it revokes the agreement because the object is damaged, a licence would normally be granted. The option agreement is a legally binding contract under which the owner is obliged to sell to the buyer to whom it has granted the option, if that buyer exercises the option during the option period.

Certain conditions are attached to the purchase by a UK buyer, including that the artwork be accessible to the public for a minimum period of time.

Failure to obtain an export licence or providing inaccurate or misleading information to obtain an export licence constitutes a criminal offence.

There are additional export controls in respect of artworks containing CITES-listed materials and in certain cultural property.

In October 2022, Arts Council England commissioned the development of a <u>new digital</u> <u>system</u> to manage the application and processing of export licences. The system launch is anticipated in 2023.

## Import controls

# **15** Other than in relation to endangered species, are there any import controls for cultural property in your jurisdiction? What are the consequences of failing to comply with import controls?

In April 2019, the EU adopted a Regulation (Regulation (EU) 2019/880) to introduce an import licensing system for certain categories of cultural property imported into the EU that were created or discovered outside the EU. As the UK was still part of the EU when the Regulation came into force, and as EU Regulations have direct effect in each member state, the operative provisions of the Regulation (article 3(1)) came into effect in December 2020 as retained EU law, which required member states to prevent the import of unlawfully exported cultural goods after that date.

In December 2020, the UK government confirmed that the Regulation would apply in full in Northern Ireland as it was included in Annex 2 of the Northern Ireland Protocol in the Withdrawal Agreement. However, in 2021, the UK government revoked the Regulation in Great Britain through the <u>Introduction and the Import of Cultural Goods (Revocation)</u> <u>Regulations 2021</u>. The revocation of the Regulation in Great Britain does not affect its application in Northern Ireland, where it continues to apply.

The Regulation requires that when importing certain types of cultural property into Northern Ireland (or the EU), the importer will either need to apply for an import licence (in the case of the most at-risk objects) or submit an importer statement, both via an electronic database.

The importer will need to confirm (and in some cases, provide documentary evidence) that: (1) the cultural goods in question have been exported from the country where they were created or discovered in accordance with the laws and regulations of that country; or (2) the absence of such laws and regulations at the time they were taken out of its territory. There are different rules when the country of origin cannot be reasonably determined or where the export took place prior to 24 April 1972. The Regulation contains exemptions for museum exhibitions, conservation, research, study and temporary exhibition at art fairs (although an importer statement or licence may be required upon sale following an art fair). It is anticipated that by June 2025, the EU will have developed a licensing database, through which applications will be submitted and tracked, effectively creating a passport for such cultural goods. However, very few details have been published and therefore it is not yet clear how the system will operate.

Additional import restrictions are enacted from time to time as a result of trade, import and export sanctions and embargoes such as those set by the UN Security Council. As at January 2023, the sanctions affecting the import of cultural property include : the <u>Export</u> <u>Control (Syria Sanctions) (Amendment) Order 2014</u>, which restricts the import of cultural property illegally exported from Syria after 15 March 2011; and the <u>Iraq (United Nations Sanctions) Order 2003</u>, which restricts the import of cultural property illegally exported from Iraq after 6 August 1990, and the Russia (Sanctions) (EU Exit) Regulations 2019 with related amendment regulations.

The Cultural Property Armed Conflicts Act 2017 (implementing the 1954 Hague Convention or the Protection of Cultural Property in the Event of Armed Conflict in the UK) prohibits the importation into the UK after 12 December 2017 of unlawfully exported cultural property where the importer knows or has reason to suspect that the object has been unlawfully exported. For the purposes of this legislation, unlawfully exported cultural property is cultural property that satisfies the three conditions below:

- the cultural property in question must have been exported from occupied territory as defined in international law;
- its export must have been unlawful under either the laws of the territory in question or any rule of international law; and
- either the state from which it was exported or the occupying state must have been a state party to the First or Second Protocol to the 1954 Hague Convention at the time of export.

Where unlawfully exported cultural property has been imported into England and Wales, it shall in most cases be seized by the relevant authorities and returned to the country of origin. There are very limited circumstances whereby the good faith possessor shall be entitled to fair compensation.

# **Export and import tax**

**16** Does any liability to pay tax arise upon exporting or importing art, antiques or collectibles?

No UK tax is payable upon the export of works of art, antiques and collectible items from the UK.

Great Britain (England, Wales and Scotland) is treated by the EU as a third country. As the rate of customs duty for works of art, antiques and collectibles (as defined in Chapter 97 of both the EU Common Customs Tariff and the <u>UK Global Tariff</u>) is zero, no customs duty is due on these categories of items upon importation into Great Britain from the EU, and upon importation into the EU from Great Britain (Northern Ireland has a different regime). However, import VAT is now payable when importing works of art, antiques and collectibles into Great Britain from the EU and into the EU from Great Britain due to Brexit. The current rate of UK import VAT for works of art, antiques and collectibles is 5 per cent. The rate of EU import VAT depends on the EU country of importation. Works of art, antiques and collectors' items also qualify for the reduced rate of import VAT if they are imported into Great Britain from outside the UK and into Northern Ireland from outside the EU.

If the object you seek to import does not fall within the definitions of works of art, antiques or collectibles – for example, the object is less than 100 years old and does not fit within the definition of collectible as interpreted by the European Court of Justice and the national courts – the importer into Great Britain, including from EU countries, is liable to pay import VAT at the current standard rate of 20 per cent, plus in some cases customs duty on the constituent materials of the item at the rate set by the UK Global Tariff if the item does not meet the country of origin rules set out in the UK–EU Trade Agreement of December 2020.

For the most part, the existing VAT procedures that applied in the UK prior to 31 December 2020 continue to apply, including the VAT exemptions and suspension regimes (eg, importation in bond, temporary admission (TA)). Since 1 January 2021, those galleries and dealers with a TA account have to consider imports from the EU and how they affect their TA, while galleries and dealers operating TA with a guarantee have to consider the adequacy of the guarantee if they import artworks from the EU under TA. If the importer (or the shipping agent on the importer's behalf) has opted for 'postponed VAT accounting' (PVA), then import VAT will not be payable at the point of entry into Great Britain but will be accounted for on the importer's VAT return. PVA provides the importer with the convenience of not having to pay import VAT upfront. Imports from the rest of the world will be treated in the same way and also have the benefit of operating PVA.

Prior to Brexit, once imported into the UK, works of art, antiques and collectibles could move freely around the EU without further import tax. The UK was often seen as a gateway to the EU for the art market as it had the lowest rate of import VAT for works of art, antiques and collectibles, compared to France at 5.5 per cent, Italy at 10 per cent and Germany at 7 per cent. Following Brexit, Great Britain is now treated like any other non-EU country. This means that while exports from Great Britain are zero-rated for VAT, collectors based in the EU will incur import VAT at their respective country's VAT rate when they import works of art, antiques and collectible items from Great Britain.

Special rules apply to trade between Great Britain and Northern Ireland and between the EU and Northern Ireland.

# **DIRECT AND INDIRECT TAXATION**

# Taxes

# **17** Outline the main types of tax liability arising from ownership and transfer of art, antiques and collectibles.

The sale of an artwork by the artist directly or by a gallery or dealer will give rise to a liability to pay income tax or corporation tax. In the UK, income tax is applied at a progressive rate from 20 per cent to 45 per cent (income below £12,571 is generally zero-rated for income tax purposes). From 2013, the small profits rate of corporation tax is currently set 19 per cent with the main rate rising to 25 per cent.

The resale of artworks by a private collector will typically result in a liability to pay capital gains tax, which ranges from 10 per cent to 20 per cent for works of art. There is an annual exemption allowance for individuals currently set at £12,300.

The beneficiary of a lifetime gift or a legacy involving artworks may be liable to paying inheritance tax up to 40 per cent.

Currently, there is no tax on wealth in the UK.

### **Tax exemptions**

**18** Outline any tax exemptions or special conditions applicable to art, antiques and collectibles.

Many art dealers make use of the UK VAT margin scheme where possible, which allows them to reduce the 20 per cent VAT liability on the total price of art, antiques and collectibles to a rate of 16.67 per cent VAT on the difference between the price at which they bought the artwork and the price at which they are selling the artwork (the margin).

Since 1 January 2021, purchasing works under the margin scheme from sellers located in EU member states is no longer possible. All works purchased from the EU will now be imports into the UK. For the importer to divert an import of a work of art into margin scheme stock, it will have to opt to not recover the import VAT payable on the import. This option is a formal notification to Her Majesty's Revenue and Customs, which would remain in place for a period of at least two years and would require all imported works to be treated in this way.

Under the <u>Cultural Gifts Scheme</u>, UK taxpayers who make donations to public institutions and registered charities may qualify for a tax reduction calculated with reference to the value of the artwork donated. Similarly, UK taxpayers may use the <u>Acceptance in Lieu scheme</u> to deduct the full market value of artworks transferred to public ownership from their inheritance tax liability. In addition, the rate of the inheritance tax payable can be reduced on estates that leave at least 10 per cent of the assets to a registered charity.

### **BORROWING AGAINST ART**

#### Types of security interest

**19** In your jurisdiction what is the usual type of security interest taken against art, antiques and collectibles?

If the borrower is an individual, the lender will typically require the borrower to pledge the art, antiques or collectables by actual or constructive delivery of the collateral to the lender. If the borrower is a corporate entity, the lender will typically require the borrower to grant a chattel mortgage over the art, antiques or collectables.

### **Consumer loans**

**20** If the borrower borrowing against art assets in your jurisdiction qualifies as a consumer, does the loan automatically qualify as a consumer loan, and are there any exemptions allowing the lender to make a non-consumer loan to a private borrower?

Consumer loans are regulated by the Financial Conduct Authority (FCA). The format and content of consumer loan agreements are prescribed in detail by FCA regulations, and mistakes in drafting consumer loan agreements can render them unenforceable. However, a consumer loan may fall within the scope of an exemption from FCA rules. The two exemptions most often relied upon by lenders against art are the exemption for high-net-worth individuals if the amount of the loan exceeds £60,260, and the exemption where the loan is entered into wholly or predominantly for a business purpose if the amount of the loan exceeds £25,000.

# **Register of security interests**

**21** Is there a public register where security interests over art, antiques or collectibles can be registered? What is the effect of registration? Is the security interest registered against the borrower or the art?

If the loan is made to a company incorporated in England and Wales, the charge should be registered in the register of charges of the company at Companies House. Registration perfects the lender's security interest and gives the lender priority subject to prior registered charges. The charge must be registered within 21 days, beginning the day after the charge is created. Failure to register a charge against a company registered in England and Wales within the 21-day period would invalidate the security interest and any priority over subsequent charges correctly registered.

If the loan is made to a private individual by way of a bill of sale (a document creating a charge in the artwork for the benefit of the lender while the borrower retains possession of the artwork), the bill of sale must be registered in the register of bills of sale. If it is not, the charge created by the bill of sale is void against third parties and the borrower. The register of bills of sale is maintained by the High Court. The <u>Bills of Sale Acts (1878 and 1882)</u> are unfit for 21st century lending. The Law Commission presented a proposal to reform the Acts but in May 2018, the government announced that it would not bring it forward. In February 2020,

the Law Commission proposal was presented to the House of Lords as a private member's bill, but there has been no progress since then.

# Non-possessory security interests

# **22** Can the lender against art collateral perfect its security interest without taking physical possession of the art?

If the loan is to an individual, it is possible to create a charge on the art by way of a bill of sale, without the lender having to take possession. However, given the many pitfalls and restrictions associated with bills of sale, they are rarely used by lenders against art. Depending on the situation, there may be ways to structure the transaction to allow the borrower to keep possession while at the same time perfecting the lender's security interest, however this is potentially complex and can give rise to unacceptable tax liability for the borrower. If the loan is to an English company, and the lender's charge is registered on the company's register of charges at Companies House within the 21-day period, the lender has a perfected security interest through registration and taking possession is not necessary to perfect the security interest.

# Sale of collateral on default

# **23** If the borrower defaults on the loan, may the lender sell the collateral under the loan agreement, or must the lender seek permission from the courts?

If the loan agreement gives the lender the necessary rights in the event of default, in principle the lender can sell the collateral without permission from the courts. However, situations may arise where the borrower or other creditors object to a sale of the collateral, and they may seek assistance from the court. If an administrator or a liquidator of the borrower has been appointed, their permission must be sought.

#### **Ranking of creditors**

# **24** Does the lender with a valid and perfected first-priority security interest over the art collateral take precedence over all other creditors?

Security interests against companies can take the form of fixed and floating charges. A creditor that holds a valid fixed charge (provided that it was created as a fixed charge and is not a crystallised floating charge) over a company's asset is entitled to the proceeds of the realisation of that asset in satisfaction of the liability due to it from the company. The holder of such a valid fixed charge will suffer no deductions in an insolvency process from the realisation of property secured by his or her fixed charge other than where there are prior ranking fixed charges over the same property or he or she agrees that disposal costs incurred by the liquidator or administrator may be taken from them. The <u>Finance Act 2020</u> changed the order of priority for holders of floating charges by putting the revenue before secured creditors holding floating charges – in respect of a range of taxes, namely VAT, PAYE income tax and employees' national insurance contributions. His Majesty's Revenue and Customs' (HMRC) preferential status does not apply to taxes that it collects directly such as corporation tax and employer's national insurance contributions. As of December 2020,

HMRC is paid out of proceeds of assets subject to a floating charge before the holder of that charge.

# **INTELLECTUAL PROPERTY RIGHTS**

# **Creator copyright**

**25** Does copyright vest automatically in the creator, or must the creator register copyright to benefit from protection?

The author of a work made on or after 1 August 1989 is automatically the first owner of any copyright in it (<u>Copyright</u>, <u>Designs and Patents Act 1988 (CDPA)</u>). There is no need for registration. The predecessor of the CDPA, the <u>Copyright Act 1956</u>, provided for the same. There are exceptions to the general rule, including for literary, dramatic, musical or artistic works made by employees in the course of employment, Crown copyright, parliamentary copyright and copyright owned by certain international organisations. The copyright protection of works created by artificial intelligence was recently under consideration by the Intellectual Property Office in a consultation that ran from October 2021 to January 2022. The government sought evidence and views on a range of options on how AI should be dealt with in the patent and copyright systems. The Government's conclusions confirm that it does not plan changes to the law for computer-generated works due to the difficulty of providing an accurate evaluation of the options and the risk that changes to the law could have unintended consequences. No changes to UK patent law are planned for AI-devised inventions either. The government has, however, confirmed that it will keep these areas of the law under review.

# **Copyright duration**

### **26** What is the duration of copyright protection?

The duration of copyright protection is as follows:

- artistic works: 70 years from the end of the calendar year in which the author dies;
- works of joint authorship or co-authorship: 70 years from the end of the calendar year in which the last known author dies;
- works of unknown authorship: copyright expires at the end of the period of 70 years from the end of the calendar year in which the work was made or if, during that period, the work is made available to the public, at the end of the period of 70 years from the end of the calendar year in which it is first made available; and
- computer-generated literary, dramatic, musical or artistic works: 50 years from the end of the calendar year in which the work was made.

# Display without right holder's consent

# **27** Can an artwork protected by copyright be exhibited in public without the copyright owner's consent?

Yes, for paintings, sculptures and other artistic works. However, the moral rights of the author, unless expressly waived, have to be respected at all times.

In addition, under the CDPA, consent is required to perform, show or play a literary, dramatic or musical work in public.

# Reproduction of copyright works in catalogues and adverts

# **28** Can artworks protected by copyright be reproduced in printed and digital museum catalogues or in advertisements for exhibitions without the copyright owner's consent?

Under English Law, two exceptions permit the reproduction of an artwork in printed and digital catalogues or in advertisements for exhibitions without the copyright owner's consent.

Under the first exception, the copyright owner's consent is not required for the illustration of the artwork in a catalogue or marketing brochure advertising its sale, provided that the catalogue or marketing brochure makes clear that the artwork is for sale. Once the work has been sold or the right to sell the work expires (ie, the consignment agreement expires), this exemption no longer applies. Care needs to be taken following the sale to obtain copyright consent for any further commercial use of the image of the sold artwork.

In addition, the fair dealing exception permits the limited use of copyright material without consent from the copyright owner for the purpose, among others, of criticism and review. It may be possible to rely upon the fair dealing exception in the case of printed and digital catalogues. Whether or not something is considered fair dealing is a fact-specific enquiry. As such, much will depend on the context of the catalogue. Factors to be considered are commercial use, quantity and proportionality. For example, a free leaflet or catalogue that includes guidance or commentary on the nature and purpose of the artworks in the exhibition may be regarded as fair. Advertisements, however, are less likely to fall within the scope of this exception.

In general, museums, auction houses and galleries considering reproducing an artwork protected by copyright in catalogues and advertisements will need to carefully consider the exemptions under English law and the context before reproducing the artwork without consent.

# Copyright in public artworks

#### **29** Are public artworks protected by copyright?

Certain categories of artistic works may be reproduced without the copyright owner's consent if they are permanently situated in a public place or in premises open to the public. These include buildings, sculptures, models for buildings and works of artistic craftsmanship.

Copyright in these works is not infringed by making a graphic work representing it, taking a photograph or making a film of it, or broadcasting a visual image of it. This exception does not extend to all forms of public art, such as street art, therefore legal advice should be sought in relation to other artistic works.

## Artist's resale right

# **30** Does the artist's resale right apply?

The artist's resale right (ARR), also known as the droit de suite, applies in the UK. The ARR entitles authors of original works of art in which copyright subsists and their successors in title to a royalty each time one of their works is resold through an auction house or an art market professional. The right to this royalty lasts for the same period as copyright in that work of art. There are certain exceptions to the ARR, including where the work being resold was bought directly from the artist less than three years previously and it is being resold for  $\ge 10,000$  or less. In addition, sales between private individuals, without the use of an art market professional, or to public, non-profit making museums do not attract royalty payments.

The ARR only applies when the sale price reaches or exceeds the sterling equivalent of €1,000 and is calculated on a sliding scale as follows:

Royalty	Portion of the resale price
4%	up to €50,000
3%	between €50,000.01 and €200,000
1%	between €200,000.01 and €350,000
0.5%	between €350,000.01 and €500,000
0.25%	in excess of €500,000

Royalties are also capped so that the total amount of the royalty paid for any single sale cannot exceed €12,500. ARR is exempt from VAT.

Collective management of ARR is compulsory in the UK. The two main collecting societies are the Artists' Collecting Society and the Design and Artists Copyright Society, which collect and distribute the royalty. Individual artists and estates cannot seek payment directly from art market professionals.

ARR continues to apply in the UK following Brexit.

# **Moral rights**

### 31 What are the moral rights for visual artists? Can they be waived or assigned?

Under English law, moral rights for visual artists are personal rights that apply to literary, dramatic, musical or artistic works and films. They were introduced by the CDPA and, therefore, only apply to artists living on or after 1 August 1989. The rights are as follows:

• the paternity right: the right to be identified as the author or director of a copyright work, which lasts for the life of the author plus 70 years;

- the right of integrity: the right to object to derogatory treatment of a copyright work, which lasts for the life of the author plus 70 years;
- false attribution: the right not to have a literary, dramatic, musical or artistic work falsely attributed to him or her as author and not to have a film falsely attributed to him or her as director, which lasts for the life of the author plus 20 years; and
- the right of privacy: the right to privacy of certain films and photographs, which lasts for the life of the author plus 70 years.

Moral rights can be waived contractually. If a waiver is agreed, its terms should be specific so as to avoid uncertainty and should include, among other things, a detailed description of the specific work, whether the waiver is subject to conditions or subject to revocation, and whether it extends to licensees and successors in title to the owner (or prospective owner) of the copyright in the work.

Moral rights cannot be assigned; they will remain with the creator of the work and pass to the artist's estate on death.

# AGENCY

# Accounting to the principal

**32** Does the law require the agent to account to the principal for any commission or other compensation received by the agent while conducting the principal's business?

Yes. As a matter of English law, an agent owes fiduciary duties to his or her principal. These are implied duties in addition to any duties that may have been agreed between the principal and the agent. One such implied fiduciary duty is a duty to account for any commission, benefit or profit made or received by the agent when conducting the principal's business. The commission, benefit or profit belongs to the principal, and the agent can keep it for his or her own account only with the principal's consent.

# **Disclosed agent commission**

# **33** Does disclosure to the principal that the agent will receive a commission allow the agent to keep the commission unless the principal objects?

The agent will generally be able to retain his or her commission where he or she has disclosed to the principal: that he or she will receive a commission; and the amount of the commission. Ideally, the principal then gives his or her express consent to the agent retaining the commission for his or her own account.

If there is no disclosure at all, the commission retained by the agent amounts to a secret commission. Secret commissions are treated by the law as a special type of fraud or bribe, and the agent must account for it in full. By taking a secret commission, the agent may find that he or she must pay to the principal all remuneration received by him or her in the course of conducting the principal's business, not just the commission. The principal

may also be entitled to damages for fraud (for the amount of any actual loss). Transactions involving secret commissions are voidable at the election of the principal.

If there is a degree of disclosure but the principal has not given informed consent, the commission is not secret; however, the principal may still be entitled to the commission and other remedies. This half-way category arises where the possibility of a commission payment was disclosed but not the fact that such commission had actually been paid or its amount.

The question as to what constitutes informed consent is a question of fact. English judges have held that 'there is no precise formula which will determine all cases'. It may be sufficient for the agent to disclose to the principal that he or she will receive a sum of money from a third party, leaving it to the principal to enquire as to the amount. However, informed consent typically requires not just disclosure that a commission will be paid, but also the amount of the commission.

### Undisclosed agent commission

# **34** If a third party pays a commission to an agent that is not disclosed to the principal, can the principal claim the commission from the third party?

Yes. Upon discovery that a third party paid a secret commission to his or her agent, the principal can claim the commission either from the agent or from the third party. If the third party is held liable to pay the commission to the principal, it will have paid the commission twice, leaving it with a claim against the agent for the return of the commission paid to him or her.

# **CONSIGNING ITEMS**

# Protection of interests in consigned works

# **35** How can consignors of artworks to dealers protect their interest in the artwork if the dealer goes into liquidation?

The entry of a dealership into a formal insolvency process does not defeat the proprietary interest of the consignor in art held by the dealership on consignment. A consignor who can show that it (rather than the insolvent dealership) holds title to an asset is entitled to have the asset transferred to it. If the liquidator sells the asset, the consignor is entitled to an account of the realisations made in respect of the asset.

To protect their interest and to avoid any dispute with the liquidator or other creditors over the basis upon which the dealer is in possession of the artwork, consignors ought to record the terms of the consignment in writing and consider how the consigned item might be labelled, separately stored or otherwise identified to indicate a separate proprietary interest.

# **AUCTIONS**

#### Regulation

**36** Are auctions of art, antiques or collectibles subject to specific regulation in your jurisdiction?

There is no government-appointed regulator in charge of regulating auctioneers of art, antiques and collectibles.

No general trading licence is required from auctioneers selling art, antiques and collectibles, except in relation to certain categories of collectibles, such as wine, spirits and tobacco. However, certain local councils, including Westminster City Council, require auction houses to register with the council.

Regulations applicable to auction sales are found in different statutes. These regulations have not been consolidated. For example, in live auctions, the name of the auctioneer must be publicly displayed throughout the course of the auction (<u>Auctioneers Act 1845</u>), bid rigging is prohibited (<u>Auctions Bidding Agreements Acts 1927</u> and <u>1969</u>; <u>Enterprise Act</u> <u>2002</u>) and, where a sale by auction is not notified to be subject to a right to bid by or on behalf of the seller, the seller cannot bid himself or herself or employ any person to bid at the sale (section 57(4), Sale of Goods Act 1979).

# **37** May auctioneers in your country sell art, antiques or collectibles privately; offer advances or loans against art, antiques or collectibles; and offer auction guarantees?

Auctioneers are given wide discretion to provide other services to sellers and buyers beyond auction services. The larger auction houses offer sellers the opportunity to sell their artworks privately as opposed to at auction. Moreover, auction houses routinely sell artworks that did not sell at the auction privately, after the auction. Some auction houses offer seller advances over sale proceeds, or loans secured against artworks that are not consigned for sale. Auction guarantees are available for higher-value lots.

# **SPOLIATION DURING THE NAZI ERA**

# **Claims to Nazi-looted art**

**38** In what circumstances would the heirs of the party wrongly dispossessed typically prevail over the current possessor, if a court in your country accepted jurisdiction and applied its own law to a claim to art lost during the Nazi era?

As a general rule, the possessor of an artwork cannot transfer title to it that they themselves do not have (also known as the *nemo dat quod non habet* rule). This means that, in principle, anyone deriving possession from the thief cannot claim good title. There are exceptions to this rule but, if this were the only rule, the victim of a wrongful dispossession would have a good claim against the current possessor for the return of the artwork. However, by application of the Limitation Act 1980, a claim to a stolen artwork must be made within six years of

the date of the first acquisition in good faith. The Limitation Act goes further: if more than six years have passed, the claim is barred and the victim's ownership is extinguished. In practice, this means that if English law applies, and if the current possessor can show that more than six years have passed since the first acquisition in good faith, any legal claim brought against the possessor will fail. It is important to note, however, that the current possessor may not be able to market, sell or do anything else with the artwork, even if title vests in them, as long as there is an unresolved claim hanging over the artwork.

# **39** Is there an ad hoc body set up to hear claims to Nazi-looted art?

In the UK, the Spoliation Advisory Panel was established in 2000 as an alternative dispute resolution process for claims from persons dispossessed between 1 January 1933 and 31 December 1945 whose artworks are today held in UK national collections, museums or galleries 'for the public benefit'. The claim must relate to 'events occurring during the Nazi era'. Recommendations by the Spoliation Advisory Panel are not legally enforceable, but both sides are expected to accept them. The Panel may recommend the return of an artwork to the claimant, a compensatory or ex gratia payment, or other 'fair and just solutions' (such as the attachment of plaques next to exhibits explaining the history of the artwork in question and providing details on the dispossessed person and his or her fate during the Nazi era).

In making its recommendations, the Spoliation Advisory Panel's remit is not restricted to the technical legal entitlements of claimants but takes into account moral considerations as well. The Panel may also be called upon to make a recommendation about a claim for an artwork in a private collection, where both claimant and current possessor jointly request it to do so. However, this has not happened thus far.

# **LENDING TO MUSEUMS**

#### **Responsibility for insurance**

# **40** Who is responsible for insuring art, antiques or collectibles loaned to a public museum in your jurisdiction?

In England and Wales, art on loan to a public museum is typically insured under the <u>Government Indemnity Scheme</u>. Pursuant to the Scheme, the government covers the risk of loss or damage to the art on loan. The Scheme acts as an alternative to commercial insurance, as it allows art and cultural objects to be shown publicly in the UK that might not have been otherwise because the cost of insurance would have been prohibitively high. The Scheme covers loans from private lenders in the UK and abroad, as well as loans from UK non-national museums and galleries. In England, the Scheme is administered by Arts Council England. Under the Scheme, certain risks are excluded and these exclusions are non-negotiable. As such, borrowers and lenders sometimes rely on commercial insurance to cover risks excluded under the Scheme. Public regional museums and galleries (including historic houses, libraries and archives) may also request funding from the Art Fund (the national fundraising charity for art) to secure important strategic loans from major UK collections. Grants cover all costs associated with securing and displaying loans to these cultural institutions, such as insurance.

#### Immunity from seizure

# **41** Are artworks, antiques or collectibles loaned to a public museum in your country immune from seizure?

Cultural objects in England and Wales are protected from seizure by the <u>Tribunals, Courts</u> and <u>Enforcement Act 2007</u>. To benefit from immunity from seizure, the following conditions must be met:

- the object is usually kept outside the UK;
- the object is not owned by a person who is a resident in the UK;
- the import of the object does not contravene any law;
- the object is brought into the UK for the purpose of a temporary public exhibition at an approved museum or gallery; and
- the museum or gallery has published information about the object where required to do so by regulations.

A list of approved museums and galleries can be found on the <u>website</u> of Arts Council England. In England, to obtain approved status, the museum or gallery must submit a completed questionnaire along with supporting evidence to the Secretary of State for Digital, Culture, Media and Sport, demonstrating that it has satisfactory due diligence processes in place for examining the history of loans and for provenance research. It should also demonstrate that it will not borrow objects if there is any suspicion that they were stolen, looted or illegally obtained. Once approved status has been granted, the museum or gallery is required to list the works that are immune from seizure on its website, providing details of the loan and of the exhibition. Immunity is then automatic. Approved museums are not required to reapply for each exhibition or item that needs to be protected, but they must meet the conditions for protection each time. Approval can be withdrawn if an institution has inadequate procedures for establishing an item's place of origin or ownership, or fails to comply with the <u>Protection</u> of Cultural Objects on Loan (Publication and Provision of Information) Regulations 2008.

# **CULTURAL PATRIMONY**

#### **National treasures**

# **42** Is there a list of national treasures?

There is no list of national treasures in England and Wales.

### **Right of pre-emption**

# **43** If the state is interested in buying an artwork for the public collections, does it have a right of pre-emption?

There is no right of pre-emption in England and Wales. However, when an export licence is requested and the Secretary of State decides that an artwork meets one or more of the Waverley criteria, the export licence application will be suspended to allow UK organisations, typically public museums, or individuals to make an offer to buy it.

### Automatic vesting in the state

# **44** In what circumstances does ownership in cultural property automatically vest in the state?

Ownership of cultural property can automatically vest in the Crown when, for instance, it qualifies as a treasure within the meaning of the <u>Treasure Act 1996</u> (as amended by the <u>Treasure (Designation) Order 2002</u>).

The Act designates several categories of objects that are considered treasure. These categories include objects that are at least 300 years old that meet the following criteria:

- not a coin but containing at least 10 per cent precious metal;
- one of at least two coins in the same find containing at least 10 per cent precious metal; or
- one of a group of at least 10 coins in the same find.

Alternatively, objects that are at least 200 years old and designated by the Secretary of State as objects of outstanding historical, archaeological or cultural importance can also qualify as treasure. The UK also has a <u>Portable Antiquities Scheme</u> to record archaeological finds made by members of the public that may or may not fall under the Treasure Act. In 2020, the UK government consulted on <u>proposed amendments</u> to the Treasure Act. Among other aspects, changes were proposed to the definition of 'treasure' to include value-based factors as well as archaeological and historic significance of finds. The UK government published the results of the consultation in December 2020 and intends to make some amendments to the Treasure Act, but such amendments to the legislation will take time and, as of January 2023, the Treasure Act remains as outlined above.

# Illegally exported property claimed by foreign states

# **45** How can a foreign state reclaim in your jurisdiction cultural property illegally exported from its territory?

In the EU, a member state can seek the return of cultural property illegally exported to another member state by relying on Directive 2014/60/EU of 15 May 2014. Prior to Brexit, the UK implemented this Directive through the <u>Return of Cultural Objects (Amendment)</u> <u>Regulations 2015</u> (the 2015 Regulations). However, under the power in section 8 of the Withdrawal Agreement, the <u>Return of Cultural Objects (Revocation) Regulations 2018</u> was introduced to revoke the 2015 Regulations to avoid a one-sided obligation for the UK in the event of a no-deal Brexit.

The EU–UK Trade and Cooperation Agreement (TCA) specifically provides that the EU and the UK will continue to cooperate in facilitating the return of cultural property illicitly removed from the other party's territory, having regard to the 1970 UNESCO Convention. In practice, the TCA maintains the mutual cooperation part of the European Directive, which requires parties to notify each other when cultural property is found in their territory and whether there are reasonable grounds for believing the property was illicitly removed from the other party, but unlike the European Directive, it does not maintain the UK's right of action in the courts of EU member states to recover such cultural property and equally, an EU member state does not have a right of action to recover cultural property in the UK.

As the TCA does not maintain the right of action under the European Directive, the options are limited for cultural property that was illegally exported but not stolen, save for the limited cases where cultural property was imported into the UK in breach of the relevant cultural property import restrictions. The UK does not have bilateral treaties with other countries designed to facilitate the return of illegally exported property. Save for repatriation of cultural property between states pursuant to the <u>1970 UNESCO Convention</u> (which the UK ratified in 2002 and implemented by enacting the Dealing in Cultural Objects Offences Act 2003), English courts will not apply the export laws of other countries. The UK has not ratified the <u>UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects</u> that could, in theory, pave the way for the return of illegally exported cultural property to the country of origin. If the English courts found that English law was violated, for example English customs laws, this could lead to the court ordering the seizure or confiscation of the illegally exported cultural property, and its possible repatriation to the country of origin.

# **NON-FUNGIBLE TOKENS**

# **Regulation and case law**

**46** How are non-fungible tokens (NFTs) regulated in your jurisdiction? Is there any case law on NFTs in your jurisdiction?

### Regulation

NFTs are not currently regulated in the UK, although there is increased pressure for regulation. The Digital, Culture, Media and Sport Committee of the UK Parliament's inquiry on NFTs may include regulation proposals.

NFTs are not covered by the UK financial promotions regime, nor would they be subject to HM Treasury's proposed expansion to include crypto assets. Crypto assets which are not regulated products, including NFTs, are however included in the Advertising Standards Authority (ASA) guidance insofar that advertisements of these products must state prominently that they are not regulated.

In principle, NFTs fall under the Money Laundering Regulations (MLRs) requiring a business to be registered with the Financial Conduct Authority before issuing and/or exchanging crypto assets if conducting business within the UK so as to comply with anti-money laundering rules. Though definition of 'crypto asset' under the MLRs is not broad enough to incorporate all NFTs, a consultation by HM Treasury has suggested that all NFTs are defined as such in this regulation.

NFTs are, therefore, covered by British licensing regulations, by the ASA and by MLRs but not by the financial promotions regime. Current discussions on proposed regulatory changes may impact NFT regulations and determine which ones they will be categorised under.

### Case Law

The unique nature of NFTs means that they do fall within private property law definitions, raising the question as to whether they can be considered 'property'. On 10<sup>th</sup> March 2022,

the High Court handed down judgment in *Osbourne v Persons Unknown & Anor* [2022] EWHC 1021, confirming the treatment of the NFTs in question as property. In that case, two NFTs in Ms Osbourne's account in Ozone's NFT marketplace were removed from her account without her knowledge and found in two other anonymous accounts opened by Ozone. Ms Osbourne sought to freeze the removed NFTs, requiring Ozone to not allow for any subsequent transfers of her stolen NFTs. HHJ Pelling KC stated that '[t]here is clearly going to be an issue at some stage as to whether non-fungible tokens constitute property for the purposes of the law of England and Wales, but I am satisfied... that there is a least a realistically arguable case that such tokens are to be treated as property as a matter of English law'. The case therefore gives authority for the courts to treat NFTs as property, although this does not extend to the underlying content that the NFTs represent.

*D'Aloia v Person Unknown & Others* [2022] EWHC 1723 saw the Claimant allege that the Defendant fraudulently induced him to transfer crypto currency assets into various wallets. The case is of note because the High Court allowed service of proceedings by NFT directly to the Defendants' digital wallet.

Both cases extend rights to those who are the victims of crypto fraud. Though the latter case does not specifically concern the regulation of NFTs, it is of interest considering the future role of NFTs and how they may be regulated in both courts and beyond.

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# **ANTI-MONEY LAUNDERING**

# Compliance

# **47** What are the anti-money laundering compliance obligations placed on the art trade?

Anti-money laundering legislation applicable to the art market in the UK is chiefly comprised of: (1) the <u>Money Laundering</u>, <u>Terrorist Financing and Transfer of Funds</u> (Information on the <u>Payer</u>) <u>Regulations 2017</u> (the 2017 Regulations) that transposed the EU's Fifth Anti-Money Laundering Directive into English law, as amended by the Money Laundering and Terrorist Financing (Amendment) Regulations 2019 (the 2019 Regulations) that brought 'art market participants' within the regulated sector for anti-money laundering and further amended by the Money Laundering and Terrorist Financing (Amendment) (No. 2) Regulations 2022 (the 2022 Regulations); (2) the Proceeds of Crime Act 2002 (POCA); and (3) the <u>Terrorism Act 2006</u> (jointly, the TA).

### 2017 Regulations

Pursuant to the 2017 Regulations, art market professionals and businesses fell within the regulated sector only if they qualified as high-value dealers, or if they provided financial-type services such as loans or advances secured by works of art, antiques or collectibles. The 2017 Regulations define a high-value dealer as any business or sole trader that accepts

or makes high-value cash payments of €10,000 or more (or its equivalent in any currency) in exchange for goods. The 2017 Regulations impose significant obligations on high-value dealers, including registering with Her Majesty's Revenue and Customs (HMRC) for supervision, identifying clients and verifying clients' identity, and training employees to identify suspicious transactions.

# 2019 Regulations

The 2019 Regulations extended the application of anti-money laundering regulations to art market participants (AMPs) defined as a firm or sole practitioner trading in or acting as an intermediary in the sale or purchase of works of art, where the value of the transaction, or a series of linked transactions, amounts to  $\in$ 10,000 or more (regardless of method of payment).

'Works of art' within the 2019 Regulations are defined by reference to section 21(6) of the Value Added Tax Act 1994, as amended, and broadly cover paintings and drawings as well as original and limited edition engravings, prints, sculptures, tapestries, enamels, ceramics and photographs. Other items such as furniture, coins, stamps, jewellery, automobiles, antiques and collectibles are not included in the definition of 'works of art' (unless they otherwise fall within the categories mentioned above).

Pursuant to the 2019 Regulations, dealers, intermediaries, auction houses and freeports who fall under the definition of AMP must:

- register for supervision with HMRC;
- carry out a written risk assessment of their clients and their businesses, including identifying low-risk and high-risk clients and transactions;
- develop written anti-money laundering policies and procedures;
- conduct customer due diligence (CDD) and transaction due diligence;
- train staff on anti-money laundering regulations and relevant internal policies and procedures;
- appoint a nominating officer who, among other things, will be in charge of reporting suspicious activity to the National Crime Agency; and
- maintain records relating to due diligence on individual transactions, staff training programmes, and AML policy and risk assessment updates.

The British Art Market Federation has issued detailed <u>guidance</u> approved by His Majesty's Treasury (HMT) on the interpretation of the 2017 Regulations in the art market context (the Guidance). The Guidance falls within the definition of 'relevant guidance issued by any other supervisory authority or appropriate body and approved by the Treasury' (Regulation 86(2)(b) (ii)) and therefore must be taken into account by the courts in deciding whether an offence has been committed under the 2017 Regulations. The Guidance provides the most comprehensive description of the application of the 2017 Regulations in the art market. At the date of writing, the June 2022 Guidance remains the most up to date version in force, although a further update to the Guidance is expected in early 2023 to reflect the 2022 Regulations.

The June 2022 update to the Guidance clarified the definitions of 'intermediary' caught by the AML Regulations in an art market context, clarified that sales by artists are not subject to the AML Regulations and clarified that art sale contracts can be agreed before customer

due diligence (CDD) has been completed, so long as the required CDD is completed prior to release of the art and transfer of ownership.

CDD entails the following: identifying the AMP's 'customer' (as defined in the Guidance) and, where relevant, the beneficial owner of the customer; verifying the customer's identity; and assessing the purpose and intended nature of the business relationship or occasional transaction. There are three levels of CDD, namely standard, enhanced and simplified. The level of CDD to be carried out will vary depending on the AMP's assessment of the customer's and the transaction's money laundering risk, based upon the customer profile, the nature of the business relationship or transaction, and relevant political and geographical risk factors.

The baseline requirement for identifying an individual is most commonly independently produced documentation showing the individual's name, address, date of birth, residential address and likeness, such as passports, driving licences or utility bills. Where the transaction is not conducted in person, the AMP should take steps to verify that the person conducting the transaction is the person identified in the documentation supplied. Where the AMP's customer is a company, trust or partnership, the Guidance sets out detailed requirements for identification and verification of the customer. Where the AMP's customer is known to be acting as an agent for another party, the AMP has also to conduct CDD on the other party and verify that the agent is authorised so to act.

# POCA

All art market professionals and businesses must comply with POCA, including those that do not fall within the scope of the 2017, 2019 and 2022 Regulations. POCA establishes a series of criminal offences in relation to money laundering, including:

- concealing, disguising, converting, transferring or removing criminal property from the UK;
- entering into or becoming involved in an arrangement that facilitates the acquisition, retention, use or control of criminal property by or on behalf of another person; or
- acquiring, using or having possession of criminal property.

A person convicted of a substantive offence under POCA is liable to imprisonment for up to 14 years or to pay a fine, or both. The main defence against committing a primary money laundering offence under POCA is to seek consent from the National Crime Agency before concluding the transaction in relation to which there is knowledge or suspicion of money laundering.

# ΤA

The TA set out a series of offences relating to the funding of terrorism. An individual or other entity selling cultural property from countries occupied by or known to be associated with terrorists is at risk of committing an offence under the TA, the most relevant offence being the retention or control of (or facilitation of the retention or control of) terrorist property.

### **ENDANGERED SPECIES**

# CITES

# **48** Is your jurisdiction a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)?

The UK is a party to CITES. The EU Wildlife Trade Regulations (Council Regulation (EC) No. 338/97 and Commission Regulation (EC) No. 865/2006), which were in force in the UK before Brexit, continue to apply in England and Wales as retained EU legislation, albeit in an amended form.

England and Wales is now considered a 'third country' and will have to abide by the requirements set out in the Regulations when exporting items containing endangered species to the EU.

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England and Wales is now considered a 'third country' and will have to abide by the requirements set out in the Regulations when exporting items containing endangered species to the EU. Under the EU's revised guidance on the ivory trade, as of January 2023 the only exceptions for import of ivory for commercial purposes are: (1) musical instruments pre-dating 1975 or (2) antiques pre-dating 1947 that are sold to museums, after the relevant authority responsible for cultural heritage confirms their importance and supports the transaction. Import of raw ivory or worked ivory specimens for non-commercial purposes is permitted subject to a high level of scrutiny. In any case, objects submitted for import require a permit.

In England and Wales, CITES licensing is operated by the Department of Environment, Food and Rural Affairs, with a designated management authority in charge of administering its licensing system (the Animal and Plant Health Agency (APHA)). Violation of the EU Wildlife Trade Regulations is a criminal offence, attracting a maximum conviction of a five-year custodial sentence or a fine, or both. The Wildlife Crime Unit is responsible for enforcement.

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# **49** Is the sale, import or export of pre-CITES endangered species subject to a licence?

The import and export of pre-CITES endangered species is subject to a licence. Before Brexit, many artworks containing CITES-listed species (both pre- and post-1947) could move freely between the UK and the EU without import and export licences. As England and Wales is now considered international, a CITES export licence is required to remove endangered species from England and Wales, and a CITES import licence to import endangered species into the country of destination, irrespective of whether the country of destination is within or outside the EU. To import endangered species in England and Wales, a CITES import (whether EU or non-EU) and a UK CITES import licence. The APHA requires the export licence from the exporting country or the application for a UK import licence will be refused.

The APHA currently aims to decide on each export licence application within two weeks, but if the movement also requires an import permit from the destination country (which is now the case for exports from the UK to the EU), applicants will need to factor in the time it takes to apply for an import permit.

Trade with countries that are not party to CITES and do not issue comparable documentation is not permitted.

Unless there is an exemption (such as the 'antique' exemption), any artworks and antiques containing a CITES-listed species that appear on Annex A in the EU Wildlife Trade Regulations (which is equivalent to CITES Appendix I) require licences before they can be advertised for sale or sold. The decision on whether to issue a licence is based on the guidance set out in the EU Wildlife Trade Regulations, as applicable domestically in England and Wales.

Alterations to the CITES Annexes are adopted by the EU following each conference of the parties, which typically take place every two or three years. It is therefore important to check the current restrictions and requirements regularly. It remains to be seen whether England and Wales will adopt the EU updates to the Annexes, or whether it will adopt the CITES Appendices instead, as the EU Annexes are generally stricter than the CITES Appendices.

# **50** Is the sale, import or export of post-CITES worked or antique endangered species authorised? On what conditions?

The UK (and the EU) allows certain exemptions for antique artworks, which exempt these artworks from certain restrictions and conditions that would otherwise be required for import, export and trade. An artwork is considered antique if it is a worked specimen acquired before 3 March 1947. An object is considered worked if it has been significantly altered from its natural state (eg, fashioned into jewellery, musical instruments or furniture), provided that it was worked before 3 March 1947. Items that were worked before that date and have been reworked after it (eg, if an ivory sculpture carved before 1947 is reworked into a piece of jewellery after 1947) will no longer be considered antique and will not benefit from the exemptions.

# Specific endangered animal products

# **51** Are there any special rules for works of art made of elephant ivory, rhino horn or other specific endangered animal products?

In 1989, CITES effectively banned the international trade of African elephant ivory, save for very exceptional circumstances, by adding it to Appendix I of CITES. This ban has been recognised in the UK since that date, but prior to Brexit, trade across the EU was not considered international. Accordingly, there were exceptions to the ban (such as the antique exemption for pre-1947 worked specimens) that allowed a limited trade in ivory objects. Trade in raw ivory, however, was completely prohibited in the UK, regardless of its age. Post Brexit, these exemptions will not apply to trade with the EU. Furthermore, the Ivory Act (see below) will prohibit most of the trade that would have benefited from such exemptions.

In December 2018, the UK enacted the <u>Ivory Act 2018</u>, which imposes a ban on dealing in elephant ivory of any age subject to certain narrow exemptions (listed below). Dealing includes selling, buying, hiring, offering or arranging to offer, keeping for sale and importing to or exporting from the UK with the intention to sell or hire. The Ivory Act has wide application and applies to anyone within the UK, including non-residents who are visiting the UK temporarily. It also expressly applies to sales and loans outside the UK, where the arranging takes place from the UK. Accordingly, dealers and collectors cannot avoid the ban by moving objects out of the UK while continuing to do business from the UK. However, the Act does not apply to purchases outside the UK, so it is still possible (subject to CITES permits) to acquire an ivory object outside the UK and bring it back to the UK.

The lvory Act sets out the following narrow exemptions whereby dealing is permitted.

- Pre-1918 'outstandingly valuable and important' exemption: ivory objects assessed by a panel of recognised specialists to be of 'outstandingly high artistic, cultural or historical value'. These must be the rarest of their type, so the threshold is expected to be very high. As of January 2023, the guidance for this exemption is yet to be released.
- Pre-1918 portrait miniatures exemption: portrait miniatures painted on thin slivers of ivory if they were made before 1918, possess a surface area of no more than 320cm<sup>2</sup> (excluding the frame) and are registered.
- Pre-1947 de minimis exemption: worked ivory objects produced before 1947 that contain less than 10 per cent ivory by total volume, where the ivory is integral to the object (ie, the ivory cannot easily be removed without damage to the object).
- Musical instruments exemption: music instruments produced before 1975 that contain less than 20 per cent ivory by volume.
- Museum exemption (ivory of any age): sales, loans and exchanges by individuals and companies to accredited museums and between accredited museums. Accredited museums are those accredited by Arts Council England, the Welsh government, Museums Galleries Scotland or the Northern Ireland Museums Council in the UK, or if outside the UK, museums that are members of the International Council of Museums.

DEFRA has launched a consultation on the <u>possible extension</u> of the Ivory Act to other species (such as hippopotamuses, walruses and whales), which closed in autumn 2021. At the time of writing (January 2023), the results of this consultation have not yet been released.

In February 2022, <u>the lvory Act (Commencement No. 1) Regulations 2022</u> entered into force in the UK (the Commencement Regulations). The Commencement Regulations implement specific provisions of the 2018 lvory Act dealing with exemptions and registration (sections 1 to 11) so that applications can be made. The scope of the Commencement Regulations includes acquisitions by qualifying museums. The Commencement Regulations also implement general provisions on the extent and application of the lvory Act (sections 38 to 44), but provisions on criminal and civil sanctions, powers of entry, search and seizure, and retention and disposal or return of items were not in force until 6 June 2022. Notably, the meaning of 'ivory' for purposes of this and related legislation is restricted to material originating from elephant species in accordance with section 37(1), (7) and (8) of the lvory Act.

The Ivory Prohibitions (Exemptions) (Process and Procedure) Regulations 2022 (the Prohibitions Regulations) also entered into force in February 2022. The Prohibitions Regulations include further details on the information required for exemption certificate and registration applications, fees and appeals processes for the refusal or revocation of an application. There are specific provisions addressing exemption certificates that are issued in another person's name. The Schedule of the Prohibitions Regulations contains a list of Prescribed Institutions authorised to assess items whose owners have applied for exemption certificates for the purpose of sale. Prescribed Institutions include the Ashmolean Museum of Art and Archaeology in Oxford, Glasgow museums in Scotland and the Victoria and Albert Museum in London.

The lvory Act 2018 entered into force on 6 June 2022. Under the Act, exempt items must be declared and registered before any transaction can take place. Owners of objects containing ivory can verify their eligibility and apply for exemption certificates using the government's <u>digital ivory service</u>. While it is permitted to bequeath, donate or lend ivory items provided that no exchange or payment is involved (for instance, through a will or gift), trading unregistered items in the UK is considered an offence with a maximum fine of £250,000 or five years' imprisonment.

# **CONSUMER PROTECTION**

# **Cancelling purchases**

# **52** In what circumstances may consumers cancel the sale of art, antiques or collectibles?

Pursuant to the <u>Consumer Contracts (Information, Cancellation and Additional Charges)</u> <u>Regulations 2013</u>, consumer-buyers have the right to cancel distance and off-premises sales at any time during the statutory cancellation period – 14 calendar days from the day on which the consumer or his or her agent takes possession of the artwork – without giving any reason and without incurring any liability, except in limited circumstances. The Regulations have carved out an exemption for property offered for sale in public auctions where the consumer is able to attend in person; in these instances, traders do not have to offer the right to cancel.

Where the right to cancel is exercised by the consumer within the statutory period, the trader must reimburse the consumer. Where the right to cancel applies and the trader fails

to inform the consumer of this right, the Regulations automatically extend the cancellation period by 12 months, unless the dealer subsequently notifies the consumer of the right to cancel, in which case it runs for 14 days from the date of notification.

## Duties of businesses selling to consumers

# 53 Are there any other obligations for art businesses selling to consumers?

Schedule I of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 sets out mandatory information to be provided to consumers for sales made on-premises. Schedule II of the Regulations sets out mandatory information to be provided in the context of distance and off-premises sales, including but not limited to the identity of the seller if he or she is acting on behalf of another trader. A failure to provide the relevant information to the consumer, when entering into an off-premises contract, is a criminal offence.

For distance contracts concluded by electronic means, the trader must ensure that the consumer, when placing the order, explicitly acknowledges that the order implies an obligation to pay. If placing an order entails activating a button or a similar function, the trader must ensure that the button or similar function is labelled in an easily legible manner only with the words 'order with obligation to pay' or a corresponding unambiguous formulation indicating that placing the order entails an obligation to pay the trader. The trader must also ensure that any trading website through which the contract is concluded indicates clearly and legibly, at the latest at the beginning of the ordering process, whether any delivery restrictions apply, and which means of payment are accepted.

The Consumer Rights Act 2015 applies alongside the Regulations. The Act sets out the remedies available to consumers for breach of their statutory rights, including but not limited to the right to reject the goods for a full refund or to obtain a price reduction where goods are not of satisfactory quality, fit for purpose and as described. The Act further consolidates the law on unfair contract terms in consumer contracts and introduces the right for consumers to bring competition infringement proceedings against traders in the courts.

# REGULATION

# Art market regulator

**54** Is there a specific regulatory body overseeing the art market or certain business activities carried out within the art market in your jurisdiction?

There is no regulator in England and Wales specifically assigned to regulating the art market.

### **Other regulators**

# **55** What other forms of regulation are professional art market participants in your jurisdiction subject to?

The following regulators in England and Wales have regulatory authority over certain activities carried out by art market participants.

#### **Competition and Markets Authority**

There is a broad range of rules applicable to businesses entering into transactions with consumers. These regulations govern most of the aspects of business-to-consumer transactions, from advertising to the avoidance of unfair contract terms, and consumer remedies. The authority in charge of ensuring compliance with consumer protection laws is the Competition and Markets Authority (CMA). The CMA's powers include investigating business practices that are detrimental to consumers and contravene the existing legislation, and prosecuting traders that engage in unfair commercial practices. The CMA also has authority to investigate cartels and other anticompetitive behaviours (eg, unlawful bidding arrangements and other types of collusion over pricing).

## **Financial Conduct Authority**

Arranging insurance of artworks is regulated by the Financial Conduct Authority (FCA). Businesses offering insurance products must either be authorised to do so by the FCA or be registered as an exempt business. FCA authorisation is usually needed when dealing in, arranging or assisting with the performance of an insurance contract. Exclusions may apply, but their availability depends on the circumstances, the nature of the activities carried out and the degree of involvement of the art market professional. Providing insurance-related services in breach of the authorisation or exemption requirements constitutes a criminal offence and may lead to the unenforceability of the agreement drawn up in breach of the applicable regulations. Art market participants, including dealers, are generally unlikely to be recognised as exempt businesses, as exemptions are very strictly defined and only apply to a limited number of organisations, including members of controlled professions and banking authorities.

The FCA also regulates loans to consumers.

#### His Majesty's Revenue and Customs

High-value dealers and art market participants as defined in the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 and the Money Laundering and Terrorist Financing (Amendment) Regulations 2019 must register with His Majesty's Revenue and Customs (HMRC) and are subject to supervision by HMRC.

#### Trade Associations

While trade associations do not have regulatory authority, they exercise peer pressure and, in some cases, they have the power to exclude a member from the association. Many auctioneers in England and Wales are members of the Society of Fine Art Auctioneers and

Valuers, and Sotheby's, Christie's, Phillips and Bonhams are members of the British Art Market Federation. Fine art dealers are typically members of one of the three leading trade associations, namely the Society of London Art Dealers, the Association of Art and Antiques Dealers and the British Antique Dealers' Association.

# **UPDATE AND TRENDS**

# Key developments of the past year

**56** Are there any other current developments or emerging trends that should be noted?

## Online trading

Many art businesses have now firmly expanded their trading to the digital realm and this change, which originally a response to the pandemic, is unlikely to be reversed as sanitary restrictions are relaxed. Businesses are increasingly looking to offer a hybrid offering, some of which is purely online.

### New technology

The blockchain technology is increasingly being used in the art world to achieve multiple objectives, including recording provenance, facilitating authentication and tracing artworks. New companies are launching new blockchain-related products all the time. This is set to continue in 2023.

The NFT bubble has burst. Since the peak of NFT prices in May 2022, OpenSea's NFT market has experienced a drop of 99% in transaction volume. During May 2022, OpenSea processed more than \$2.7 billion NFT transactions. At the end of August 2022, trading volume for NFT sales had dropped all the way to \$9.34 million. The drop in NFT values is tied to the crash in the crypto market but also (probably) to the low quality of the digital art associated with NFTs.

#### **Restitution and interpretation**

Western institutions have continued to grapple with the need to address colonial issues, both in terms of acknowledging their own roles in the acquisition of cultural objects and in the need to provide more accurate representations of the cultures featured in their collections. Repatriation made headlines throughout 2022, for example, last November, the Horniman Museum in London returned six objects to Nigeria. The Smithsonian Institution has also returned its Benin bronzes to Nigeria. It is not just public institutions that are being targeted. Recently, a Maori tribe requested the return of artifacts being sold at Sotheby's. The items in question include a pair of Maori short clubs, called *mere*. This is in line with the increased attention on the return of Native American human remains and burial objects. Pressure to represent cultures more accurately has resulted in the removal of several exhibitions, for example, with the Wellcome Collection in London closing its Medicine Man display – and the updating of others in consultation with Indigenous stakeholders, as seen with the American Museum of Natural History's Northwest Coast Hall that re-opened last May.

### A focus on climate protest

Throughout 2022, museums have been the settings for and in some cases targets of protests and demonstrations – from actions aimed at the slow-moving response to the climate crisis to expressions of solidarity with the uprisings in Iran – a trend that looks likely to continue in 2023.

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**RETURN TO CONTENTS** 

# Summary

BUYING AND SELLING	69	
Passing of title	69	
Implied warranty of title	70	
Registration	70	
Good-faith acquisition of stolen art	70	
Acquiring title to stolen art through prescription	71	
Risk of loss or damage	72	
Due diligence	72	
Other implied warranties	73	
Voiding purchase of forgeries	74	
Voiding inadvertent sales of works by masters	75	
EXPORT AND IMPORT CONTROLS	75	
Export controls	75	
Import controls	76	
Export and import tax	77	
DIRECT AND INDIRECT TAXATION	77	
Taxes	77	
Tax exemptions	77	
BORROWING AGAINST ART	78	
Types of security interest	78	
Consumer loans	78	
Register of security interests	78	
Non-possessory security interests	79	
Sale of collateral on default	79	
Ranking of creditors	79	
INTELLECTUAL PROPERTY RIGHTS	79	
Creator copyright	79	
Copyright duration	80	
Display without right holder's consent	80	
Reproduction of copyright works in catalogues and adverts	80	
Copyright in public artworks	80	
Artist's resale right	81	
Moral rights	81	
AGENCY	82	
Accounting to the principal	82	
Read this article on Lexology		

PAGE 69	RETURN TO SUMMARY
Disclosed agent commission Undisclosed agent commission	82 82
CONSIGNING ITEMS	83
Protection of interests in consigned works	83
AUCTIONS	83
Regulation	83
SPOLIATION DURING THE NAZI ERA	84
Claims to Nazi-looted art	84
LENDING TO MUSEUMS	85
Responsibility for insurance	85
Immunity from seizure	85
CULTURAL PATRIMONY	85
National treasures	85
Right of pre-emption	86
Automatic vesting in the state	86 87
Illegally exported property claimed by foreign states	67
NON-FUNGIBLE TOKENS	87
Regulation and case law	87
ANTI-MONEY LAUNDERING	88
Compliance	88
ENDANGERED SPECIES	88
CITES	88
Specific endangered animal products	89
CONSUMER PROTECTION	89
Cancelling purchases	89
Duties of businesses selling to consumers	90
REGULATION	90
Art market regulator	90
Other regulators	90
UPDATE AND TRENDS	90
Key developments of the past year	90

# **BUYING AND SELLING**

# Passing of title

# 1 When does ownership of art, antiques and collectibles pass from seller to buyer?

Ownership of art, antiques and collectibles passes from seller to buyer as soon as they have agreed on the artwork to be sold and on its sale price. This is the case even if the art, antique or collectible has not yet been delivered or the price has not yet been paid (article 1583, Civil

Code). However, the buyer and the seller can contractually agree to postpone the transfer of ownership, until payment or delivery of the artwork, for example.

# Implied warranty of title

**2** Does the law of your jurisdiction provide that the seller gives the buyer an implied warranty of title?

No, there is no implied warranty of title per se. However, the seller gives the buyer an implied warranty of peaceful possession. In other words, the seller warrants to the buyer that the art, antique or collectible is sold free of any third-party claims. Hence, if the buyer's title is challenged, the seller may have to refund the sale price independent of damages. The implied warranty of peaceful possession may be excluded or limited by contract. An action based on a breach of warranty of peaceful possession is subject to a five-year statute of limitations, which starts to run as of the date of the breach.

### Registration

**3** Can the ownership of art, antiques or collectibles be registered? Can theft or loss of a work be recorded on a public register or database?

No, there is no title registry of art, antiques or collectibles.

There is also no public database of stolen works. International databases are typically used, such as the Art Loss Register and the Interpol database. The French Central Office for the Fight against Illicit Traffic in Cultural Goods has a specific database called TREIMA, but it is not available to the public.

However, art, antiques and collectibles that belong to public entities are registered on the <u>Palissy database</u>. This database contains a list of stolen artworks that belong to public entities.

# Good-faith acquisition of stolen art

4 Does the law of your jurisdiction tend to prefer the victim of theft or the acquirer in good faith of stolen art?

French law tends to prefer the acquirer in good faith of stolen art over the victim of theft for several reasons.

First, each transfer of an artwork creates a new title (independent from the former) that stems from the mere possession of the artwork, according to a core principle under French law that states that possession equals title as far as movable goods are concerned (article 2276, Civil Code). If the possessor of the stolen art, antique or collectible acquired it in good faith, ownership in the art, antique or collectible automatically vests in the acquirer.

Second, the claim of ownership of the victim of theft is subject to a three-year statute of limitations, which is shorter than the ordinary five-year limitation period.

Third, if the good-faith possessor of a stolen artwork, antique or collectible acquired it at an art fair, at auction or from a professional of the art market, the original owner may only obtain its restitution in consideration of the reimbursement of the price the possessor paid for it (article 2277, Civil Code).

Finally, good faith is always presumed (article 2274, Civil Code). A possessor is in good faith if he or she regards himself or herself as entitled to the property, and this belief must be reasonable. The burden of proof of the possessor's bad faith thus lies with the victim of theft.

As an exception to the above principles, when the victim of theft is a public entity, and the stolen art, antique or collectible belongs to the public domain (in the sense of public property law, not to be confused with the public domain in the sense of intellectual property law), the public victim's restitution claim is not subject to any statute of limitations, and the good-faith possessor is not entitled to any compensation.

#### Acquiring title to stolen art through prescription

**5** If ownership in stolen art, antiques or collectibles does not vest in the acquirer in good faith, is the new acquirer protected from a claim by the victim of theft after a period of time?

Ownership in stolen art, antiques or collectibles automatically vests in the possessor who acquired them in good faith. The victim of theft may only claim ownership for a period of three years as of the date of the theft.

# **6** Can ownership in art, antiques or collectibles vest in the acquirer in bad faith after a period of time?

Yes, ownership in art, antiques or collectibles may vest in the acquirer in bad faith after a period of adverse possession. Possession is composed of two elements: a physical element (material acts similar to those that a legitimate owner would perform) and a psychological element (the intention to hold for oneself).

To adversely possess, the possession must be continuous and uninterrupted, peaceful, public and unequivocal (article 2261, Civil Code). If one of those requirements is absent, the possession is vitiated, and the possessor is unable to acquire property through the passage of time.

There is controversy surrounding the period of time that is required for the ownership of movable property (as opposed to real property), such as art, antiques or collectibles, to vest in the acquirer in bad faith as there is no specific provision in the law. Depending on the interpretation of the provisions of the Civil Code, the period may be 5 years or 30 years. Authors generally consider that 30 years of adverse possession is more consistent with the legal framework.

# 7 Must the professional seller of art, antiques or collectibles maintain a register of sales?

To ensure the traceability of objects, all art market professionals (including auctioneers) must maintain a register of sales (article 321-7, Penal Code).

The register must include the seller's and the professional intermediary's identity and domicile, a precise description of each object, including its nature and provenance (article R321-3, Penal Code), the purchase price and the method of payment (article R321-5, Penal Code). Those elements must be kept for a decade and can be consulted by the police and tax services, customs, competition, consumer affairs and fraud prevention services (article R321-10, Penal Code).

Breaches of those obligations are punishable by six months' imprisonment and a fine of €30,000 (article 321-7, Penal Code).

#### Risk of loss or damage

8 When does risk of loss or damage pass from seller to buyer if the contract is silent on the issue?

In the absence of any contrary stipulations of the contract on the issue, and similar to the transfer of ownership, risk of loss or damage automatically passes from seller to buyer as soon as both have agreed on the artwork to be sold and on its sale price, even if the buyer is not in possession of the art, antique or collectible (article 1196, Civil Code).

The parties may contractually agree that the risk will pass at a different time, notably upon delivery of the artwork to the buyer. This clause is commonly negotiated by the buyer to protect himself or herself against the hazards that may notably occur during transportation of the artwork.

## Due diligence

# **9** Must the buyer conduct due diligence enquiries? Are there non-compulsory enquiries that the buyer typically carries out?

There is no formal legal obligation for the buyer to conduct due diligence enquiries when buying art, antiques or collectibles. However, in the event the buyer wishes to have the sale voided on the basis of an error committed on the substantial qualities of the artwork bought – such as an error on the correct attribution of the work, on its dating or on its condition – the courts may take into account the due diligence enquiries carried out by the buyer.

In the absence of such enquiries, the courts may find the professional buyer to have been reckless in his or her purchasing of the art, antique or collectible (particularly when the buyer is a professional of the art market). However, a non-professional buyer may reasonably rely on the description of the artwork when buying from a professional seller.

Typically, when conducting due diligence enquiries, the buyer should do the following:

- request documents confirming the validity of the seller's title (free of any thirdparty claims);
- request documents evidencing the provenance of the art, antique or collectible;
- search available databases of stolen works notably the Art Loss Register if any doubt arises on the provenance of the art, antique or collectible;
- confirm the authenticity of the art, antique or collectible and possibly request an expert opinion; and
- establish whether the art, antique or collectible was legally imported into the country or, if it is to be exported, whether an export certificate or licence has been obtained or if he or she must obtain it.

### **10** Must the seller conduct due diligence enquiries?

There is no formal legal obligation for the seller to conduct due diligence enquiries when selling art, antiques or collectibles. However, similarly to the buyer, in the event the seller purports to have the sale of an artwork, antique or collectible voided based on an error and in the event his/her liability is challenged, the courts will take into account the due diligence enquiries carried out by the seller. In the absence of such enquiries, the courts may find the seller to have been reckless in his or her selling of the art, antique or collectible and either reject the action to void the sale or find him/her liable for having sold an inauthentic piece.

Professionals of the art market have adopted codes of ethics in which they provide for a certain number of due diligence enquiries to be conducted. Most codes of ethics are soft laws (ie, not binding), but courts usually rely on these sets of non-binding rules to assess the potential liability of art market professionals. These due diligence enquiries mostly concern the authenticity and the provenance of the art, antique or collectible. Professional intermediaries, such as dealers and auctions houses that sell on behalf of a seller, must check the identity and the title of the seller, and also inform the authorities if there is any suspicion of money laundering.

#### Other implied warranties

# **11** Does the law provide that the seller gives the buyer implied warranties other than an implied warranty of title?

There are three general implied warranties that the seller gives to the buyer in a sales contract:

- a warranty of peaceful possession;
- a warranty of conformity, under which the seller warrants to the buyer that the sold asset conforms to its description (article 1603, Civil Code); and
- a warranty against hidden defects, by which the seller warrants the buyer against defects in the asset sold that make it unfit for its intended use (article 1641 et seq, Civil Code).

Warranties of conformity are seldom used in the art market. An action based on a warranty of conformity is subject to the ordinary five-year statute of limitations, which starts to run from the day the buyer discovers the breach of the warranty. It may not be excluded when the buyer is not a professional in the same field.

Warranties against hidden defects are also almost never used in the art market – an artwork normally does not have a 'use' in the sense of this warranty. The action of the buyer based on this warranty is subject to a two-year statute of limitations, which starts to run from the discovery of the defect (article 1648, Civil Code). It may not be excluded when the buyer is not a professional in the same field.

There is also a specific warranty that the seller gives the buyer in the art market that relates to the accuracy of the description of the artwork. The wording used to describe the art, antique or collectible put up for sale gives rise to warranties. For instance, according to the Marcus Decree (Decree No. 81-255 of 3 March 1981 on the prevention of fraud in art and collectible sales):

- 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; and
- 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 to have benefited from his or her technique.

Therefore, sellers and intermediaries of the art market must pay particular attention to the terminology they use when describing the art, antique or collectible put up for sale as it may imply certain warranties.

#### Voiding purchase of forgeries

**12** If the buyer discovers that the art, antique or collectible is a forgery, what claims and remedies does the buyer have?

The buyer of an artwork that transpires to be a forgery may bring an action 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, the contract is voided ab initio (ie, the sale is treated as having never been concluded). 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 being specified that no action on a contract may be brought once 20 years have elapsed after the date the contract was entered into.

If the seller is in bad faith (ie, he or she sold the artwork, antique or collectible knowing it was a forgery), the buyer may also claim for damages on the basis of a contractual liability action. The act of knowingly selling a forgery as an original is also subject to criminal sanctions.

#### Voiding inadvertent sales of works by masters

# **13** Can a seller successfully void the sale of an artwork of uncertain attribution subsequently proved to be an autograph work by a famous master by proving mistake or error?

This depends on the seller's understanding at the time of the sale and on the wording used to describe the artwork. If the artwork is sold as a 'copy of', 'studio of' or 'circle of' and the seller can show that he or she contracted the sale in the erroneous belief that the artwork could not be an autograph work, he or she will have an action to void the sale.

On the other hand, if the artwork is sold as 'attributed to', the seller does not have an action to void the sale as he or she accepts the risk that the work might be an autograph piece (as it also might not be).

### **EXPORT AND IMPORT CONTROLS**

### **Export controls**

# **14** Are there any export controls for cultural property in your jurisdiction? What are the consequences of failing to comply with export controls?

Yes, there are export controls for cultural property of major interest for national heritage from a historical, artistic or archaeological point of view. The export of this cultural property is contingent upon the issuance of an export certificate (and an export licence if the item is exported outside the European Union) if it falls within the 15 categories listed by the Heritage Code. Major interest for national heritage is defined in the list according to two criteria: age and value.

The following are subject to the prior issuance of an export certificate:

- paintings (except watercolour, gouache and pastel pieces) that are over 50 years old and worth more than €300,000;
- photographs that are over 50 years old and worth more than  $\pounds$ 25,000; and
- archaeological objects that are over 100 years old and worth more than  $\in$  3,000.

The value thresholds were recently raised significantly (in some cases even doubled), showing a growing leniency in favour of foreign transactions (to the detriment of the national protection of cultural heritage).

The procedure of issuance of an export certificate is designed to give the French administration time to review the cultural value of the property and decide whether to classify it as a national treasure (ie, to ensure that the item will permanently remain in France).

The owner of an asset intended for export must file an application in person or through an agent with the Ministry of Culture, including a photograph of the item. The Ministry of Culture has four months to review the application. When this period has expired, the Minister must issue or deny the certificate.

When granted, the certificate permanently attests that the cultural property is not a national treasure, which therefore means that the certificate is granted on a permanent basis (except for property that is less than 100 years old).

If the Minister of Culture refuses to grant an export certificate, a 30-month period commences during which the cultural property may not leave France. The applicant may not claim for any compensation for the refusal of his or her export certificate (but he or she can challenge the decision before the administrative tribunal).

Upon the expiration of the 30-month period, a new application for the issuance of an export certificate can be made, except if the cultural property has either been classified as a historic monument or if the state has made an offer to purchase it. If the owner refuses the state's purchase offer, the refusal to deliver the certificate is renewed with no compensation (ie, the item continues to be restricted to France).

Penalties in the event of failure to apply for an export certificate or to comply with refusal are the same: €450,000 fine, two years' imprisonment and confiscation of the item.

### Import controls

**15** Other than in relation to endangered species, are there any import controls for cultural property in your jurisdiction? What are the consequences of failing to comply with import controls?

As a principle, under French law, cultural goods are treated as any other merchandise and may be freely imported.

Following a July 2016 law, some controls were implemented on the import of certain cultural goods. In effect, the import of cultural property of archaeological, prehistoric, historical, literary, artistic or scientific interest imported directly from a non-member state of the European Union and 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 is subject to the presentation of a certificate or any other equivalent document authorising the export from the exporting state when provided by the state's legislation. Failure to show the certificate will result in the import being forbidden (article L111-8 of the Heritage Code).

The import of cultural goods that have left the territory of a state unlawfully is also forbidden (article L111-9 of the Heritage Code).

Cultural goods that have been seized at customs because they left the territory of a non-EU member state 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.

#### **Export and import tax**

# **16** Does any liability to pay tax arise upon exporting or importing art, antiques or collectibles?

The tax treatment of international transfers of art, antiques or collectible assets depends on the legal or tax qualification of the assets transferred and of the transaction itself (export, import, sale, gift, etc). Exports are exempt from VAT, while imports and transactions realised within the European Union are currently subject to a 5.5 per cent VAT rate, unless carried out by national or public museums or certain foundations. This rate may rise to 20 per cent by 2025 following the adoption of a European Directive. Art market professionals are extremely concerned by this dramatic rise of the VAT regime on the import of art and its implications for the French art market.

### **DIRECT AND INDIRECT TAXATION**

#### Taxes

# **17** Outline the main types of tax liability arising from ownership and transfer of art, antiques and collectibles.

Buyers of art, antiques or collectibles are subject to 5.5 per cent, 10 per cent or 20 per cent VAT when they import, export or acquire within the European market, or from an artist or an art gallery and intermediary.

During the period of ownership, art, antiques or collectibles, defined as such by the Common Customs Tariff, are not subject to wealth tax. Their sale or export outside the European Union by a French resident (unless for a limited period) exposes the owner to a specific 6.5 per cent tax rate (including additional social charges) on the sale price or customs valuation. In the case of omission, a fine is assessed at the rate of 25 per cent of the tax and is due in addition to the tax itself.

Gift and inheritance taxes are due upon transfer, in consideration of the market value of the art, antique or collectible transferred and kinship between the donor or the deceased and the beneficiary. Those taxes can be paid by donating works of art of a high artistic and historical value to the state.

#### **Tax exemptions**

# **18** Outline any tax exemptions or special conditions applicable to art, antiques and collectibles.

French law provides for several specific tax breaks to the benefit of public institutions and private charities, notably:

 VAT exemption on all imports of art, antiques and collectibles made to the benefit of public institutions;

- lifetime gifts made to charities situated in an EU member state, Norway, Iceland or Liechtenstein, which gives rise to tax credits of either 60 per cent offset against corporate income tax due by the corporation that made the gift within a limit of five per 1000 of its annual turnover, or 66 per cent of the asset value given by an individual, within a limit of 20 per cent of the donor's annual income; and
- inheritance tax exemption on transfers made through a lifetime gift or death to the benefit of the state, public institutions and charities as defined by the legislation.

#### **BORROWING AGAINST ART**

#### Types of security interest

# **19** In your jurisdiction what is the usual type of security interest taken against art, antiques and collectibles?

The usual type of security interest taken against art, antiques and collectibles is the pledge, which is an agreement by which the pledger gives to a creditor the right to be paid in preference to his or her other creditors out of a corporeal movable asset or a set of corporeal movable assets, present or future (article 2333, Civil Code).

A pledge is perfected by a written document that contains the description of the debt secured, the quantity of assets pledged, and their kind or nature. It may be with or without dispossession. A pledge without dispossession confers a fictitious lien to the lender insofar as the collateral is not handed over by the borrower to the lender.

#### Consumer loans

**20** If the borrower borrowing against art assets in your jurisdiction qualifies as a consumer, does the loan automatically qualify as a consumer loan, and are there any exemptions allowing the lender to make a non-consumer loan to a private borrower?

French law is silent on this issue.

There is only one type of credit institution, the Crédit Municipal, which may grant loans secured against art, antiques or collectibles. The Crédit Municipal has a monopoly over pledged loans.

#### **Register of security interests**

**21** Is there a public register where security interests over art, antiques or collectibles can be registered? What is the effect of registration? Is the security interest registered against the borrower or the art?

There is no specific public register where security interests over art, antiques or collectibles are registered. However, pledges without dispossession must be published on a registry held at the commercial court register in order to be enforceable against third parties.

#### Non-possessory security interests

# **22** Can the lender against art collateral perfect its security interest without taking physical possession of the art?

Yes. The usual type of security interest taken against art, antiques and collectibles is the pledge, which is an agreement by which the pledger gives to a creditor the right to be paid in preference to his or her other creditors out of a corporeal movable asset or a set of corporeal movable assets, present or future (article 2333, Civil Code).

# Sale of collateral on default

# **23** If the borrower defaults on the loan, may the lender sell the collateral under the loan agreement, or must the lender seek permission from the courts?

French law makes a distinction between civil and commercial pledges based on the civil or commercial nature of the debt that is secured. If the pledge is civil, the lender is not allowed to sell the collateral under the loan agreement without the prior permission of the courts. However, if the pledge is commercial, the lender may sell the collateral without seeking permission from the courts eight days after sending a simple notice to the defaulting borrower.

In the event of a pledged loan, the Crédit Municipal sells the art, antiques or collectibles used as collateral at auctions that are organised by the institution.

#### Ranking of creditors

# **24** Does the lender with a valid and perfected first-priority security interest over the art collateral take precedence over all other creditors?

In general, a creditor with a valid and perfected first-priority security interest takes precedence over creditors with no security interest. Generally, the privilege of the tax authority and of employees ranks higher than a credit, even with a first-priority security interest.

#### **INTELLECTUAL PROPERTY RIGHTS**

#### **Creator copyright**

**25** Does copyright vest automatically in the creator, or must the creator register copyright to benefit from protection?

The author of a work of the mind automatically enjoys in this work, by the mere fact of its creation, exclusive intellectual property rights, which are enforceable against all persons (article L111-1 of the Intellectual Property Code); therefore, no formalities, such as registration, are required for an author to benefit from intellectual property right protection.

#### **Copyright duration**

#### **26** What is the duration of copyright protection?

An author enjoys two types of intellectual property rights: moral rights and economic rights. Moral rights are perpetual; 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 the sense of intellectual property law) and may be used freely.

#### Display without right holder's consent

# **27** Can an artwork protected by copyright be exhibited in public without the copyright owner's consent?

No, the right of exhibition is exclusively held by the author of the artwork (it is one of the attributes of his or her economic rights with the reproduction right). Hence, all public exhibitions of the author's work require his or her prior consent. This is an application of a core principle under French intellectual property law, according to which the ownership of the intellectual property right is independent from any ownership right in the physical object (ie, in the artwork itself (article L111-3 of the Intellectual Property Code)).

### Reproduction of copyright works in catalogues and adverts

**28** Can artworks protected by copyright be reproduced in printed and digital museum catalogues or in advertisements for exhibitions without the copyright owner's consent?

In theory, no. Each reproduction of an artwork must be authorised by the author. However, the law provides for an exception to the right of reproduction when the reproduction is made by libraries, museums or archival services for conservation purposes only. Another exception is the reproduction in catalogues of auction sales after seizure; voluntary auction sales are not covered by this exception.

#### Copyright in public artworks

#### **29** Are public artworks protected by copyright?

An artwork is protected if it is an original work of the mind of the author, irrespective of the place where it is displayed. However, copyright protection may be attenuated based on public order considerations (and, notably, public security) when an artwork is displayed in a public space.

It has been disputed whether street art should be protected by copyright insofar as the creation in itself is illicit; however, with the growing fame of street artists, there is less contention, and the courts tend to grant intellectual property protection to the artists.

#### Artist's resale right

#### **30** Does the artist's resale right apply?

Yes. The royalty is levied on sales involving art market professionals as sellers, buyers or intermediaries (ie, art galleries, art dealers and auction houses). The royalty right benefits the artist during his or her lifetime and benefits his or her heirs and legatees for 70 years after his or her death. The possibility for an author to bequeath his or her royalty right only became available in July 2016.

No royalty is levied on first direct sales by the artist or his or her heirs or on the resale by a seller who has acquired the artwork directly from the artist less than three years before that resale and where the resale price does not exceed  $\notin 10,000$  or on any resales for a price lower than  $\notin 750$ .

The rates of the royalty applicable are regressive:

- 4 per cent for any part of the sale price between €750 and €50,000;
- 3 per cent for any part of the sale price between €50,000 and €200,000;
- 1 per cent for any part of the sale price between €200,000 and €350,000;
- 0.5 per cent for any part of the sale price between €350,000 and €500,000; and
- 0.25 per cent for any part of the sale price over €500,000.

The total amount of the royalty may not exceed €12,500. In other words, all artworks sold for €2 million or more will be subject to a flat royalty of €12,500.

The seller of the artwork is normally responsible for the payment of the royalty, although the Supreme Court has recently finally decided that the burden of the royalty may contractually be shifted to the buyer. The art market professional that acts as an intermediary in the sale (eg, an auction house) is responsible for collecting the royalty from the seller and passing it to the relevant collecting agency.

### **Moral rights**

#### **31** What are the moral rights for visual artists? Can they be waived or assigned?

French law grants authors moral prerogatives on their work. These rights are directly attached to the author as a person; they are perpetual, inalienable and imprescriptible.

There are four types of moral prerogative:

- the right of paternity, allowing the author to command that his or her name be associated with his or her work;
- the right of integrity of the work, which allows the author to oppose any alteration of his or her work and any misuse of the work;
- the right of disclosure, which allows the author to decide when and how his or her work will be communicated to the public and to oppose the exploitation of a work that he or she has not made public; and

 the right of withdrawal or reconsideration, which allows the author to decide either to discontinue the exploitation (right of withdrawal) or to alter the work (right of reconsideration).

## AGENCY

## Accounting to the principal

**32** Does the law require the agent to account to the principal for any commission or other compensation received by the agent while conducting the principal's business?

Yes, the agent is bound by law to report and account to the principal for his or her management, which may include any commission or compensation received while conducting the principal's business. The agent must also return to the principal all that he or she received by virtue of his or her mandate, even if what he or she received was not owed to the principal (article 1993, Civil Code).

#### **Disclosed agent commission**

**33** Does disclosure to the principal that the agent will receive a commission allow the agent to keep the commission unless the principal objects?

Yes, the agent may keep a commission received from a third party if he or she discloses this information to the principal and the principal agrees to the commission being received by the agent. The disclosure must be sufficiently clear to comply with the agent's legal obligation to report and account to the principal for his or her management.

#### Undisclosed agent commission

**34** If a third party pays a commission to an agent that is not disclosed to the principal, can the principal claim the commission from the third party?

Yes. The agent cannot do anything beyond his or her mandate. This obligation is tied to the agent's obligation to report and account to the principal for his or her management.

### **CONSIGNING ITEMS**

#### Protection of interests in consigned works

**35** How can consignors of artworks to dealers protect their interest in the artwork if the dealer goes into liquidation?

A consignment agreement does not transfer ownership from the consignor to the consignee. A dealer who holds artworks on consignment does not own the artworks.

Creditors may only exercise their privilege over the debtor's assets and not on assets that belong to third parties. Therefore, should the dealer go bankrupt, his or her creditors cannot reach the artworks that are held on consignment. To avoid any confusion between the dealer's assets and the consigned assets, the consignor should be mindful to have his or her artwork registered in the dealer's book as the consignor's property.

If a consigned artwork were to be erroneously apprehended as one of the dealer's assets, the consignor may file a claim in the dealer's bankruptcy proceedings.

There is no register under which consignors may register their interest in consigned artworks.

### AUCTIONS

#### Regulation

**36** Are auctions of art, antiques or collectibles subject to specific regulation in your jurisdiction?

Yes, auctions are strictly regulated, although a recent law, passed in February 2022 aiming at modernising the regulation of the art market, has tended to alleviate some constraints on the professionals of the auction world. 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. There is a regulatory authority of auction sales, which has recently been renamed, the Council of Auctions Houses, to which all auction houses must declare their activity and which has disciplinary powers. This representative authority has undergone major changes, in particular in terms of representativity, to include more members from the auction world.

Online auctions are subject to the same rules (article L321-3 of the Commercial Code).

# **37** May auctioneers in your country sell art, antiques or collectibles privately; offer advances or loans against art, antiques or collectibles; and offer auction guarantees?

Auctioneers may conduct private sales either independently from an auction or after an item failed to sell at auction.

An auctioneer may offer an advance to the seller on the sale of the art, antique or collectible (article L321-13 of the Commercial Code). Auctioneers may not, however, offer loans against art, antiques or collectibles.

An auctioneer may guarantee to the seller a minimum auction price for the art, antique or collectible offered for sale. In the event the item has been valued, the guaranteed price may not be inferior to the low estimate. If the guaranteed price is not reached, auctioneers are authorised to declare themselves the successful bidders of the artwork at this price. Otherwise, they must pay the seller the difference between the guaranteed minimum price and the auction price (article L321-12 of the Commercial Code).

# **SPOLIATION DURING THE NAZI ERA**

#### **Claims to Nazi-looted art**

**38** In what circumstances would the heirs of the party wrongly dispossessed typically prevail over the current possessor, if a court in your country accepted jurisdiction and applied its own law to a claim to art lost during the Nazi era?

To prevail (following a case-by-case analysis), the claimant in a Nazi-looted art claim must first establish the ownership of his or her ancestor over the item, which becomes more difficult with the passage of time. The claimant must also show that his or her ancestor was wrongly dispossessed during the Nazi occupation. Wrongful dispossession may be presumed on the basis of contextual elements, such as the date of the transaction (during Nazi occupation in France), the identities of the parties to the transaction (such as parties known for their implication 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.

#### **39** Is there an ad hoc body set up to hear claims to Nazi-looted art?

No. Nazi-looted art claims are heard by the ordinary national courts.

However, an administrative body, the <u>Commission for the Compensation of Victims of</u> <u>Spoliation</u>, was set up in France in 1999 to examine individual claims presented by victims or their heirs for damage resulting from the spoliation of property that occurred as a result of anti-Semitic laws passed during the Nazi occupation, both by the occupant and by the Vichy authorities. The Commission, which is not a jurisdiction, is responsible for conceiving and recommending appropriate reparations or compensation. It is empowered to make any useful recommendation, particularly regarding compensation.

A number of artworks were recuperated at the end of the war by the French authorities. Those whose owners were not identified were placed in custody in national museums pending their restitution to their rightful owners; they are classified as 'national museum recoveries'. The inventory of these is freely available online at the website of the <u>National Museums Recovery</u>. Some of these artworks are still being detained by the state due to a lack of claims. Some artworks were also bought by the state in the regular market and were eventually proved to have been looted. When they are owned by public entities, these works become inalienable. To allow for their restitution, a bill must thus be passed to allow for their deaccessionning from the public collections. For instance, a law was adopted in February 2022 to allow for the return of 14 works from the public collections looted during Nazi occupation.

### **LENDING TO MUSEUMS**

#### **Responsibility for insurance**

**40** Who is responsible for insuring art, antiques or collectibles loaned to a public museum in your jurisdiction?

The state may insure art, antiques or collectibles that are loaned to a public museum for a temporary exhibition. Typically, private insurance is subscribed on a case-by-case basis to cover the transportation of the items on loan from the lending institution to the borrowing public institution.

#### Immunity from seizure

# **41** Are artworks, antiques or collectibles loaned to a public museum in your country immune from seizure?

Art, antiques or collectibles 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 this 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. The request must describe, in detail, 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.

# **CULTURAL PATRIMONY**

#### National treasures

#### 42 Is there a list of national treasures?

Art, antiques and collectibles may be categorised as national treasures depending on their legal status. Not all of them are listed.

The following are considered national treasures:

- items that form part of the collections of the museums labelled 'Museum of France': these collections are exhaustively listed in the <u>Joconde database</u>;
- public and historic archives: a number of those archives are available online listed in various inventories; and
- artworks that have been classified as historical monuments: those artworks are listed in the <u>Palissy database</u>.

The unilateral classification of an item belonging to a private individual as a historical monument may give rise to compensation because the item may no longer be exported outside France. The compensation is generally equivalent to the loss of profit for the owner owing

to the impossibility to sell the work on the international market, which explains why this unilateral classification rarely happens.

All other items belong to the public domain. The classification of an item as belonging to the public domain is not the result of an administrative decision (although some artworks belong to the public domain because of their legal status, for instance items classified as historical monuments). Items may be recognised as belonging to the public domain if they belong to a public institution and if they are of particular interest from a historical, artistic, archaeological, scientific or technical point of view. Items belonging to the public domain may not be sold, unless an administrative decision has been taken on the basis that the item has lost its interest (which hardly ever happens). Most of these items are listed on the Palissy database.

All other items of major interest for national heritage from a historical, artistic or archaeological point of view are those that fall within the 15 categories listed by the Heritage Code, for which an export certificate is required when they meet the age and value thresholds provided for in the law.

A list of the national treasures that have been refused an export certificate is available online at the website of the <u>Ministry of Culture</u>.

The refusal of an export certificate does not give rise to any compensation.

### **Right of pre-emption**

# **43** If the state is interested in buying an artwork for the public collections, does it have a right of pre-emption?

Yes, the state has a right of pre-emption on all auction sales or private sales of items unsold at auction. In practice, the pre-emption right is exercised by an administrative agent, who makes an announcement after the auctioneer's hammer falls for the artwork that the state wishes to pre-empt.

#### Automatic vesting in the state

# **44** In what circumstances does ownership in cultural property automatically vest in the state?

Ownership in cultural property automatically vests in the state when a 'treasure' is found on grounds that belong to the state or its regional or local authorities; conversely, if the treasure is found on private grounds, the state has no claim except if the findings are immovable and, since 2016, movable archaeological remains.

Ownership also automatically vests in the state over the estate of a deceased with no heirs, which may comprise cultural items.

## Illegally exported property claimed by foreign states

# **45** How can a foreign state reclaim in your jurisdiction cultural property illegally exported from its territory?

Directive 2014/60/EU dated 15 May 2014, transposed into French law, provides a legal framework for the return of cultural objects unlawfully removed from the territory of a member state. The courts will order the return of the cultural object when it is found to have been removed unlawfully from the requesting member state. The possessor is entitled to fair compensation, provided that he or she demonstrates that he or she exercised due care and attention in acquiring the object.

It is, however, highly difficult for non-EU member states to successfully claim the restitution of cultural property illegally exported from their territory. French courts apply French law to those types of claims (ie, the law where the object is located) and, notably, the principle according to which possession is equal to title as far as movable goods are concerned. In other words, the good-faith possessor will prevail over the requesting state. Foreign states may, however, avail themselves of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property for illicit exports after 1997 – the year that France ratified the Convention.

France is not a party to the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 24 June 1995.

### **NON-FUNGIBLE TOKENS**

#### Regulation and case law

**46** How are non-fungible tokens (NFTs) regulated in your jurisdiction? Is there any case law on NFTs in your jurisdiction?

France has not yet adopted a specific regulation for NFTs and their trade so far. The legal status of NFTs is still under debate.

Some consider that NFTs can be classified as digital assets in the sense of the Financial and Monetary Code, as a consequence of which traders of NFTs must register with the French regulatory body of financial markets, the AMF and are subject to its supervisory control.

NFT traders and marketplace holders may also be subject to consumer law, and notably the obligations of online platform operators obligations, including pre-contractual information and transparency.

NFTs are also subject to copyright if the art connected to the NFT satisfies the conditions to be protected (ie, is an original creation of the mind).

A 2022 law authorised auction houses to sell incorporeal goods, including NFTs.

#### **ANTI-MONEY LAUNDERING**

#### Compliance

# **47** What are the anti-money laundering compliance obligations placed on the art trade?

Professionals of the art market (auction houses, art dealers, gallerists, etc) are subject to anti-money laundering obligations. Notably, art market professionals must carry out antimoney laundering checks, such as on the identity, domicile and profession of their clients, and gather all relevant elements on the client's estate and provenance of the sums. Art market professionals must declare to Tracfin, the French anti-money laundering unit, any sums 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.

### **ENDANGERED SPECIES**

### CITES

# **48** Is your jurisdiction a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)?

Yes, France is a party to the CITES Convention. Council Regulation (EC) No. 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein (the EU Wildlife Trade Regulation) ensures the application of the CITES Convention within the European Union.

The management authority of the CITES Convention in France is the Directorate-General for Planning of the Ministry of Ecology. The CITES documents (import and export permits and re-export certificates) are issued by the Regional Directorates of Environment, Planning and Housing.

# **49** Is the sale, import or export of pre-CITES endangered species subject to a licence?

In principle, intra-EU trade of specimens of the most endangered species (listed in Annex A to the EU Wildlife Trade Regulation) is subject to obtaining a CITES certificate from the competent authority. However, worked specimens that were acquired before 1947 are exempt from the certificate requirement if an expert or a specialist has certified in writing, among other things, the age of the specimen. The import and export of the specimen is, similarly, not subject to a licence.

# **50** Is the sale, import or export of post-CITES worked or antique endangered species authorised? On what conditions?

The sale, import or export of post-CITES worked endangered species is normally subject to the EU Wildlife Trade Regulation. The owner of a worked endangered species must comply

with the requirement to obtain CITES documents (import or export permits, or trade or re-export certificates).

## Specific endangered animal products

**51** Are there any special rules for works of art made of elephant ivory, rhino horn or other specific endangered animal products?

Yes. France has adopted several decrees to specifically regulate the trade of elephant ivory and rhino horn. Under the most recent decree adopted on the matter (Decree of 4 May 2017 amending the Decree of 16 August 2016 on the prohibition of trade in elephant ivory and rhino horn in the national territory), the trade of post-1975 worked items made of ivory or rhino horn is strictly prohibited, while the following may be traded subject to a prior declaration:

- worked items made between 2 March 1947 and 1 July 1975 of an amount of ivory or rhino horn below 200 grams; and
- worked items made before 1 March 1947 with less than 20 per cent volume of ivory or rhino horn.

Possessors of those items must be able to prove the date by any expert means and, if necessary, by carbon dating.

### **CONSUMER PROTECTION**

#### **Cancelling purchases**

**52** In what circumstances may consumers cancel the sale of art, antiques or collectibles?

Consumers may void the sale of art if their consent is vitiated by an error on the authenticity of the art or if their consent was given in circumstances of deceit.

In distance sales, consumers have the right to cancel the sale within a period of 14 working days, which starts running from the date of receipt of the item purchased. This right to cancel the sale does not apply to auction sales, including phone or online bids.

#### Duties of businesses selling to consumers

#### **53** Are there any other obligations for art businesses selling to consumers?

Yes, professionals are bound by a duty to provide information to consumers, in a clear and comprehensible manner, on the main features of the item sold, its price and the delivery deadlines.

### REGULATION

#### Art market regulator

**54** Is there a specific regulatory body overseeing the art market or certain business activities carried out within the art market in your jurisdiction?

The Conseil des ventes volontaires (CVV), renamed in February 2022 the Conseil des Maisons de Ventes (council of auction houses), is the specific regulatory body overseeing the public auction market. It has undergone major changes, following the adoption of a recent 2022 law aiming at mordenising the regulations of the art market. All auction houses must declare their activity to the CVV. The CVV ensures auction houses comply with their legal, regulatory or professional obligations. It has disciplinary powers – which have been recently increased – and may impose sanctions ranging from a warning to a temporary or permanent ban on exercise. The 2022 recent reform included a change in the representativity of the council, which now includes more members from the auction world.

### **Other regulators**

# **55** What other forms of regulation are professional art market participants in your jurisdiction subject to?

Many art market professionals are grouped in companies or unions that self-regulate, in particular, with the adoption of codes of ethics. But those companies or unions are not regulators per se.

### **UPDATE AND TRENDS**

#### Key developments of the past year

# **56** Are there any other current developments or emerging trends that should be noted?

The French authorities are continuing their pursuit to return certain cultural objects to their rightful owners, in particular those taken from African countries during colonial times. President Emmanuel Macron expressed this public wish in a speech on 28 November 2017 in Ouagadougou. Since then, a number of cultural objects have been restituted to various African countries, such as 26 objects recently restituted to Benin and a sword to Senegal. To serve this purpose, a law was adopted on 7 December 2020, followed by a decree adopted on 23 July 2021, to simplify the procedure of deaccessioning artworks or cultural objects from public collections.

Discussions are being held on the adoption of a framework deaccessioning law that would avoid having to pass a new law authorising the state to deaccession cultural objects from the public collection everytime works are have to be restituted.



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# Germany

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**RETURN TO CONTENTS** 

# Summary

BUYING AND SELLING	93
Passing of title	93
Implied warranty of title	94
Registration	94
Good-faith acquisition of stolen art	94
Acquiring title to stolen art through prescription	94
Risk of loss or damage	95
Due diligence	95
Other implied warranties	95
Voiding purchase of forgeries	96
Voiding inadvertent sales of works by masters	96
EXPORT AND IMPORT CONTROLS	96
Export controls	96
Import controls	97
Export and import tax	97
DIRECT AND INDIRECT TAXATION	98
Taxes	98
Tax exemptions	98
BORROWING AGAINST ART	99
Types of security interest	99
Consumer loans	99
Register of security interests	99
Non-possessory security interests	99
Sale of collateral on default	100
Ranking of creditors	100
INTELLECTUAL PROPERTY RIGHTS	100
Creator copyright	100
Copyright duration	101
Display without right holder's consent	101
Reproduction of copyright works in catalogues and adverts	102
Copyright in public artworks	102
Artist's resale right	102
Moral rights	103
AGENCY	104
Accounting to the principal	104
Read this article on Lexology	

PAGE 93	RETURN TO SUMMARY
Disclosed agent commission	104
Undisclosed agent commission	104
CONSIGNING ITEMS	105
Protection of interests in consigned works	105
AUCTIONS	105
Regulation	105
SPOLIATION DURING THE NAZI ERA	105
Claims to Nazi-looted art	105
LENDING TO MUSEUMS	106
Responsibility for insurance	106
Immunity from seizure	107
CULTURAL PATRIMONY	107
National treasures	107
Right of pre-emption	108
Automatic vesting in the state	108
Illegally exported property claimed by foreign states	109
NON-FUNGIBLE TOKENS	109
Regulation and case law	109
ANTI-MONEY LAUNDERING	110
Compliance	110
ENDANGERED SPECIES	110
CITES	110
Specific endangered animal products	111
CONSUMER PROTECTION	111
Cancelling purchases	111
Duties of businesses selling to consumers	111
REGULATION	112
Art market regulator	112
Other regulators	112
UPDATE AND TRENDS	112
Key developments of the past year	112

# **BUYING AND SELLING**

# Passing of title

# 1 When does ownership of art, antiques and collectibles pass from seller to buyer?

Ownership usually passes upon transfer of possession from the seller to the buyer. The parties are free to agree on a different time, for example, upon receipt of payment in full.

# Implied warranty of title

# **2** Does the law of your jurisdiction provide that the seller gives the buyer an implied warranty of title?

The Civil Code (CC) provides for the presumption that whoever has possession is the actual owner of the object (section 1006, CC). This presumption can, inter alia, be refuted by a previous owner if the object was stolen, lost or otherwise removed from his or her possession without his or her consent.

### Registration

**3** Can the ownership of art, antiques or collectibles be registered? Can theft or loss of a work be recorded on a public register or database?

There is no register for ownership of art. Theft or loss of a work can be recorded, for example, on the Art Loss Register, or the Lost Art Database if the work was lost during the Third Reich period.

#### Good-faith acquisition of stolen art

4 Does the law of your jurisdiction tend to prefer the victim of theft or the acquirer in good faith of stolen art?

German law tries to balance the interests of the victim of theft of art and the good-faith acquirer. In principle, there is no good-faith acquisition of title for stolen art (section 935(1), CC). However, a person who acquires the stolen work of art in good faith and has this work in his or her possession for at least 10 years, while continuing to be in good faith, acquires valid title. If a person, upon his or her death, was not in good faith but the heir is in good faith, the heir can acquire legal title after 10 years from the point of inheritance. Legal title of a stolen work of art will also transfer to the good-faith acquirer if the work of art is sold in public auction (section 935(2), CC; Federal Supreme Civil Court, decision of 5 October 1989, IX ZR 265/88).

An acquirer is deemed not to be in good faith if he or she either positively knew, or should have known, that the seller was not the owner of the object. There is no general duty on the purchaser to investigate the validity of the seller's title. If the circumstances of the sale give rise to a concrete suspicion, an obligation to investigate may arise. If the purchaser disregards those suspicious signs and refrains from further investigation, he or she will not acquire good-faith title.

#### Acquiring title to stolen art through prescription

5 If ownership in stolen art, antiques or collectibles does not vest in the acquirer in good faith, is the new acquirer protected from a claim by the victim of theft after a period of time?

A bad faith acquirer cannot obtain legal title. The claim for return of the stolen asset expires after 30 years from the day of loss (section 197(1), No. 1, CC).

There is no obligation for the victim of theft to bring the claim at the earliest opportunity. If the circumstances are such that the victim has conveyed the impression that he or she has given up on the claim, the acquirer may hold this against a subsequent claim for return of the object.

# **6** Can ownership in art, antiques or collectibles vest in the acquirer in bad faith after a period of time?

No. The bad faith acquirer will not obtain valid title. However, the rightful owner may lose his or her right to claim for return of the work after the 30-year statute of limitations has expired.

7 Must the professional seller of art, antiques or collectibles maintain a register of sales?

There is no specific obligation, other than for purposes of bookkeeping, tax, etc.

#### Risk of loss or damage

**8** When does risk of loss or damage pass from seller to buyer if the contract is silent on the issue?

The risk of loss or damage passes on transfer of possession to the buyer. The parties can contractually agree on a different point in time.

## Due diligence

**9** Must the buyer conduct due diligence enquiries? Are there non-compulsory enquiries that the buyer typically carries out?

Under the Cultural Goods Protection Act (CPPA) of 2016, anyone who engages in the trade of cultural goods must exercise a reasonable duty of care to determine whether a piece was stolen or illegally excavated (section 41, CPPA). Additional obligations apply to professional dealers, such as the obligation to examine the identity of the seller, the provenance of the work, and the accuracy of any import and export papers (section 42, CPPA). A particularly high standard of care is to be exercised if there are circumstances that suggest that the work may have been taken from the rightful owners during the Third Reich period (section 44, CPPA).

#### **10** Must the seller conduct due diligence enquiries?

The obligations set forth under sections 41, 42 and 44 of the CPPA also apply to a seller.

#### Other implied warranties

**11** Does the law provide that the seller gives the buyer implied warranties other than an implied warranty of title?

Generally, there are no implied warranties. Exceptions may apply to descriptions in auction catalogues (see Federal Supreme Civil Court, decision of 13 February 1980, VIII ZR 26/79).

#### Voiding purchase of forgeries

# **12** If the buyer discovers that the art, antique or collectible is a forgery, what claims and remedies does the buyer have?

In general, if the work of art is a forgery, it is defective if it has been sold as genuine (Federal Supreme Civil Court, decision of 13 February 1980, VIII ZR 26/79). In this case, the buyer can claim rescission of the contract or a reduction of the purchase price, as well as damages if the seller acted with intent or negligence (sections 434 and 437, CC).

If the buyer has been defrauded by the seller, he or she also has the right to void the contract and claim repayment of the purchase price.

### Voiding inadvertent sales of works by masters

**13** Can a seller successfully void the sale of an artwork of uncertain attribution subsequently proved to be an autograph work by a famous master by proving mistake or error?

Section 119(2) of the CC provides for the right of any party to a contract to void the transaction if he or she erred with respect to a relevant property of the asset in question. It has been held that the authorship of a work of art qualifies as a relevant property (Federal Supreme Civil Court, decision of 8 June 1988, VIII ZR 135/87) and that the seller can validly void the purchase agreement if, at a later stage, it turns out that the work was actually that of a master rather than only being a copy or from the studio of the master. The seller bears the burden of proof of the origin of the work.

### **EXPORT AND IMPORT CONTROLS**

#### Export controls

# **14** Are there any export controls for cultural property in your jurisdiction? What are the consequences of failing to comply with export controls?

Under the Cultural Goods Protection Act (CPPA), certain categories of works of art are subject to export controls, irrespective of whether the export is to an EU member state or to a third country. The export controls apply if certain thresholds in terms of age and value of the piece are exceeded. Works that are sold by the creator and that are not registered in the register for nationally important cultural goods are not subject to export control provisions.

Category	Export to third country	
	Age (in years)	Value (€)
Paintings	50	150,000
Watercolours	50	30,000
Etchings and lithographs	50	15,000
Photographs	50	15,000
Archaeological items	100	0

Category	Export to third country	
	Age (in years)	Value (€)
Antiques (furniture, instruments, watches, ceramics, carpets, etc)	50	50,000

Category	Export to EU member state	
	Age (in years)	Value (€)
Paintings	75	300,000
Watercolours	75	100,000
Etchings and lithographs	75	50,000
Photographs	75	50,000
Archaeological items	100	0
Antiques (furniture, instruments, watches, ceramics, carpets, etc)	100	100,000

Any works that are listed in the register of nationally important cultural goods at www. kulturgutschutz-deutschland.de are subject to an export prohibition, irrespective of age and value.

A violation of the obligation to obtain an export licence (for the listed goods) or the export ban (for the goods registered in the register of nationally important cultural goods) carries a sentence of up to five years' imprisonment.

# Import controls

**15** Other than in relation to endangered species, are there any import controls for cultural property in your jurisdiction? What are the consequences of failing to comply with import controls?

The import of cultural property is prohibited according to section 28 of the CPPA if the item has been classified as national cultural property under the laws of the country of origin and if it has been exported disregarding the regulations concerning the protection of national cultural property of such country.

Furthermore, import of cultural property is prohibited if done under violation of European legal acts or under violation of section 1, No. 1 of the protocol of The Hague Convention regarding the Protection of Cultural Property in the Event of an Armed Conflict.

Sanctions for the violation of the above regulations are a maximum of five years of imprisonment or a financial fine (section 83, No. 3, CPPA). Furthermore, the object of cultural property or objects that were generated through or used to prepare or execute the import can be confiscated according to section 85, Nos. 1 and 2 of the CPPA.

# Export and import tax

**16** Does any liability to pay tax arise upon exporting or importing art, antiques or collectibles?

There is no specific tax liability for exporting or importing art. However, VAT might apply, as well as customs. The latter is determined on a case-by-case basis.

## **DIRECT AND INDIRECT TAXATION**

### Taxes

# **17** Outline the main types of tax liability arising from ownership and transfer of art, antiques and collectibles.

The two main types of tax liability are income tax (including corporate income tax and trade tax) and VAT.

Income tax will be triggered if art, antiques or collectibles are sold by a business and a profit is generated from the sale. The biggest potential issue in this regard is determining whether a collector holds the work in his or her private collection or whether he or she has a business income as a result of dealing in art. However, private persons buying and selling within one year might also incur tax if the acquisition was made with the speculative intention of making a profit.

With regard to VAT, it must be determined whether the person who is exporting art qualifies as an entrepreneur (ie, a dealer) under German VAT law. The VAT rate will be 19 per cent or 7 per cent, or no VAT will apply, and is determined on a case-by-case basis according to the VAT code.

### **Tax exemptions**

**18** Outline any tax exemptions or special conditions applicable to art, antiques and collectibles.

German tax law offers exemptions for income tax, inheritance and gift tax and certain other taxes, such as real estate tax, if a collection of art qualifies as being of public importance.

For instance, sponsorship or promotion of art is generally accepted as qualifying for a tax exemption under income tax law. Moreover, offering public access to collections generally qualifies for a tax exemption under inheritance tax law if the collection is qualified as being of public importance. Determining whether a collection of art is of public importance requires cooperation with the fiscal authorities.

According to article 43 of Council Regulation (EC) No. 1186/2009 of 16 November 2009 on Exemption from Customs Duty, an exemption from customs duties applies to goods of an educational, scientific or cultural nature, which are listed in Annex II of the Regulation.

### **BORROWING AGAINST ART**

#### Types of security interest

**19** In your jurisdiction what is the usual type of security interest taken against art, antiques and collectibles?

The usual type of security interest is a pledge, which normally entails the lender taking physical possession of the work. There is also the possibility of transferring title of the work to the lender as collateral. In this case, the work can remain with the borrower. However, there is a presumption of legal title for the possessor of the work (section 1006, the Civil Code (CC)), which entails a risk for the lender.

#### **Consumer loans**

**20** If the borrower borrowing against art assets in your jurisdiction qualifies as a consumer, does the loan automatically qualify as a consumer loan, and are there any exemptions allowing the lender to make a non-consumer loan to a private borrower?

If the borrower is a consumer, the terms of the CC on consumer lending apply, subject to certain exceptions (section 491, CC). Two exceptions may apply to borrowings against art:

- if the recourse of the lender is limited to the pledged work of art (section 491(2), No. 2, CC); or
- if the loan is for a maximum of three months and only minimal costs are involved (section 491(2), No. 3, CC).

#### **Register of security interests**

**21** Is there a public register where security interests over art, antiques or collectibles can be registered? What is the effect of registration? Is the security interest registered against the borrower or the art?

No.

#### Non-possessory security interests

**22** Can the lender against art collateral perfect its security interest without taking physical possession of the art?

No, the lender against art collateral must be in physical possession of the art to perfect its security interest according to section 1205 of the CC. The establishment of joint possession of the work of art can suffice to perfect its security interest if the work of art can be accessed by the lender, or if the work of art is in possession of a third party and the piece can only be handed over to the owner and lender together.

If the lender wants to have a perfected security without taking physical possession, a security transfer would have to be implemented, by which the lender would have to become the legal owner of the work.

# Sale of collateral on default

**23** If the borrower defaults on the loan, may the lender sell the collateral under the loan agreement, or must the lender seek permission from the courts?

The lender may proceed with the sale if he or she has obtained a valid court order to do so. This requires a court process unless there is a notarial deed of acknowledgment of debt. This instrument is rarely used in this context.

### **Ranking of creditors**

**24** Does the lender with a valid and perfected first-priority security interest over the art collateral take precedence over all other creditors?

In German law, the concept of a perfected security interest does not exist. German law operates on the concept of priority. However, if, for example, the work of art that has been pledged to the lender ultimately becomes the possession of the borrower, a third party can acquire good-faith title to the work if it is sold by the borrower.

If the lender has obtained a valid first-priority security interest in the work of art, he or she will be entitled to the full proceeds of the sale up to the value of the loan. If a liquidator has been installed over the estate of the borrower, then the sale will be made through the liquidator. Before disbursement of the sale proceeds to the borrower, the liquidator's fees will be deducted.

### **INTELLECTUAL PROPERTY RIGHTS**

### **Creator copyright**

**25** Does copyright vest automatically in the creator, or must the creator register copyright to benefit from protection?

According to section 7 of the Copyright Act (CA), all copyright vests automatically in the creator. The 'work made for hire' principle is not applicable in Germany, therefore legal entities will under no circumstances be regarded as creators. They can, however, be owners of related rights (most prominently for the release of posthumous works or the production of moving pictures) and might be granted exclusive or non-exclusive rights of use by the creator (section 31, CA).

There are no registration formalities in Germany. However, section 10(1) of the CA provides for a presumption of authorship based on designation. In the absence of proof to the contrary, a person is regarded as the creator of an artwork if he or she is identified as its creator on the original of the artwork.

#### **Copyright duration**

#### **26** What is the duration of copyright protection?

In general, copyright expires 70 years after the creator's death (section 64, CA). However, there are some specific regulations that deviate from this rule. For example, where several persons have jointly created a work without the possibility of separately exploiting their contribution (section 8, CA), copyright expires 70 years after the death of the last surviving joint author (section 65(1), CA).

German copyright law provides specific regulations for anonymous works in section 66 of the CA, which states that copyright expires 70 years after publication of the anonymous work. If it was not published during that period, the copyright expires 70 years after its creation.

Where German copyright law provides for related rights, particular provisions apply. In general, related rights are protected for 50 years from the creation of the underlying work. However, if the work is published during that term, the term of protection will restart and an additional protection term of 50 years is added, calculated from the first publication date.

According to section 69 of the CA, the term of protection is not calculated from the actual date of death or publication but commences at the end of the calendar year in which the event giving rise to it occurs. Therefore, if the author died on 1 January 1949, the copyright does not expire on 1 January 2019 but on 31 December 2019 at 12am.

### Display without right holder's consent

# **27** Can an artwork protected by copyright be exhibited in public without the copyright owner's consent?

The owner of the original of an artwork is authorised to exhibit it physically in public even if it has not yet been published (section 44(2), CA). The qualification of an artwork as an original depends on the criteria applied by professionals in the art trade. This plays a decisive role, particularly for serial productions of graphics and castings. With regard to these types of work, it is presupposed that the author himself or herself must have contributed to their production, for example, by giving instructions. Indications of the status of an original artwork may be numbering, or a signature or foundry stamp on the graphic or casting.

The exhibition right may also be invoked by third parties (eg, museums) to whom the owner has provided the original work (eg, by way of loan). However, it is required that the first owner has legally obtained the work from the creator.

The author may explicitly rule out the exhibition right, but this must occur at the time of the sale of the original and the exclusion must be made expressly (ie, it cannot later be inferred from the circumstances).

#### Reproduction of copyright works in catalogues and adverts

# **28** Can artworks protected by copyright be reproduced in printed and digital museum catalogues or in advertisements for exhibitions without the copyright owner's consent?

According to section 58(1) of the CA, the reproduction, distribution and making available to the public of artistic and photographic works that are exhibited in public or intended for public exhibition or public sale by the organiser shall be permitted for advertising purposes to the extent necessary for the promotion of the event.

Making available to the public comprises, inter alia, digital offline media, such as DVDs and CD-ROMs, and online usage, such as the advertisement of exhibitions on the internet. Advertising material and invitation cards using exhibited artistic works in preparation for an exhibition are permissible, but this does not apply to postcards, calendars or other merchandising, as those materials would constitute an independent gain of profit as opposed to direct promotion of the event.

If an artistic work is used on the basis of section 58 of the CA, the source of the work must always be cited, in particular the artist's name.

## **Copyright in public artworks**

#### **29** Are public artworks protected by copyright?

Public artworks, including street art, are protected by copyright. Copyright protection arises irrespective of whether rights of third parties are violated. Consequently, house owners must generally observe copyright law despite the unwanted imposition of a change to their buildings.

A moral right issue may arise when it comes to refurbishment of the building in question. Whereas the complete destruction of the building would be permissible, visible changes that affect the work of art may not be permissible. The same applies to changes of location in the case of site-related art, which can also be regarded as a violation of the author's moral rights. Removing street art from a building and selling it separately is also inadmissible under the right of distribution (section 17, CA).

### Artist's resale right

#### **30** Does the artist's resale right apply?

Section 26 of the CA provides for a resale right for originals of artistic or photographic works where the net sales price amounts to at least  $\in$ 400. Architectural works and works of applied art, as well as simple photographs, do not fall under this provision. The term 'originals' covers all works that have been produced by the artist or under his or her control, such as multiples (eg, casts, prints or copies to the extent that they have been made from the template of the work with the consent of the author).

The duration of the resale right coincides with the general copyright duration.

Beneficiaries are the author and co-author, their heirs and successors in right.

The resale royalty is limited to a maximum of €12,000 and amounts to:

- 4 per cent for the portion of the selling price up to €50,000;
- 3 per cent for the portion of the selling price from €50,000.01 to €200,000;
- 1 per cent for the portion of the selling price from €200,000.01 to €350,000;
- 0.5 per cent for the portion of the selling price from €350,000.01 to €500,000; and
- 0.25 per cent for the portion of the selling price exceeding €500,000.

The royalty becomes due from the seller if the work is resold and an art dealer or an auctioneer is involved as purchaser, seller or intermediary. If the seller is a private person, the art dealer or the auctioneer, involved as purchaser or intermediary, is jointly and severally liable in addition to the seller; in their internal relationship, however, the seller is solely liable for payment.

The beneficiary may only collect the payment claim directly, whereas the information rights in relation to the art dealer or auctioneer in respect of which of the author's works have been resold with their involvement during the past three years or in respect of the name and address of the seller, and regarding the selling price, must be pursued by a collecting society, generally VG Bild-Kunst.

The resale right is subject to the general statute of limitations, which is three years from the end of the year when the author was first entitled to his or her claim and he or she gained or could have gained knowledge thereof without gross negligence.

### **Moral rights**

### 31 What are the moral rights for visual artists? Can they be waived or assigned?

The moral rights of the author are the right of (first) publication (section 12, CA), the right of recognition of the authorship (section 13, CA) and the right to prohibit distortion of the work (section 14, CA). These moral rights may also be invoked by foreign artists, independent of whether their home country adheres to respective international conventions or is party to a bilateral agreement with Germany.

The following rights can be distinguished.

• The right of publication: this gives the author the right to determine whether and how his or her work will first be published, as well as the right to communicate or describe the content of his or her work to the public, as long as neither the work nor the essential content or a description thereof has been published with his or her prior consent. The consent must cover the original form of the artwork, and the specific time and place of the work's publication. Therefore, the first publication of an adaptation of the work would affect the author's usual rights if he or she had given consent for it. The same applies if the work was published at a different time or place as determined by the author. An exception to this right is the exhibition right that is automatically granted to the purchaser of an original work of art (even if it is published) according to section 44(2) of the CA.

- The right of recognition as the author of the work in relation to any use made of the work: the artist may determine whether and which designation of authorship the work shall bear. Authors, co-authors and publishers are entitled to the recognition right. While this right may not be entirely waived, the author may, depending on the case, agree to refrain from pursuing his or her right for a limited period of time (eg, in the case of a ghostwriter). However, permanent waiver of the recognition right has been rejected by German courts. Rather, there is a right to terminate such agreement after five years. The right of recognition allows the author to remain anonymous or to later dissociate himself or herself from the work.
- The right to prohibit the distortion or any other derogatory treatment of the work that
  might prejudice the author's legitimate intellectual or personal interests in the work:
  this moral right also applies to any alterations during usage of the work that are capable
  of affecting the author's legitimate interests.

Moral rights expire 70 years after the author's death.

### AGENCY

#### Accounting to the principal

**32** Does the law require the agent to account to the principal for any commission or other compensation received by the agent while conducting the principal's business?

The agent is generally obligated to continuously keep the principal informed on the status of any transaction, including any fees received (sections 666 and 675, the Civil Code (CC)). This includes the information on compensation received by the agent. This information obligation can be contractually excluded.

#### Disclosed agent commission

# **33** Does disclosure to the principal that the agent will receive a commission allow the agent to keep the commission unless the principal objects?

In the absence of an agreement to the contrary, the agent must disgorge any commission that he or she has received, or will receive, from a third party to the principal (section 667, CC; Federal Supreme Civil Court, decision of 30 May 2000, IX ZR 121/9). This disclosure is not sufficient for the agent to retain the commission. To do so, the agent must acquire the express or implied consent of the principal. The agent bears the burden of proof.

#### Undisclosed agent commission

**34** If a third party pays a commission to an agent that is not disclosed to the principal, can the principal claim the commission from the third party?

The principal can claim the commission from the agent.

#### **CONSIGNING ITEMS**

#### Protection of interests in consigned works

**35** How can consignors of artworks to dealers protect their interest in the artwork if the dealer goes into liquidation?

The consignment of an artwork does not change ownership of the work. If the dealer goes into liquidation, the owner can demand return of the property from the administrator. If a creditor or the liquidator attempts to sell the work, the owner can ask the court to intervene (section 771, the Code of Civil Procedure).

# AUCTIONS

#### Regulation

**36** Are auctions of art, antiques or collectibles subject to specific regulation in your jurisdiction?

German law contains certain privileges for public auctions. For an auction to qualify as public, it must be conducted by either a bailiff or a licensed auctioneer (section 383(3), the Civil Code (CC)). The main effects of a public auction are that the good-faith purchaser can acquire title in good faith even for stolen goods (section 935(2), CC) and that the specific provisions on purchases by consumers do not apply (section 474(2), CC).

# **37** May auctioneers in your country sell art, antiques or collectibles privately; offer advances or loans against art, antiques or collectibles; and offer auction guarantees?

Yes. However, in this case the specific privileges that accompany a public auction do not apply. If a dealer engages in frequent lending, he or she may be required to obtain a banking licence.

## **SPOLIATION DURING THE NAZI ERA**

### **Claims to Nazi-looted art**

**38** In what circumstances would the heirs of the party wrongly dispossessed typically prevail over the current possessor, if a court in your country accepted jurisdiction and applied its own law to a claim to art lost during the Nazi era?

The prospects of success depend on whether a public body, such as a museum, archive or library, or a private person or institution, is in possession of the art. Against the latter, the heirs may legally assert a claim for restitution; however, owing to the lengthy time that has passed since the Nazi era, claims of the heirs are likely to be time-barred.

The possessor may also argue that the art was acquired in good faith. Although this significantly reduces the chances of any legally enforceable claim for the return of the work, the possessor typically has an interest to amicably settle the heirs' restitution claim. Art labelled as potentially Nazi-looted becomes difficult, if not impossible, to sell.

The question of whether art can be successfully reclaimed from a public institution tends to be one of politics rather than legal principle. Germany signed the Washington Principles of 1998, to which German public institutions normally adhere, although they are not legally binding. The Principles were further implemented via two national soft law regulations.

In practice, the heirs will typically prevail over a public body as the current possessor if the art was allocated to the institution by previous 'state bodies', such as the Gestapo (the secret state police). If the art was sold to a public body, it is crucial to determine whether the loss of possession was caused by Nazi persecution. The guidelines establish the presumption that Nazi persecution was the reason for the sale of art from a person persecuted by the Nazis. Accordingly, the current possessor bears the burden of proof that the art was sold 'under normal circumstances', which increases the heirs' chances of success.

#### **39** Is there an ad hoc body set up to hear claims to Nazi-looted art?

In 2003, the government established the Limbach Commission, a panel of up to 10 honorary members that gives recommendations on restitution claims regarding art stolen or purchased under duress by the Nazis. The Commission's resolutions are based on the Washington Principles.

A decision is reached by conducting preliminary proceedings, followed by an oral hearing. A decision by the Commission requires a two-thirds majority. The Committee's decisions are not legally binding and can be categorised as mediation in disputes over provenance. As such, they cannot be appealed or enforced by either party. However, public bodies normally adhere to the Committee's resolutions.

#### LENDING TO MUSEUMS

#### **Responsibility for insurance**

# **40** Who is responsible for insuring art, antiques or collectibles loaned to a public museum in your jurisdiction?

There is no typical insurance arrangement in Germany relating to loaned art in public museums. It is possible to insure art on the part of the lender or the public museum. The insurance premium is determined by the risk of damage, which in turn is affected by the exhibition venue. The evaluation of the imminent risks at the exhibition venue is usually more difficult for the insurer of the lender, which may lead to an increased premium. Obtaining coverage under the museum's insurance is, therefore often, preferable.

In both variations, it is necessary to determine the art's market value. Since it is often difficult to assess the objective value of art, the insurer and the insured typically stipulate an amount contractually. To protect the parties against sudden increases in value (eg, if the

artist dies), insurance contracts normally include an escalation clause and stipulate the need for yearly re-evaluations.

In light of rising insurance premiums, a number of federal states are issuing guarantees in the event that the loaned work is damaged during transport or during the exhibition, thereby dispensing of the need to involve an insurer.

### Immunity from seizure

## **41** Are artworks, antiques or collectibles loaned to a public museum in your country immune from seizure?

Yes. It is long-settled case law that works of art that are on loan from a foreign country to a museum in Germany cannot be attached by a creditor of that country. Under general international law, the foreclosure of assets belonging to a foreign country is not permissible to the extent that the property serves public (as opposed to commercial) needs of that country (Berlin High Court, decision of 5 March 2010, 18 W 2/10). This includes works of art belonging to a foreign country (Federal Supreme Civil Court, decision of 1 October 2009, VII ZB 37/08).

#### **CULTURAL PATRIMONY**

#### **National treasures**

#### **42** Is there a list of national treasures?

There are 16 registers for cultural property of national significance. According to section 7 of the Cultural Goods Protection Act (CPPA), cultural property must be entered into a register of cultural property of national significance if:

- it is particularly significant for the cultural heritage of Germany, its states or one of its historical regions, and is, therefore, a formative part of Germany's cultural identity; and
- its removal would be a significant loss for Germany's cultural heritage so that keeping it in the federal territory is of outstanding cultural public interest.

An aggregation of individual items (in particular archival holdings, library holdings, estates, collections or parts thereof) must be entered into a register of cultural property of national significance even if the individual items do not necessarily fulfil these criteria. Decisive factors for the classification of national cultural property are the local reference to Germany and the history of reception of the cultural property. This does not necessarily mean that the cultural property must have been created in Germany or by a German artist; however, a short stopover of the cultural property in Germany is not enough.

Registration has the following consequences.

- The direct possessor must notify the competent authority of any change of location.
- No person (not even the owner or legitimate possessor) may destroy, damage or change the appearance of the cultural property in a substantial and permanent way, unless for

the purposes of professional conservation and restoration or research. Consequently, any loss, destruction, damage or any change to the appearance of the cultural property in a way that is not trivial and not temporary must be notified to the authorities.

- If the ownership changes, the new owner of the cultural property, or alternatively the former owner, is obliged to immediately notify the competent authorities.
- Most importantly, any temporary or permanent export of a registered cultural property is dependent on the permission (licence) of the authorities. This is the case even when the procedure to enter the cultural property in a register of cultural property of national significance has only been initiated and the decision on the registration has not yet become incontestable. To secure the remaining cultural property, the government may order seizure to keep such items inside Germany. Any export of registered cultural property without a permit is a criminal offence.

There is no compensation obligation other than certain tax concessions. Even if a permanent export licence is refused with final and binding effect, and the owner of the registered cultural property of national significance is then forced to sell it owing to economic hardship, the CPPA does not provide a legal compensation obligation. The competent authority is only obliged to seek a fair settlement. This, however, does not mean that the state is obliged to buy the cultural property, but must give support in finding potential buyers.

#### **Right of pre-emption**

**43** If the state is interested in buying an artwork for the public collections, does it have a right of pre-emption?

No.

#### Automatic vesting in the state

**44** In what circumstances does ownership in cultural property automatically vest in the state?

Under section 984 of the Civil Code, when a treasure is found, half of the property is acquired by the discoverer and the other half by the owner of the object in which the treasure was hidden. However, most of the federal states (except Bavaria) deviate from this provision under section 73 of the Introductory Act to the Civil Code. This provision grants a state a claim for an appropriation right under the various State Heritage Protection Acts. Under the provision, mobile monuments that are abandoned or have been hidden for so long that their owners can no longer be identified become the property of the state if they are discovered during government investigations or in protected excavation areas, or if they have an outstanding scientific value.

Additional possibilities for the state to acquire ownership exist under the CPPA as well as under tax and criminal laws.

#### Illegally exported property claimed by foreign states

### **45** How can a foreign state reclaim in your jurisdiction cultural property illegally exported from its territory?

The CPPA provides for various repatriation claims with slightly different procedures and conditions. These claims for return of cultural property pursuant to the CPPA are considered claims under public law. However, civil law claims can be raised independently and are not affected by these rules. In each case, there is either the possibility of administrative mediation or legal action before the competent courts.

If judicial proceedings before an administrative court are initiated, the following documents must be attached to the statement of claim:

- an adequate description of the cultural property, including information about:
  - its identity and provenance;
  - the actual or presumed date of removal; and
  - the actual or presumed location in the federal territory;
- a declaration stating that, under national law or according to administrative proceedings of the requesting member state or state party, the item is national cultural property; and
- a declaration by the requesting member state or state party that the cultural property has been unlawfully removed from its sovereign territory.

If the direct possessor exercised due diligence when acquiring the cultural property, he or she may refuse to return the cultural property until the requesting member state or state party has awarded him or her fair compensation. In determining the amount of compensation, consideration is given to the expenses incurred for acquiring the cultural property and for taking the measures necessary for its preservation. The compensation must not exceed the expenses. No compensation is paid for lost profits.

#### **NON-FUNGIBLE TOKENS**

#### Regulation and case law

**46** How are non-fungible tokens (NFTs) regulated in your jurisdiction? Is there any case law on NFTs in your jurisdiction?

Answer pending.

#### **ANTI-MONEY LAUNDERING**

#### Compliance

## **47** What are the anti-money laundering compliance obligations placed on the art trade?

Art dealers are subject to the Anti-Money Laundering Act (AMLA) of 2017. To comply with the obligations under the AMLA, art dealers must obtain and store information on their contract partners, representatives, the ultimate economic beneficiary and the transaction (section 8(1), AMLA).

With regard to a natural person, the art dealer must take note of his or her first or last name, place of birth, date of birth, nationality and place of residence. With regard to a legal entity, the art dealer must take note of its corporate name, legal form, register number and place of business, and the names of its legal representatives.

The dealer must take a copy of the identification document (passport or identification card) of the contract party or the representative and verify whether the contract partner or ultimate beneficiary qualifies as a politically relevant person. In addition, the dealer must continuously monitor the business relationship.

### **ENDANGERED SPECIES**

#### CITES

# **48** Is your jurisdiction a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)?

In Germany, the CITES Convention has been implemented by Council Regulation (EC) No. 338/97 of 9 December 1996 on the protection of species of wild fauna and flora, as well as the German Federal Regulation for the Protection of Species. The Convention and the respective implementation laws are enforced by the Federal Agency for Nature Conservation (BfN), which is charged with granting import and export permits for protected species and the products derived from them.

### **49** Is the sale, import or export of pre-CITES endangered species subject to a licence?

The sale of antiques is generally permissible. Antiques are specimens processed into objects before 1 June 1947, for example, into jewellery, decoration, art or objects of daily use (including musical instruments) that no longer require any further processing (blank objects are not included). Import and export is subject to a licence provided by the BfN.

## **50** Is the sale, import or export of post-CITES worked or antique endangered species authorised? On what conditions?

The sale, import and export of post-1947 worked endangered species is subject to strict regulations and is generally prohibited unless specific permits are obtained. Exceptions may apply for private, non-commercial import and export.

### Specific endangered animal products

## **51** Are there any special rules for works of art made of elephant ivory, rhino horn or other specific endangered animal products?

Yes. With regard to these species, additional restrictions apply. For example, private, non-commercial import and export is more restricted.

#### **CONSUMER PROTECTION**

### **Cancelling purchases**

**52** In what circumstances may consumers cancel the sale of art, antiques or collectibles?

Consumers may cancel contracts on the sale of art in specific circumstances.

In the case of distance contracts (online sale, etc) consumers generally have a 14-day right of withdrawal that cannot be excluded from the contract. According to this right, consumers may cancel the sale for any reason. An exception only applies for specific auctions, which does not include platforms such as eBay.

In addition, consumers may cancel contracts if the purchased item is defective; for example, if it was attributed to a certain period or a certain artist but transpires to be inauthentic.

#### Duties of businesses selling to consumers

#### **53** Are there any other obligations for art businesses selling to consumers?

With regard to distance contracts, comprehensive obligations under consumer protection laws apply. In particular, information obligations regarding price, shipping and contract details, including information on the statutory right of withdrawal and warranties, apply. For example, full contract details must be provided in a durable medium.

In addition, in the case of online sales, comprehensive formal requirements regarding the online store and its functionalities apply.

#### REGULATION

#### Art market regulator

**54** Is there a specific regulatory body overseeing the art market or certain business activities carried out within the art market in your jurisdiction?

No.

#### Other regulators

**55** What other forms of regulation are professional art market participants in your jurisdiction subject to?

The Cultural Goods Protection Act contains a number of rules and regulations pertaining to the professional art market. Apart from this, the art market is subject to the general rules, such as tax law, criminal law, etc.

#### **UPDATE AND TRENDS**

### Key developments of the past year

**56** Are there any other current developments or emerging trends that should be noted?

No updates at this time.

\* This chapter was co-authored by Ilja Czernik, who has since left the firm.



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# Greece

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**RETURN TO CONTENTS** 

### Summary

BUYING AND SELLING	114
Passing of title	114
Implied warranty of title	115
Registration	115
Good-faith acquisition of stolen art	116
Acquiring title to stolen art through prescription	116
Risk of loss or damage	117
Due diligence	117
Other implied warranties	118
Voiding purchase of forgeries	118
Voiding inadvertent sales of works by masters	119
EXPORT AND IMPORT CONTROLS	119
Export controls	119
Import controls	120
Export and import tax	122
DIRECT AND INDIRECT TAXATION	122
Taxes	122
Tax exemptions	123
BORROWING AGAINST ART	124
Types of security interest	124
Consumer loans	124
Register of security interests	124
Non-possessory security interests	125
Sale of collateral on default	125
Ranking of creditors	125
INTELLECTUAL PROPERTY RIGHTS	125
Creator copyright	125
Copyright duration	126
Display without right holder's consent	126
Reproduction of copyright works in catalogues and adverts	126
Copyright in public artworks	126
Artist's resale right	126
Moral rights	127
AGENCY	127
Accounting to the principal	127
Disclosed agent commission	127
-	

PAGE 114	RETURN TO SUMMARY
Undisclosed agent commission	128
CONSIGNING ITEMS	128
Protection of interests in consigned works	128
AUCTIONS	128
Regulation	128
SPOLIATION DURING THE NAZI ERA	129
Claims to Nazi-looted art	129
LENDING TO MUSEUMS	129
Responsibility for insurance	129
Immunity from seizure	130
CULTURAL PATRIMONY	130
National treasures	130
Right of pre-emption	130
Automatic vesting in the state	131
Illegally exported property claimed by foreign states	131
NON-FUNGIBLE TOKENS	131
Regulation and case law	131
ANTI-MONEY LAUNDERING	132
Compliance	132
ENDANGERED SPECIES	133
CITES	133
Specific endangered animal products	134
CONSUMER PROTECTION	134
Cancelling purchases	134
Duties of businesses selling to consumers	135
REGULATION	136
Art market regulator	136
Other regulators	136
UPDATE AND TRENDS	136
Key developments of the past year	136

### **BUYING AND SELLING**

### Passing of title

# 1 When does ownership of art, antiques and collectibles pass from seller to buyer?

According to the Greek Civil Code, ownership passes when the contract of sale is concluded. Two conditions must be met for the contract of sale of art to be concluded: (1) agreement

to sell or buy; and (2) physical delivery of the object from seller to buyer. No formalities are required. Both oral and written agreements are valid.

The seller and buyer are free to agree when ownership passes. Usually, the seller reserves title until receipt of payment.

#### Implied warranty of title

## **2** Does the law of your jurisdiction provide that the seller gives the buyer an implied warranty of title?

In a contract of sale, the seller must transfer title of the art to the buyer free from any third-party rights. Breach by the seller of this obligation is considered to be either non-performance of a contractual obligation or defective performance and it incurs liability, unless the buyer had knowledge of any third-party rights at the time of sale (with the exception of a pledge or seizure).

As a general rule, the fulfilment of a seller's obligations must take place as dictated by good-faith and commercial practices, and also taking into account the parties' particular agreements. Sellers who do not perform their obligations according to the specific agreements or good faith and moral ethics are liable for breach of contract.

The warranties implied by law in relation to title arising from the principle of good faith are mandatory. The parties may agree that the seller limits or excludes the warranty of title, but any agreement limiting the seller's liability caused by intent or gross negligence is null and void.

The buyer can rely on the warranty of title for 20 years. This limitation period starts running from the moment the claim arises and pursuit becomes possible. All provisions on limitation periods are mandatory law.

#### Registration

### **3** Can the ownership of art, antiques or collectibles be registered? Can theft or loss of a work be recorded on a public register or database?

There is no public register of art, antiques and collectibles. Possessors of movable objects characterised as national cultural patrimony must register them with the Ministry of Culture and Sport. This register is not public.

The owner can register the loss or theft of art on international, private databases, such as the Art Loss Register. INTERPOL also keeps a database of stolen art but does not receive requests or theft reports directly from private individuals. Rather, the owner has to report the event to the local police, who could then inform the National Central Bureau of INTERPOL to have the stolen item recorded on INTERPOL's Stolen Works of Art Database. The public have only partial access to this database.

#### Good-faith acquisition of stolen art

## 4 Does the law of your jurisdiction tend to prefer the victim of theft or the acquirer in good faith of stolen art?

According to the Greek Civil Code, the general principle is that ownership of stolen art vests with the original owner and does not pass to the good-faith acquirer. However, ownership to the good-faith acquirer passes if the stolen object is sold at a public auction or on the open market.

Although there is a general rule that the person who possesses, in good faith, a movable object for three years without interruption obtains ownership through constructive adverse possession, the good-faith acquirer of stolen art does not obtain ownership, as good faith is not recognised as a ground for passing title of stolen objects. The acquirer of stolen art can only obtain ownership after 20 years of uninterrupted possession, pursuant to the provisions on actual adverse possession.

For the acquirer to be deemed in good faith, they must either genuinely believe that the seller had good title or be unaware of the defective title, provided that both states of mind are not derived from gross negligence. By contrast, the acquirer is deemed to be in bad faith if they knew of the seller's lack of legal title or was unaware of the lack of title because of gross negligence. Good faith is presumed, while bad faith must be proved by the claimant.

#### Acquiring title to stolen art through prescription

5 If ownership in stolen art, antiques or collectibles does not vest in the acquirer in good faith, is the new acquirer protected from a claim by the victim of theft after a period of time?

The good-faith acquirer of stolen art is protected from a claim by the victim of theft if 20 years of peaceful, uninterrupted possession have passed from the date of possession. This does not apply to cultural objects protected by the state as cultural patrimony.

The statute of limitations can also aid the good-faith acquirer. Specifically, a claim by the victim of theft may be time-barred after five years from the date of theft of the art. However, if the stolen art was removed from a collection in public view or in a public space, the victim of theft will be time-barred after 15 years from the date of theft.

### **6** Can ownership in art, antiques or collectibles vest in the acquirer in bad faith after a period of time?

A bad-faith acquirer with 20 years of peaceful, uninterrupted possession can obtain ownership.

# 7 Must the professional seller of art, antiques or collectibles maintain a register of sales?

Sellers of antiques falling under the category of cultural patrimony must keep an official register of objects entering their premises that have been approved by the Ministry of

Culture and Sport. The register must include a description, a photograph and the origin of the object, the details of the previous and new owner or possessor, details of the possession permit, the date of sale and the sold price.

No register is required for objects that do not fall under the category above.

#### Risk of loss or damage

**8** When does risk of loss or damage pass from seller to buyer if the contract is silent on the issue?

According to the Greek Civil Code, the risk of loss or damage passes from seller to buyer upon delivery of the art, regardless of whether legal title passes with delivery or at a later stage. Risk also passes when the buyer is unable to take delivery of the art because of their own fault.

The parties are free to agree on the passing of loss or damage at another stage. In practice, the seller expressly assumes the risk of loss or damage until delivery, obtaining insurance for transport risks.

#### **Due diligence**

**9** Must the buyer conduct due diligence enquiries? Are there non-compulsory enquiries that the buyer typically carries out?

There is no obligation to conduct due diligence when buying art. However, a well-advised buyer will seek assurances in relation to the following:

- the seller's unencumbered legal title;
- the artwork's provenance;
- certificates from stolen art databases;
- expert opinions in relation to authenticity; and
- compliance with any cross-border obligations.

#### **10** Must the seller conduct due diligence enquiries?

In October 2020, <u>Law 4734/20</u> transposed into Greek legislation Directive (EU) 843/2018 and introduced due diligence obligations in respect of the client to professional sellers of fine art if the price exceeds  $\in$ 10,000. Specifically, they must identify the customer and beneficial owner and verify their identities, assess the purpose and intended nature of the business relationship and conduct ongoing monitoring. Private sellers, on the other hand, do not have an obligation to conduct due diligence enquiries.

#### **Other implied warranties**

# **11** Does the law provide that the seller gives the buyer implied warranties other than an implied warranty of title?

Generally, in a contract of sale the seller must deliver the goods with the agreed qualities and without any material defects. The seller is in breach of these obligations if the goods are (1) not as described, (2) not fit for the contract's purpose, (3) not fit for use or (4) not of satisfactory quality. In the case of artworks, the buyer is unlikely to be able to rely on breach of description, as it is uncommon to purchase art by description. Similarly, the buyer will not be able to rely on fitness for purpose and use warranties, unless it was expressly agreed that the purchase was intended for a specific use or purpose (eg, on-site installation). Therefore, arguments will centre around breach of satisfactory quality. False provenance, poor condition and fake or misattributed artworks may be considered to breach the implied warranties of agreed quality and lack of material defects. Such a breach by the seller is considered to be either non-performance of a contractual obligation or defective performance and it incurs liability, unless the buyer had knowledge of the lack of agreed qualities or of the defects of the products.

The parties may agree that the seller limits or excludes the above-mentioned warranties, but any agreement limiting the seller's liability caused by intent or gross negligence is null and void.

Finally, the buyer can rely on the warranties of agreed quality and lack of material defects for two years. This limitation period starts to run from delivery of the art to the buyer, unless the seller fraudulently concealed the defect or lack of agreed quality, in which case the buyer has 20 years to bring a claim.

#### Voiding purchase of forgeries

### **12** If the buyer discovers that the art, antique or collectible is a forgery, what claims and remedies does the buyer have?

If the buyer discovers that the art is a forgery, the following options are available.

On the basis of breach of the implied warranties of agreed quality or material defects, the buyer can:

- request substitution of the forgery with another genuine artwork (which is impracticable owing to the unique nature of artworks);
- ask for a reduction of the purchase price (this is pointless in practice as the value of a genuine artwork becomes obsolete if it turns out to be a forgery); or
- rescind the contract and demand return of the purchase price. Alternatively, the buyer can claim damages for non-performance of the contract. The buyer has two years to bring a claim.
- On the basis of fraudulent deception on the part of the seller, the buyer can:
- rescind the contract and request the rectification of any other damage (including actual damage and lost profits); or

 accept the contract and request the rectification of damage (including actual damage and lost profits).

### Voiding inadvertent sales of works by masters

**13** Can a seller successfully void the sale of an artwork of uncertain attribution subsequently proved to be an autograph work by a famous master by proving mistake or error?

Any party to a contract can request to void the transaction if the party erred in relation to one of the essential components of the contract. Selling an artwork as a 'copy of' that is subsequently proven to be an autograph work will probably satisfy the essential component requirement. The seller bears the burden to prove the mistake and, if he or she is successful in doing so, can void the transaction.

#### **EXPORT AND IMPORT CONTROLS**

#### Export controls

**14** Are there any export controls for cultural property in your jurisdiction? What are the consequences of failing to comply with export controls?

According to Law <u>4858/2021</u>, which recently codified <u>Law 3028/2002</u>, art, antiques and collectibles that fall under the category of cultural patrimony are subject to export controls. Specifically, the following movable monuments require an export licence:

- those dating up to 1453;
- those dating between 1453 and 1830 that constitute findings from excavation or other archaeological research, or have been removed from immovable monuments, as well as church icons and liturgical tools from the same era;
- those dating between 1453 and 1830 that do not fall under the category above, as long as they are characterised as monuments because of their social, technical, folkloric, ethnological, artistic, architectural, industrial or generally historical or scientific significance; and
- those that are more recent, as long as they are characterised as monuments because of their social, technical, folkloric, ethnological, artistic, architectural, industrial or generally historical or scientific significance.

The general rule is that export of such objects is forbidden, with exceptions for: (1) monuments that are of no great significance to the cultural heritage of the country and whose export does no harm the unity of a collection; and (2) temporary export. Moreover, movable monuments dating to before 1830 can be exported if it can be proven that they were imported into Greece less than 50 years ago, provided they have not been exported before that.

The export licence is issued by virtue of a decision of the Minister of Culture based on the opinion of the Central Archaeological Council.

Exporting a cultural object in breach of the above-mentioned export controls is a criminal offence and carries a 10-year prison sentence. If an object has been granted a temporary export licence and the owner fails to import it back, the owner is liable for up to five years' imprisonment. If, however, the owner applied for a temporary export licence without the intention of importing it back, this too carries a 10-year prison sentence. The illegally exported cultural objects are seized if they belong to the perpetrator or an accomplice. Alternatively, a criminal fine is imposed amounting to half of the value of the illegally exported objects.

In relation to objects that do not fall under the cultural patrimony definition above, permission for export must be obtained from the competent service of the National Gallery. This permission is purely administrative and is granted unless the object falls under the definition of cultural patrimony.

Finally, for artworks exported from Greece to a non-EU country, an EU export licence is required if the EU age and value thresholds are met.

#### Import controls

# **15** Other than in relation to endangered species, are there any import controls for cultural property in your jurisdiction? What are the consequences of failing to comply with import controls?

No licence is required for importing cultural goods that were either created or discovered in the customs territory of the European Union.

However, Greece is bound by Regulation (EU) 2019/880 on the introduction and the import of cultural goods, which applies to cultural goods either created or discovered outside of the European Union's customs territory.

Accordingly, as of 28 December 2020, the import of certain cultural goods that were removed from the territory of the country where they were created or discovered in breach of the laws of that country are prohibited. Greece has not yet enacted rules on penalties for infringements of this prohibition.

Additionally, although not yet applicable in practice, certain import conditions will have to be met for cultural objects that fall under the following categories: (1) products of archaeological excavations or discovery, as well as elements of artistic or historical monuments or archaeological sites that are more than 250 years old, regardless of their financial value; and (2) other items that are more than 200 years old and have a minimum financial value of €18,000 (indicatively, ancient coins, paintings, sculptures, prints, rare manuscripts, old books, etc).

#### Import licence

Objects under category (1) above require an import licence. The holder of the goods must apply for an import licence to the Greek customs authorities via a centralised electronic system. The application must be accompanied by supporting documents providing evidence that the cultural goods have been exported from the country where they were created or

discovered in accordance with the laws of that country or providing evidence of the absence of such laws and regulations at the time the cultural goods were taken out of its territory.

The import licence may be denied where the customs authorities:

- have information or reasonable grounds to believe that the goods were removed from the territory of the country where they were created or discovered in breach of the laws of that country;
- have not been provided with the required supporting documents and information;
- have information or reasonable grounds to believe that the holder of the goods did not acquire them lawfully; or
- have been informed that there are pending claims for the return of the cultural goods by the country where they were created or discovered.

### Importer statement

Objects under category (2) above require an importer statement. The holder of the goods must submit, via the same centralised electronic system, an importer statement and a standardised document. The importer statement must consist of a declaration signed by the holder of the goods stating that the cultural goods have been exported from the country where they were created or discovered in accordance with the laws of that country at the time they were taken out of its territory. The standardised document must describe in detail the cultural goods in question.

If the country where the cultural goods were created or discovered cannot be reliably determined or the cultural goods were taken out of the country where they were created or discovered before 24 April 1972, the import licence application may be accompanied by supporting documents and the declaration (if the objects fall under category (2)) may instead state that the cultural goods have been exported in accordance with the laws and regulations of the last country where they were located for a period of more than five years and for purposes other than temporary use, transit, re-export or transhipment.

#### Sanctions

Greece has not yet enacted rules on penalties for infringements in relation to import licences and importer statements but is expected to impose penalties that will be effective, proportionate and dissuasive by 28 June 2025.

#### Application

In practice, the requirements for both import licences and importer statements are expected to be deferred until 2024 or 2026 to enable the development of the centralised online system.

#### **Export and import tax**

### **16** Does any liability to pay tax arise upon exporting or importing art, antiques or collectibles?

No tax liability arises upon the export of art, antiques and collectibles from Greek territory. Conversely, duties and VAT at a reduced rate of 13 per cent are applicable to the import of the same goods and are payable upon import. This reduced VAT rate on imports was introduced by Law 4738/2020 (as amended by Law 4876/2021) and will apply until 30 June 2022, after which the standard 24 per cent VAT rate will be applicable. Nevertheless, a number of exemptions are provided for in cases where special customs schemes are applicable. In such cases, where the goods enter into Greek territory under a special customs regime (such as the temporary import regime or the intra-EU transit regime), the applicable duties or VAT will become payable as soon as the goods exit these special import regimes. Moreover, in cases where the goods imported into Greece are destined for subsequent export to a third country, their import is VAT-exempt (provided that the lawful requirements are met).

#### **DIRECT AND INDIRECT TAXATION**

#### Taxes

**17** Outline the main types of tax liability arising from ownership and transfer of art, antiques and collectibles.

### Personal income tax

If the seller is an individual tax resident in Greece and the transfer of art, antiques and collectibles is carried out for the purposes of gaining profit, then the transfer can be considered to be a business transaction; any profit from the transaction will be subject to personal income tax at progressive rates of up to 44 per cent and a special solidarity contribution at progressive rates of up to 10 per cent. A business transaction occurs whenever a single transaction takes place for profit or whenever 'consistent similar transactions' (ie, three similar transactions within a six-month period) take place.

#### Deemed personal income tax

The acquisition by an individual tax resident in Greece of movable objects (including art, antiques and collectibles) of a value higher than  $\in 10,000$  will be taxed as deemed personal income, unless the value of the acquisition is covered by the declared income or capital of the buyer.

#### Corporate income tax

If the seller is a legal person or entity that is tax resident in Greece or has a Greek permanent establishment (to which the profits from selling art are attributable), then any business profits from selling art, antiques and collectibles are subject to corporate income tax at a rate of 22 per cent.

#### Inheritance and donation tax

The gratuitous transfer of art, antiques and collectibles may be subject to Greek inheritance and donation tax, under certain circumstances, at progressive rates of up to 10 per cent, 20 per cent or 40 per cent, depending on the family relationship between the transferor and the transferee. As of 1 January 2021, the gifts between first-degree relatives (ie, spouses, parents, children and grandchildren) have been increased to €800,000.

#### Wealth tax

Greece does not levy any wealth tax on the ownership of movable objects.

#### Reporting of art, antiques and collectibles

Politicians, public servants, judges, certain categories of businesspeople and corporate executives should report movable objects or collections with a value higher than €40,000 (including VAT). Supporting documents proving the value of the asset should be filed along with the relevant return.

#### VAT

The transfer of art, antiquities and collectibles by an individual or legal person or entity subject to VAT will be subject to VAT at the standard 24 per cent rate (or in some specific cases to a reduced 13 per cent rate until 30 June 2023) if the transfer is taxable in Greece.

#### **Tax exemptions**

**18** Outline any tax exemptions or special conditions applicable to art, antiques and collectibles.

#### Corporate income tax

The revenues of not-for-profit legal persons or legal entities are exempt from income tax if they are realised in the context of fulfilling the not-for-profit purpose of the legal persons or entities. Revenues from activities that are not considered part of this purpose are subject to corporate income tax (at a rate of 22 per cent).

#### Inheritance and donation tax

If the transferee is a not-for-profit legal person or entity, then the applicable tax rate is 0.5 per cent on gifts in most cases.

The suspension of said tax that applied until 30 June 2022 has not been extended and, thus, 0.5 per cent gift or inheritance tax is levied on relevant transactions.

#### VAT

A reduced VAT rate (13 per cent) is applicable to the import of art, antiques and collectibles and the sale of the same goods made by their creator or his or her successors. This reduced

VAT rate is applicable until 30 June 2023. Moreover, a special VAT scheme is provided for the resellers of art, antiques and collectibles. For resellers who opt for this special VAT scheme, the VAT due is calculated on their profit margin. For this special regime to apply, the law provides for specific requirements and for a detailed procedure that should be followed.

#### **BORROWING AGAINST ART**

#### Types of security interest

**19** In your jurisdiction what is the usual type of security interest taken against art, antiques and collectibles?

Under Greek law, a pledge may be taken against movable assets, including movable artwork, antiques and collectibles. Pledges are established for the purpose of securing certain claims, present or future.

#### **Consumer loans**

**20** If the borrower borrowing against art assets in your jurisdiction qualifies as a consumer, does the loan automatically qualify as a consumer loan, and are there any exemptions allowing the lender to make a non-consumer loan to a private borrower?

A loan does not automatically qualify as a consumer loan if the borrower qualifies as a consumer. In general, consumer loans are granted for purposes that fall outside the scope of the borrower's business activities. Private borrowers can be granted other types of loans, such as loans for the purposes of their business activities or for the purposes of the acquisition of real estate property.

#### **Register of security interests**

**21** Is there a public register where security interests over art, antiques or collectibles can be registered? What is the effect of registration? Is the security interest registered against the borrower or the art?

There is no special public register where security interests over artworks are registered. The establishment of a typical pledge over a movable asset does not require any public registration. However, Law 2844/2000 provides for a specific type of pledge that can be established without delivery of the pledged asset, by virtue of the parties' relevant written agreement under certain conditions. The establishment and effectiveness of this kind of pledge requires registration and publication with the pledge registry of the borrower's residence or registered seat (or the Athens pledge registry if the borrower is not based in Greece). For the purposes of this registration, the parties submit a form including their details and the details of the pledged assets and secured claims. All submitted forms are registered and kept, and can be found on the basis of the pledgor's name.

#### Non-possessory security interests

### **22** Can the lender against art collateral perfect its security interest without taking physical possession of the art?

Law 2844/2000 provides for a specific type of pledge that can be established without delivery of the pledged asset, by virtue of the parties' relevant written agreement. For the pledge to be established, the following criteria must be met: (1) the borrower and the lender must be professionals or businesses; (2) the security must be granted for the purposes of the borrower's business activities or profession; and (3) the pledge must be registered and published with the pledge registry of the borrower's residence or registered seat (or the Athens pledge registry if the borrower is not based in Greece). For these reasons, this type of pledge mostly applies to professional entities, such as galleries and collections.

### Sale of collateral on default

**23** If the borrower defaults on the loan, may the lender sell the collateral under the loan agreement, or must the lender seek permission from the courts?

The only way to sell a pledged work of art is to have it seized by a bailiff and sold via auction within seven to eight months of it being seized. The auction is conducted electronically through an e-auction platform before a notary and the interested party can participate by paying a guarantee two working days before the date of the auction.

#### **Ranking of creditors**

## **24** Does the lender with a valid and perfected first-priority security interest over the art collateral take precedence over all other creditors?

The creditor in whose favour the pledge has been established must announce his or her claim to the auctioneer within 15 days of the auction. The pledge set on the auctioned object induces special privilege for the creditor, which, in an auction with general privileges (tax, insurance contributions, employees, etc), is satisfied in 65 per cent of the auction. The general privileges are classified in the remaining 25 per cent and claims that are deprived of privilege are classified in the remaining 10 per cent.

#### **INTELLECTUAL PROPERTY RIGHTS**

#### **Creator copyright**

**25** Does copyright vest automatically in the creator, or must the creator register copyright to benefit from protection?

Pursuant to Law 2121/1993, with the creation of the work, creators automatically have the right of copyright in that work, which includes the economic right and the moral right. No registration or other formality is required. Exceptions to this rule apply for works created by employees in the course of employment.

#### **Copyright duration**

#### **26** What is the duration of copyright protection?

The duration of copyright protection is as follows:

- for artistic works, the whole of the creator's life plus 70 years after their death;
- for works of joint authorship, the whole of the life of the last surviving author plus 70 years after their death; and
- for anonymous or pseudonymous works, 70 years from 1 January of the year after that
  in which the work is lawfully made available to the public. However, if, during this period,
  the author discloses their identity, or when the pseudonym adopted by the author leaves
  no doubt as to their identity, the general rules for artistic works apply.

#### Display without right holder's consent

**27** Can an artwork protected by copyright be exhibited in public without the copyright owner's consent?

The presentation of a work of fine art to the public is permissible without the consent of the creator and without payment, to the extent necessary to promote its sale.

#### Reproduction of copyright works in catalogues and adverts

**28** Can artworks protected by copyright be reproduced in printed and digital museum catalogues or in advertisements for exhibitions without the copyright owner's consent?

Museums that own the physical carriers into which works of fine art have been incorporated can, without the consent of the creator and without payment, reproduce those works in catalogues or advertisements for exhibitions, provided that such reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interest of the author.

#### Copyright in public artworks

#### 29 Are public artworks protected by copyright?

Public artworks, including street art, are protected by copyright. This is the case irrespective of whether the rights of third parties (especially, property rights) are violated. Nevertheless, the exercise of certain exploitation rights granted by copyright protection may be restricted owing to claims by affected third parties (eg, property owner).

#### Artist's resale right

#### **30** Does the artist's resale right apply?

The creator of an original work has a non-transferrable, non-waivable resale right to receive a royalty based on the sale price obtained for any resale of the work by an art market

professional, subsequent to the first transfer of the work by the creator. Copyright duration provisions apply for the resale right as well. The beneficiaries are the creator and their heirs or assignees.

The creator's percentage of the resale price is calculated as follows:

- 5 per cent for the portion of the sale price up to €50,000;
- 3 per cent for the portion of the sale price from €50,000.01 to €200,000;
- 1 per cent for the portion of the sale price from €200,000.01 to €350,000.01;
- 0.5 per cent for the portion of the sale price from €350,000.01 to €500,000; and
- 0.25 per cent for the portion of the sale price exceeding €500,000.

The total amount of the royalty may not exceed €12,500.

The royalty is payable by the seller. When an intermediary art market professional is involved, they share liability with the seller for payment of the royalty.

The management and protection of the resale right may be entrusted to collective management organisations or can be collected directly by the creator.

#### **Moral rights**

#### **31** What are the moral rights for visual artists? Can they be waived or assigned?

The moral rights for visual artists are as follows: right to attribution; right of publication; right of integrity; and right to access.

The moral rights can inherited but cannot be assigned. They can be waived only partially.

#### AGENCY

#### Accounting to the principal

**32** Does the law require the agent to account to the principal for any commission or other compensation received by the agent while conducting the principal's business?

Pursuant to Greek Civil Code, the agent is obliged to account to the principal for any commission or other compensation received while managing the principal's business.

#### Disclosed agent commission

**33** Does disclosure to the principal that the agent will receive a commission allow the agent to keep the commission unless the principal objects?

The parties are free to agree on whether the agent will be remunerated with a commission or not. However, it must be an express agreement. In addition, the agent must disclose all material information in relation to the commission, including the amount received.

#### Undisclosed agent commission

### **34** If a third party pays a commission to an agent that is not disclosed to the principal, can the principal claim the commission from the third party?

Contractual terms are binding only on the contracting parties, and the parties alone may seek their enforcement. Therefore, the principal does not have a claim for the commission against the third party but will have to claim the undisclosed commission from the agent, as the agent is accountable even for negligent conduct pursuant to their obligation to report and account to the principal for their management.

#### **CONSIGNING ITEMS**

#### Protection of interests in consigned works

**35** How can consignors of artworks to dealers protect their interest in the artwork if the dealer goes into liquidation?

Pursuant to Law 4738/2020, if a dealer goes into liquidation, the consignor can claim the artwork from the creditors, provided that the artwork remains in the liquidated estate of the dealer. If the consigned artwork has been sold and the price has not yet been paid to the consignor at the time of filing for liquidation, the consignor can claim it directly from the buyer.

To protect their interests, consignors must be able to demonstrate that they are the owners of the artwork. It is good practice to enter into a written consignment agreement with the dealers to avoid any disputes in relation to proprietary rights.

There is no register where consignors can register their interest in consigned works.

#### AUCTIONS

#### Regulation

### **36** Are auctions of art, antiques or collectibles subject to specific regulation in your jurisdiction?

Where an auction is organised for antiques that fall under the category of cultural patrimony, the permission of the competent authority of the Ministry of Culture and Sport is required for the specific list of objects. If a monument is sold at auction, the Greek state, the authorised museums and the monument collectors have a pre-emption right to purchase it at the same price. This pre-emption right must be exercised within 10 days of the date of the auction.

No specific regulation exists for auctioning artworks that do not fall under the category of cultural patrimony.

# **37** May auctioneers in your country sell art, antiques or collectibles privately; offer advances or loans against art, antiques or collectibles; and offer auction guarantees?

Auctioneers of art, antiques or collectibles can sell privately either after the auction, if the lot has failed to sell, or independently of an auction.

Offering advances or granting loans or other credit facilities are activities reserved for financial institutions subject to the supervisory control of the Bank of Greece. There is no law regulating auction guarantees.

#### **SPOLIATION DURING THE NAZI ERA**

#### **Claims to Nazi-looted art**

**38** In what circumstances would the heirs of the party wrongly dispossessed typically prevail over the current possessor, if a court in your country accepted jurisdiction and applied its own law to a claim to art lost during the Nazi era?

There are no specific provisions regulating claims to art looted during the Nazi era in Greece. General provisions on good-faith acquisition of stolen objects and acquiring title to stolen objects through prescription would apply.

39 Is there an ad hoc body set up to hear claims to Nazi-looted art?

There is no such body.

#### **LENDING TO MUSEUMS**

#### **Responsibility for insurance**

# **40** Who is responsible for insuring art, antiques or collectibles loaned to a public museum in your jurisdiction?

The question of who bears responsibility for insuring art, antiques or collectibles loaned to a public museum is a matter of agreement between the lender and the borrower. In practice, the public museum will provide private, all-risk, nail-to-nail insurance for loaned objects. This insurance is usually pre-approved by the lender and the premium is paid by the borrowing institution.

The possibility for the Greek state to offer a guarantee to indemnify for loss or damage caused to antiquities and works of art exhibited in Greece by virtue of a loan from foreign museums is included in Law 4858/2021 (Codification of Law on the Protection of Antiquities and Cultural Heritage). For this state indemnity to take effect, the domestic exhibition must be organised or co-organised by the Ministry of Culture and Sports or by domestic public museums or museums established by law. The requirement that the exhibition must have special cultural or historical value to qualify for this state indemnity and the complex state

processes for granting it could present a hurdle that is hard to overcome and commercial insurance may, in many instances, remain the only practical option.

#### Immunity from seizure

## **41** Are artworks, antiques or collectibles loaned to a public museum in your country immune from seizure?

There are no provisions for immunity from seizure for artworks, antiques or collectibles loaned to a public museum. It is common practice for an immunity from seizure declaration or a letter of comfort to be issued by the museum or the Ministry of Culture and Sport, assuring that they will put their best efforts into returning the goods under loan to the country of origin.

Artworks belonging to museum collections cannot be confiscated.

#### **CULTURAL PATRIMONY**

#### **National treasures**

#### 42 Is there a list of national treasures?

Pursuant to Law 3028/2002, art, antiques and collectibles that fall under the category of cultural patrimony are deemed to be national treasures. The owner or possessor of such an artwork is responsible for: (1) its safekeeping; (2) informing the competent authorities about its location, and any transport and loss; (3) allowing it to be supervised by the competent authorities; and (4) refraining from exporting it without an official export licence.

#### **Right of pre-emption**

# **43** If the state is interested in buying an artwork for the public collections, does it have a right of pre-emption?

If a cultural object that is considered a national treasure is sold at auction, the Greek state, the authorised museums and the monument collectors have a pre-emption right to purchase it at the same price. This right must be exercised within 10 days of the auction.

Further, the state has a right of pre-emption in relation to a private sale. Specifically, the owner must notify the Ministry of Culture and Sport of their intention to sell, whom they intend to sell to and the price. The owner must then wait for a period of one month to allow the state to exercise its right of pre-emption. A sale without observing the above procedure is null and void.

Read this article on Lexology

Published March 2023

#### Automatic vesting in the state

### **44** In what circumstances does ownership in cultural property automatically vest in the state?

Ownership of cultural objects dated up to 1453 and excavation findings, irrespective of their chronology, are automatically vested in the state.

#### Illegally exported property claimed by foreign states

## **45** How can a foreign state reclaim in your jurisdiction cultural property illegally exported from its territory?

Greek Law 4355/2015 implemented Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a member state. If the foreign state reclaiming the cultural good is an EU member state, Greece will apply the export laws of the country of origin, and if the object is deemed to have been illegally exported, Greece will order its return. The good-faith acquirer may be awarded fair and equitable compensation. The requesting state may not initiate the return proceedings (1) more than three years after it became aware of the location of the object and of the possessor's identity and (2) more than 30 years after the object was unlawfully removed from the territory of the requesting state.

If the foreign state is not an EU member state, it is possible for it to rely on the UNIDROIT Convention on stolen or illegally exported cultural objects, provided it is also party to the Convention. The reclaiming state can request the Greek court to order the return of a cultural object illegally exported if the object is of significant cultural importance for the requesting state or if the removal of the object significantly impairs certain interests listed in the Convention.

Relevant bilateral agreements related to the protection of cultural property in Greece are:

- a memorandum of understanding between Greece and China;
- a bilateral agreement between Greece and Switzerland; and
- a cooperation agreement between Greece and Russia.

#### **NON-FUNGIBLE TOKENS**

#### **Regulation and case law**

### **46** How are non-fungible tokens (NFTs) regulated in your jurisdiction? Is there any case law on NFTs in your jurisdiction?

NFTs have not been a subject matter in any piece of legislation per se, including the recently revised IP Law.

Generally applicable laws or regulations that apply to NFTs include Intellectual Property Laws concerning mainly the transfer or licensing of IP rights and Consumer Protection Laws, in cases when a party to a smart contract acts under its capacity as a consumer.

Applying to blockchain technology in general and NFTs in particular to the extent that the latter are governed by a smart contract, <u>Law 4961/2022</u> on Emerging Technologies has recently introduced a definition for smart contracts and provisions on the elements that qualify a data record as a smart contract, as well as the validity and evidentiary effect of smart contracts and their enforcement.

Briefly, smart contracts are valid so long as they meet the criteria of Greek contract law as set out in the Civil Code and the Code for Civil Procedure. Where signature is required for the conclusion of a contract, the Law recognises electronic signatures.

Moreover, on the basis of consumer protection laws, smart contracts which govern an NFT are considered contracts conducted by distance means, therefore distance contract consumer protections will be applicable where one of the parties is a consumer.

NFTs have not been the subject of litigation before the Greek courts.

### ANTI-MONEY LAUNDERING

#### Compliance

### **47** What are the anti-money laundering compliance obligations placed on the art trade?

Pursuant to Law 4734/20, those who store, trade or act as intermediaries in the sale of fine art and antiquities valued at €10,000 or more are required to conduct customer due diligence – namely, identify the customer and beneficial owner and verify their identity, assess the purpose and intended nature of the business relationship and conduct ongoing monitoring.

Additionally, enhanced due diligence must be conducted where the transaction (1) is particularly complex, unusually large, conducted in an unusual manner or seems to lack an economic or lawful purpose, (2) relates to a cultural artefact and (3) involves a high-risk third country.

In these instances, art market participants need to obtain more in-depth information about the client and the beneficial owner, and the source of funds. They also need to obtain senior management approval and conduct more frequent ongoing monitoring of the business relationship. In addition, they must ensure that any payments are made through an account in the name of the client or beneficial owner and that the account is held in a financial institution with adequate anti-money laundering controls.

Where an intermediary is involved, the above due diligence obligations must be conducted for both the intermediary and the end client.

Read this article on Lexology

Published March 2023

#### **ENDANGERED SPECIES**

#### CITES

# **48** Is your jurisdiction a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)?

Both Greece and the European Union have acceded to CITES. The Convention is applied within the European Union through the EU Wildlife Trade Regulations.

The management authority of the Convention is the Ministry of the Environment and Energy. The competent authorities for granting permits and certificates are the decentralised administration authorities around the country.

## **49** Is the sale, import or export of pre-CITES endangered species subject to a licence?

Intra-EU trade and movement is allowed for specimens of species listed in Annexes B, C and D of Regulation (EC) No. 338/97 only if they have been acquired or imported into the European Union in accordance with the provisions of CITES and the EU Wildlife Trade Regulations. Specimens of species listed in Annex A are generally not allowed to be used for commercial purposes and their export to another EU country is subject to a licence. The Annexes are periodically amended so the latest versions should be consulted.

For CITES endangered species to be imported in the European Union, an import permit is required for species in Annexes A and B and an import notification is required for species in Annexes C and D. Further, the import of some species in the European Union is prohibited. The Commission periodically updates the list of CITES endangered species whose import into the European Union from the countries of origin is prohibited.

Exceptions apply for 'worked specimens' (ie, specimens that are significantly altered from their natural raw state for jewellery, adornment, art, utility or musical instruments) acquired before 3 March 1947, which can be traded in the European Union without a certificate. The age must be determined in writing by a recognised, independent expert and maybe also accompanied by a radiocarbon dating or isotope analysis special lab report.

# **50** Is the sale, import or export of post-CITES worked or antique endangered species authorised? On what conditions?

Post-CITES worked or antique endangered species are subject to the EU Wildlife Trade Regulations and their sale, import and export are subject to the restrictions and conditions that apply to CITES (and pre-CITES) endangered species.

#### Specific endangered animal products

### **51** Are there any special rules for works of art made of elephant ivory, rhino horn or other specific endangered animal products?

The European Commission adopted revised guidance on the EU regime governing elephant ivory on 16 December 2021. The new measures affect both commercial trade and imports and exports of raw and worked elephant ivory.

Intra-EU commercial trade is suspended for:

- raw ivory, except for the exclusive purpose of repairing objects containing pre-1975 musical instruments and pre-1947 antiques of high cultural, artistic or historical importance – these exceptions will require a certificate from the Ministry of Environment and Energy; and
- worked ivory items, unless the items in question pre-date 1947. Even then, commercial transactions are only permitted with a certificate from the Ministry of Environment and Energy.

Re-exports and imports are suspended for raw ivory items. They are allowed strictly for worked ivory to pre-1975 musical instruments and sales of pre-1947 antiques of high cultural, artistic or historical importance to museums. The guidance further allows for a permit to be issued where the object in question either forms part of a genuine exchange of cultural goods between reputable institutions, or is an heirloom being moved as part of a family relocation or for enforcement, scientific or educational purposes.

In respect of rhino horn, no export permits or re-export certificates are issued, except if the relevant decentralised administration authority is satisfied that the permit or certificate will be used for a narrow list of legitimate purposes. Greece, in principle, will not grant any certificate for intra-EU trade of rhino horn. The import of hunting trophy rhino horn from outside the European Union may be permitted for personal use only.

#### **CONSUMER PROTECTION**

#### **Cancelling purchases**

### **52** In what circumstances may consumers cancel the sale of art, antiques or collectibles?

A buyer may withdraw from a contract if the seller does not fulfill their obligations, (eg, delays the delivery of the product or is unable to supply it owing to their own fault). The products sold need in general to conform with the sales contract (eg, be of the description, type, quantity and quality, and not possess the functionality and other features, as required by the sales contract, be fit for any particular purpose for which the consumer requires it, be fit for the purposes for which goods of the same type would normally be used, etc). Consumers are entitled to either a proportionate reduction of the price, or, in case of a major lack of conformity of the product, withdraw from the sales contract if the seller has declared, or it is clear from the circumstances, that the seller will not bring the goods into conformity or

the seller does not fully and properly bring the goods into conformity or a lack of conformity appears despite the seller having attempted to bring the goods into conformity or the lack of conformity is of such a serious nature as to justify an immediate price reduction or termination of the sales contract or the lack of conformity is identified within 30 days of delivery and the consumer accordingly informs the seller without any undue delay.

In addition to these general provisions, consumers are protected by Law 2251/1994, which protects all types of consumers and includes no specific provisions for artwork consumers. In particular, this framework applies in the case of distant or out-of-store contracts. Distant contracts are concluded without the physical presence of the parties and by means of distance communication (eg, teleshopping) whereas out-of-store contracts are concluded in places where transactions are not usually carried out (eg, contracts concluded at the buyer's workplace), with the suppliers using the technique of surprise (as the consumers and buyers are requested to enter into a transaction at a time when they are not prepared to do so).

In such cases, the consumer has the right to withdraw from the contract within 14 days, without stating any reason. The consumer bears only the direct cost of returning the goods, unless the supplier has agreed to bear the cost himself or herself or has failed to inform the consumer about that cost.

#### Duties of businesses selling to consumers

#### **53** Are there any other obligations for art businesses selling to consumers?

A seller is obliged to deliver the product on time, without any defects and with the special features agreed between the parties.

With regard to distant contracts, Law 2251/1994 on consumer protection imposes additional obligations on suppliers. Each supplier who intends to conclude distant contracts is obliged to register his or her relevant activity in the General Commercial Registry. The supplier must also provide the consumer with the mandatory relevant information regarding the description of the product, the identity of the supplier, the price, the delivery procedures, the right of withdrawal, etc. As for out-of-store contracts, the supplier must provide the consumer with a copy of the executed contract or confirmation of the contract in writing.

When it comes to standard terms and conditions, the supplier must indicate their existence to the consumer and provide real knowledge of their content, otherwise the consumer is not bound by them. In general, pre-formulated terms are interpreted in favour of the consumer and should not – under any circumstances – overburden his or her position in a contract.

The aforementioned obligations concern sales in general – and the protection of all types of consumers – and no specific obligations are imposed on art businesses regarding the sale of artworks.

#### REGULATION

#### Art market regulator

**54** Is there a specific regulatory body overseeing the art market or certain business activities carried out within the art market in your jurisdiction?

There is no regulatory body overseeing the art market, with the exception of the Ministry of Culture and Sport overseeing auction sales for objects falling under the cultural patrimony category.

#### **Other regulators**

## **55** What other forms of regulation are professional art market participants in your jurisdiction subject to?

Credit and financial institutions (that offer loans in general) are supervised by the Bank of Greece, in cooperation with the European Central Bank under the Single Supervisory Mechanism. The purpose of this supervision is to ensure the stability and smooth operation of the financial system as well as the transparency of trading procedures and conditions. Beyond supervisory responsibilities, the Banking Supervision Department has suggested imposing administrative sanctions on supervised institutions.

Insurance companies and insurance brokers are supervised by the Department of Private Insurance Supervision of the Bank of Greece. To be able to offer private insurance products, they must be registered with the Special Registry of the Bank of Greece.

Finally, if a supplier – who must be registered in the General Commercial Registry (GEMI) – intends to conclude distant contracts, he or she must register this activity with GEMI. In the case of violations of the provisions regarding registration in the GEMI, a fine corresponding to the gravity of the violation is imposed. GEMI is supervised by the Ministry of Development and Investments.

The aforementioned regulations concern the institutions and the suppliers of distant contracts in general.

#### **UPDATE AND TRENDS**

#### Key developments of the past year

**56** Are there any other current developments or emerging trends that should be noted?

No updates at this time.



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**RETURN TO CONTENTS** 

### Summary

BUYING AND SELLING	139
Passing of title	139
Implied warranty of title	140
Registration	141
Good-faith acquisition of stolen art	141
Acquiring title to stolen art through prescription	141
Risk of loss or damage	142
Due diligence	142
Other implied warranties	143
Voiding purchase of forgeries	144
Voiding inadvertent sales of works by masters	145
EXPORT AND IMPORT CONTROLS	145
Export controls	145
Import controls	145
Export and import tax	145
DIRECT AND INDIRECT TAXATION	146
Taxes	146
Tax exemptions	146
BORROWING AGAINST ART	146
	<b>146</b> 146
BORROWING AGAINST ART Types of security interest Consumer loans	
Types of security interest	146
Types of security interest Consumer loans	146 147
Types of security interest Consumer loans Register of security interests	146 147 147
Types of security interest Consumer loans Register of security interests Non-possessory security interests	146 147 147 147
Types of security interest Consumer loans Register of security interests Non-possessory security interests Sale of collateral on default	146 147 147 147 148
Types of security interest Consumer loans Register of security interests Non-possessory security interests Sale of collateral on default Ranking of creditors INTELLECTUAL PROPERTY RIGHTS	146 147 147 147 148 148
Types of security interest Consumer loans Register of security interests Non-possessory security interests Sale of collateral on default Ranking of creditors INTELLECTUAL PROPERTY RIGHTS Creator copyright	146 147 147 147 148 148 148
Types of security interest Consumer loans Register of security interests Non-possessory security interests Sale of collateral on default Ranking of creditors INTELLECTUAL PROPERTY RIGHTS Creator copyright Copyright duration	146 147 147 147 148 148 148 <b>149</b>
Types of security interest Consumer loans Register of security interests Non-possessory security interests Sale of collateral on default Ranking of creditors INTELLECTUAL PROPERTY RIGHTS Creator copyright	146 147 147 147 148 148 148 <b>149</b> 149
Types of security interest Consumer loans Register of security interests Non-possessory security interests Sale of collateral on default Ranking of creditors INTELLECTUAL PROPERTY RIGHTS Creator copyright Copyright duration Display without right holder's consent	146 147 147 148 148 148 <b>149</b> 149 149 149
Types of security interest Consumer loans Register of security interests Non-possessory security interests Sale of collateral on default Ranking of creditors INTELLECTUAL PROPERTY RIGHTS Creator copyright Copyright duration Display without right holder's consent Reproduction of copyright works in catalogues and adverts	146 147 147 148 148 148 <b>149</b> 149 149 149 149
Types of security interest Consumer loans Register of security interests Non-possessory security interests Sale of collateral on default Ranking of creditors INTELLECTUAL PROPERTY RIGHTS Creator copyright Copyright duration Display without right holder's consent Reproduction of copyright works in catalogues and adverts Copyright in public artworks	146 147 147 147 148 148 148 148 149 149 149 149 149 150
Types of security interest Consumer loans Register of security interests Non-possessory security interests Sale of collateral on default Ranking of creditors INTELLECTUAL PROPERTY RIGHTS Creator copyright Copyright duration Display without right holder's consent Reproduction of copyright works in catalogues and adverts Copyright in public artworks Artist's resale right	146 147 147 147 148 148 148 148 149 149 149 149 149 149 150 150
Types of security interest Consumer loans Register of security interests Non-possessory security interests Sale of collateral on default Ranking of creditors INTELLECTUAL PROPERTY RIGHTS Creator copyright Copyright duration Display without right holder's consent Reproduction of copyright works in catalogues and adverts Copyright in public artworks Artist's resale right Moral rights AGENCY	146 147 147 148 148 148 <b>149</b> 149 149 149 149 149 150 150 150
Types of security interest Consumer loans Register of security interests Non-possessory security interests Sale of collateral on default Ranking of creditors INTELLECTUAL PROPERTY RIGHTS Creator copyright Copyright duration Display without right holder's consent Reproduction of copyright works in catalogues and adverts Copyright in public artworks Artist's resale right Moral rights	146 147 147 148 148 148 149 149 149 149 149 149 150 150 150

PAGE 139	RETURN TO SUMMARY
Undisclosed agent commission	151
CONSIGNING ITEMS	152
Protection of interests in consigned works	152
AUCTIONS	152
Regulation	152
SPOLIATION DURING THE NAZI ERA	153
Claims to Nazi-looted art	153
LENDING TO MUSEUMS	153
Responsibility for insurance	153
Immunity from seizure	154
CULTURAL PATRIMONY	154
National treasures	154
Right of pre-emption	154
Automatic vesting in the state Illegally exported property claimed by foreign states	154 155
NON-FUNGIBLE TOKENS	155
Regulation and case law	155
ANTI-MONEY LAUNDERING	155
Compliance	155
ENDANGERED SPECIES	156
CITES	156
Specific endangered animal products	157
CONSUMER PROTECTION	158
Cancelling purchases	158
Duties of businesses selling to consumers	159
REGULATION	160
Art market regulator	160
Other regulators	160
UPDATE AND TRENDS	161
Key developments of the past year	161

### **BUYING AND SELLING**

### Passing of title

# 1 When does ownership of art, antiques and collectibles pass from seller to buyer?

Sellers and buyers in Hong Kong constitute two forms of market. The first is auctions, and the second is the over-the-counter commercial retail trade. The <u>Sale of Goods Ordinance</u> effectively provides that when a person who is not the owner and is not transferring under

the authority or with the consent of the owner effects a transfer to a third-party buyer, the buyer acquires no better title than the transferring seller. This means that on those facts, the seller is not able to transfer any title, and the buyer does not acquire any title.

However, the Sale of Goods Ordinance preserves the good passing of title in market overt.

For a sale to qualify in market overt, there must be an open sale of goods in a shop or market in Hong Kong in the ordinary course of the business of that venue. Upon the sale being transacted by the buyer in good faith and without notice of any defect or want of title on the part of the seller, the good title to the goods passes to the buyer.

Separately, the Sale of Goods Ordinance provides that where the seller has a voidable title, but the title was not avoided at the time of the sale, the buyer in good faith and without notice of the seller's title defect acquires a good title.

#### Implied warranty of title

## **2** Does the law of your jurisdiction provide that the seller gives the buyer an implied warranty of title?

The Sale of Goods Ordinance has an implied warranty of title that the seller has the right to sell. This is coupled with an implied warranty of freedom of the goods from any charge or incumbrance not disclosed or made known to the buyer before the making of the sale contract.

A connected and directly sequential further implied warranty provides that the goods are free from any charge or incumbrance and that buyer will enjoy quiet possession of the goods, subject only to exceptional disturbance either by the owner or by any other person who may be entitled to the benefit of any charge or incumbrance, as was or will have been disclosed to or will have been known by the buyer.

Under a further implied warranty, neither of (1) or (2) below can disturb the quiet possession of the goods by the buyer:

- 1 the seller in the case of his or her own goods or the goods of a third person where the seller is transferring title of a third person; and
- 2 anyone claiming through or under either of the options in item (1).

There is a further implied condition that where goods are sold by description, they must correspond to the description, and in a sale that also involves a sample, the bulk must correspond with the description, regardless of whether it also corresponds with the sample. The seller's liability for sale by description is not avoided by the fact that they are selected by the buyer.

A final well-advised inclusion in any substantial purchase and sale of contract for goods such as artwork is that any implied warranty can be negated or varied by express agreement, as well as by the course of dealings between the parties or by usage if the usage in the market binds both parties to the contract. An express condition or warranty cannot negate

an implied condition or warranty under the Sale of Goods Ordinance unless the express warranty is inconsistent with the implied one.

#### Registration

**3** Can the ownership of art, antiques or collectibles be registered? Can theft or loss of a work be recorded on a public register or database?

There is no register of ownership in Hong Kong of art, antiques or collectibles; however, loss can be reported to the Art Loss Register (ALR), which is incorporated in England with a registered address at Hatton Garden, London. The ALR has published terms and conditions that apply to any search. Its service conditions provide for search of the Register, for new registration of any theft or loss of an artwork or valuable item and the enlistment of the ALR to help in reuniting a lost artwork with its owner through the use of its database and its specialist recoveries team.

The best course for the seller is expressly to exclude the implied warranties under the Sale of Goods Ordinance from any transaction of sale of an art piece to the buyer.

The Sale of Goods Ordinance clearly provides that any implied right, duty or liability can be negated or varied by express agreement or by course of dealings between the parties.

There are many ways in which an artwork can be 'lost' that will not be reported to the ALR and so it stands effectively as one potentially useful but in no way an exclusive route of enquiry into art loss.

#### Good-faith acquisition of stolen art

**4** Does the law of your jurisdiction tend to prefer the victim of theft or the acquirer in good faith of stolen art?

The availability of market overt both enables and protects a good faith purchase by a buyer on the open market, regardless of whether the artwork is stolen, provided that the buyer has no notice of the theft and buys in good faith. Good faith is a matter of authentic and genuine belief.

#### Acquiring title to stolen art through prescription

5 If ownership in stolen art, antiques or collectibles does not vest in the acquirer in good faith, is the new acquirer protected from a claim by the victim of theft after a period of time?

The good faith belief of the acquirer of an artwork is a paramount constituent element and protection in market overt.

A claim by a third party must establish bad faith in the acquirer. The ability to do this is, however, subject to the statutory limitation under the <u>Limitation Ordinance</u>, which provides for a six-year period, during which the claimant will be able to make his or her claim. The six-year period runs from the date when the cause of action arose, which can be either

the date of the actual sale transaction or the date upon which the claiming former owner discovers that the sale has been made. In both cases, the expiry of the six-year period running from the date when the cause of action arose is final.

# 6 Can ownership in art, antiques or collectibles vest in the acquirer in bad faith after a period of time?

No. Bad faith elements at the time of acquisition are a mandatory element at both the start and through any continuation to defeat ownership in the acquirer.

# 7 Must the professional seller of art, antiques or collectibles maintain a register of sales?

There is no obligation in Hong Kong for a professional seller of art, antiques or collectibles to maintain a register of sales. If a register is maintained, then it may be useful as rebuttable evidence in the context of historical fact of the transaction.

#### Risk of loss or damage

### 8 When does risk of loss or damage pass from seller to buyer if the contract is silent on the issue?

Under the Sale of Goods Ordinance, unless otherwise agreed, the risk of loss or damage to the goods passes from the seller to the buyer, but the goods remain at the seller's risk until the property in the goods is transferred to the buyer. Once the property has been transferred to the buyer, the risk passes to the buyer, regardless of whether delivery is made.

Otherwise, the standard provision in auction house sales is for the catalogue conditions of sale to state clearly that the risk in the goods being purchased at the auction passes on the fall of the auctioneer's hammer.

#### **Due diligence**

## **9** Must the buyer conduct due diligence enquiries? Are there non-compulsory enquiries that the buyer typically carries out?

There is no obligation on the buyer of an artwork to conduct a due diligence enquiry. However, in the context of a large, high-value artwork, it is not unusual for the buyer to make due diligence enquiries of the seller, although the seller is under no legal obligation to answer.

If the seller answers and the answer is fraudulent, this may give rise to a cause of action by the buyer; however, it may not of itself necessarily avoid the purchase and sale transaction.

#### **10** Must the seller conduct due diligence enquiries?

Regardless of the context or channel of the market, the seller has no obligation to conduct due diligence enquiries relating to the buyer.

In the terms of a high-value transaction, there is always a possibility that it may involve money laundering, which may be an offence under the <u>Organised and Serious Crimes</u> <u>Ordinance</u> (OSCO). OSCO restricts the dealing in proceeds of an indictable offence and requires a mandatory report to be made to the government authority in respect of any suspicious property that may represent those proceeds.

Under Schedule 1, Part 1 of the <u>Anti-Money Laundering and Counter-Terrorist Financing</u> <u>Ordinance</u>:

money laundering means an act intended to have the effect of making any property-

that is the proceeds obtained from the commission of an indictable offence under the laws of Hong Kong, or of any conduct which if it had occurred in Hong Kong would constitute an indictable offence under the laws of Hong Kong; or

that in whole or in part, directly or indirectly, represents such proceeds, not to appear to be or so represent such proceeds;

Whether there are one or more persons handling funds or monies that are obtained from the commission of an indictable offence is a matter of fact.

#### Other implied warranties

**11** Does the law provide that the seller gives the buyer implied warranties other than an implied warranty of title?

The law implies the following:

- the seller has the right to sell the goods and, in the case of an agreement to sell, he or she will have the right to sell the goods at the time when the property will pass;
- the goods are free and will, until the passing of property, remain free from any charge or incumbrance not disclosed or known to the buyer before the contract is made; and
- the buyer will enjoy quiet possession of the goods, subject only to possible disturbance by the owner or other person entitled to the benefit of any charge or incumbrance that is disclosed or known.

Other than this, the Sale of Goods Ordinance implies the following in contracts for sale of goods:

- the goods must correspond with the given description, and if the sale is by sample in addition to the description, the bulk of the goods that corresponds to the sample will not satisfy the former if the goods do not also correspond with the description given;
- the goods supplied under the contract are of merchantable quality, but there is no such condition:
  - where defects in the goods have been specifically drawn to the buyer's attention before the contract is made;
  - in respect of defects discovered by a buyer during an examination completed before the contract was made; or

- in respect of defects that would have been apparent on reasonable examination of the sample where the contract is a contract for sale by sample;
- if the buyer expressly or impliedly makes known to the seller any particular purpose for which the goods are being bought, the sale carries an implied condition by the seller that the goods supplied are reasonably fit for the particular purpose, except where the circumstances show that the buyer does not rely upon or that it is unreasonable for him or her to rely upon the seller's skill or judgment; and
- a contract for sale by sample carries an implied condition that the bulk must correspond with the sample in quality, the buyer must have a reasonable opportunity to compare the bulk with the sample, and the goods must be free from any defect rendering them unmerchantable that is not apparent on reasonable examination of the sample.

However, it is expressly provided in the Sale of Goods Ordinance that any right, duty or liability that arises under the contract of sale of goods by implication of law may be negated or varied by express agreement, as well as by the course of dealings between the parties or by usage if the usage in the market binds both parties to the contract.

The buyer must consider requiring that either some or all implied conditions and warranties under the Sale of Goods Ordinance be excluded. It is further provided that any express condition or warranty that is inconsistent with a condition or warranty implied by the Sale of Goods Ordinance does not negate that implied condition or warranty.

#### Voiding purchase of forgeries

**12** If the buyer discovers that the art, antique or collectible is a forgery, what claims and remedies does the buyer have?

The passing off as genuine of a fake, forged or non-authentic artwork is a fraudulent act under the <u>Crimes Ordinance</u>. The offence is committed where a person makes a false instrument, such as where a document is created by the person with the intention that the maker – or any third party – will be able to use the document to induce another person to accept it as genuine, where the acceptance will inspire the other person to do or not to do some act that will prejudice that other person him or herself or a third party. Conviction of this offence carries a maximum sentence of 14 years' imprisonment.

The Crimes Ordinance also establishes the offence of counterfeiting, although this offence is expressly restricted to apply only in the case of currency notes or coins that resemble the genuine article and are reasonably capable of being passed off as the genuine article. Whether currency notes or coins can fall within the definition of 'artwork' is very often a matter of belief; however, if it can be established, then the above-mentioned offence may have been committed and may result in a sentence of 14 years' imprisonment on conviction.

#### Voiding inadvertent sales of works by masters

# **13** Can a seller successfully void the sale of an artwork of uncertain attribution subsequently proved to be an autograph work by a famous master by proving mistake or error?

The seller of an artwork not attributing at the time of sale a certain authorship of the artwork, and in the absence of a provision reserving the rights of the seller, in the event of subsequent discovery with proof of authenticity will have no available action against the buyer in respect of the sale, provided that the original attribution was made in good faith.

To be voidable by the doctrine of mistake, any such action by the seller must be immediate upon discovery; otherwise, the doctrine of laches and delay in action by the seller will prejudice the seller's right to void the sale.

#### **EXPORT AND IMPORT CONTROLS**

#### Export controls

**14** Are there any export controls for cultural property in your jurisdiction? What are the consequences of failing to comply with export controls?

There are no export controls for cultural property in Hong Kong.

#### Import controls

**15** Other than in relation to endangered species, are there any import controls for cultural property in your jurisdiction? What are the consequences of failing to comply with import controls?

There are no import controls for cultural property in Hong Kong.

#### **Export and import tax**

**16** Does any liability to pay tax arise upon exporting or importing art, antiques or collectibles?

There are no taxes on the export or import of art, antiques or collectibles.

#### **DIRECT AND INDIRECT TAXATION**

#### Taxes

**17** Outline the main types of tax liability arising from ownership and transfer of art, antiques and collectibles.

There is no tax liability arising from ownership and transfer of art, antiques and collectibles per se in Hong Kong.

#### Tax exemptions

**18** Outline any tax exemptions or special conditions applicable to art, antiques and collectibles.

There are no tax exemptions or special conditions applicable to art, antiques and collectibles in Hong Kong.

#### **BORROWING AGAINST ART**

#### Types of security interest

**19** In your jurisdiction what is the usual type of security interest taken against art, antiques and collectibles?

Borrowing against art is very much in its infancy in the Hong Kong art market, but there are loan providers that have programmes of lending funds to high net worth persons against the security provided by their artworks.

In the case of a fixed asset, such as a painting or a piece of porcelain, physical deposit of the asset with the lender can provide contractual security, and it is even sometimes possible to take a charge over the art asset and even to permit the charging borrower or owner to retain possession of an attractive piece. This is a market in its infancy, although it is likely to grow given the substantial appreciation of works of art that are able to secure loan finance to be put to work for other purposes.

Regardless of whether the borrower is a limited company or an individual, it is possible for the lender to take a charge over the art asset concerned. In the case of a charge by a limited company, it can be taken as a charge on a book debt represented by the advanced funding. The charge must be registered at the Companies Registry within three weeks of the date of the charge; otherwise, it will be void against the liquidators of the corporate charging owner.

#### Collective investment securitisation of artwork

An environment in which any form of securitisation is likely to be classified as a security attracting and requiring detailed observance of the securities and futures legislation has still not majorly developed in Hong Kong. There is current discussion about whether 'tokens' representing some kind of right to an underlying asset are securities. Under present

legislation, a cleverly drawn up collective investment scheme could find a way around the securities definition to allow the promoter or manager to provide divided interests in the securitised collective proprietorship of an artwork. This incipient investment activity has growth prospects.

#### **Consumer loans**

**20** If the borrower borrowing against art assets in your jurisdiction qualifies as a consumer, does the loan automatically qualify as a consumer loan, and are there any exemptions allowing the lender to make a non-consumer loan to a private borrower?

Hong Kong has no legal recognition of consumer or non-consumer loans.

#### **Register of security interests**

**21** Is there a public register where security interests over art, antiques or collectibles can be registered? What is the effect of registration? Is the security interest registered against the borrower or the art?

There is no public register for entry of security interests over art, antiques or collectibles. Security interests such as mortgages by limited companies over art, antiques or collectibles should be registered at the Companies Registry within three weeks of the date of the loan transaction. In the event of default, the intended security under the mortgage will be void against the liquidators of the charging limited company owner. The limited company owner or any private owner mortgaging the artwork can retain possession of it while the loan is outstanding.

#### Non-possessory security interests

# **22** Can the lender against art collateral perfect its security interest without taking physical possession of the art?

In the case of a limited company owner or mortgagor of the artwork, the security interest of the lender must be perfected by registering the mortgage or charge at the Companies Registry within three weeks of the date of the transaction. That being satisfied, the mortgaging owner may retain or take possession of the mortgaged asset.

In the case of an individual mortgagor or chargor, there is no registration system, and the owner and the lender may make arrangements to their convenience in respect of actual possession retained by the charging owner of the artwork concerned. In the event of such retention, the secured lender should require some kind of labelling of its rights on the artwork concerned.

#### Sale of collateral on default

### **23** If the borrower defaults on the loan, may the lender sell the collateral under the loan agreement, or must the lender seek permission from the courts?

In the event of loan default by the borrower, the mortgaged document can provide that the mortgagee sell the collateral without a court order, although a court order affords a valid extra cautionary protection to the mortgagee.

#### **Ranking of creditors**

## **24** Does the lender with a valid and perfected first-priority security interest over the art collateral take precedence over all other creditors?

The lender with a valid and perfected first-priority fixed charge over the art collateral takes precedence over all other creditors and would also take priority over a floating charge, even if the fixed charge is created after the floating charge in circumstances where notice of the existence of the floating charge has been given.

Where a floating charge that is the charge over a class of assets, which in the course of the business of the borrower changes from time to time and which may be disposed of without specific consent of the lender, is crystallised into a fixed charge upon the occurrence of certain events stipulated in the loan agreement (eg, insolvency and creation of a second security), the first-priority fixed charge lender will still enjoy priority if the fixed charge has been acquired without notice of the specific crystallisation clause.

Fixed charges over assets such as artwork rank in priority according to the date of their creation and registration. Floating charges also rank in priority according to their date of creation and registration.

There are certain prior claims that apply to the proceeds of realisation of a floating charge, including the costs of preserving and realising the assets, the remuneration of the receiver and payment of the proper costs and expenses of receivership and the debts that are preferential in the receivership.

Unsecured creditors rank as follows, from highest to lowest priority:

- in the liquidation of a limited company, the costs and expenses of the liquidation in the circumstances of a limited company;
- the amounts showing to employees;
- statutory debts to the government such, as rates and taxes;
- personal holding deposits (up to the amount of HK\$500,000 per depositor), if the limited company mortgagor in liquidation is a bank;
- the amount showing to insured persons claiming under an insurance contract against the insurer, if the company is an insurer;
- landlords seeking to take control of the goods of the debtor or mortgagor in settlement of unpaid rent within three months of the date of the winding order in the case of a limited company; and

ordinary unsecured creditors who would rank among themselves for a dividend of equal percentages.

#### **INTELLECTUAL PROPERTY RIGHTS**

#### **Creator copyright**

**25** Does copyright vest automatically in the creator, or must the creator register copyright to benefit from protection?

Copyright vests automatically as the property right in (inter alia) original literary, dramatic, musical or artistic work. 'Artistic' is defined to mean a graphic work, photograph, sculpture or collage, regardless of artistic quality.

The author of a work – defined as the person who creates it – is the first owner of any copyright in the work, and there is no requirement or obligation to register the copyright to benefit from protection.

#### **Copyright duration**

#### **26** What is the duration of copyright protection?

Copyright in an artistic work expires at the end of the 50-year period from the end of the calendar year in which the author dies. If the work is of unknown authorship, copyright expires at the end of the 50-year period from the end of the calendar year in which the work was first made or, if the work is made available to the public during that 50-year period, at the end of the 50-year period from the end of the calendar year in which it is first made available to the public.

#### Display without right holder's consent

# **27** Can an artwork protected by copyright be exhibited in public without the copyright owner's consent?

Presentation of an artwork protected by copyright is an exclusive right of the copyright owner. The copyright in the displayed work without the licence of the copyright owner infringes the exclusive acts restricted by copyright.

#### Reproduction of copyright works in catalogues and adverts

# **28** Can artworks protected by copyright be reproduced in printed and digital museum catalogues or in advertisements for exhibitions without the copyright owner's consent?

The copying of any description of a copyright work is an act restricted by the copyright in the copyright owner. Copying by means of reproducing the work in any material form or in advertisement for exhibitions in any case without the consent of the copyright owner amounts to infringement.

#### Copyright in public artworks

#### **29** Are public artworks protected by copyright?

The <u>Copyright Ordinance</u> provides that copyright in a building and in sculptures, in models for buildings and in works of artistic craftsmanship, if permanently situated in a public place or in premises open to the public, is not infringed by making a graphic work representing it or making a photograph or film of it, or broadcasting or including a visual image of it in a cable programme service.

#### Artist's resale right

#### **30** Does the artist's resale right apply?

There is no artist's resale right in Hong Kong.

#### Moral rights

#### 31 What are the moral rights for visual artists? Can they be waived or assigned?

The author of an artistic work has the right to be identified as an author of the work whenever:

- the work is published commercially or exhibited in public, or a visual image of it is broadcast or included in a cable programme service;
- a film including a visual image of the work is shown in public or copies of the film are issued or made available to the public; or
- a sculpture, a work of artistic craftsmanship or a work of architecture in the form of a building or a model for a building, or copies of graphic work representing or photographs of the aforementioned, are issued or made available to the public.

The author of a work of architecture in the form of a building also has the right to be identified on the building as constructed or, when more than one building is constructed to the design, on the first of them to be constructed. The right of the author in the case of identification on a building is a right to be identified by appropriate means visible to persons entering or approaching the building, and the identification must, in each case, be clear and reasonably prominent.

In asserting their right of identification, the author can specify a pseudonym, initials or some other particular form of identification, and the author's chosen form must be used in the case of assertion.

A person does not infringe the moral right of an author by doing any of the acts mentioned as being restricted, unless assertion of moral rights is required by the Copyright Ordinance. The modes of assertion may be general or in relation to any specified act or description of an act in relation to the public exhibition of an artistic work.

The assertion of moral rights binds the assignee of the copyright work and anyone claiming through him or her, regardless of whether that person has notice of the assertion. In the case of assertion in relation to a public exhibition of artistic work, anyone into whose hands

the original or copy falls will be bound by the assertion, regardless of whether the identification is still present or visible.

In an action for infringement of those rights, the court, in considering remedies, takes into account any delay in asserting the right; therefore, laches may be raised against the assertion of the right.

The Copyright Ordinance further establishes a right to the author of (inter alia) an artistic work not to have their work subjected to derogatory treatment, which is defined as amounting to distortion or mutilation of the work or otherwise prejudicial actions to the honour or reputation of the author.

Moral rights are not assignable by the author.

#### AGENCY

#### Accounting to the principal

**32** Does the law require the agent to account to the principal for any commission or other compensation received by the agent while conducting the principal's business?

There is no statutory requirement of an agent to account to the principal for any commission or other compensation received by the agent while conducting the business of the principal.

#### **Disclosed agent commission**

**33** Does disclosure to the principal that the agent will receive a commission allow the agent to keep the commission unless the principal objects?

Under common law, the making of secret profit realised by the agent from taking an undisclosed commission can be actionable at the instance of the principal. Better protection for the agent would be disclosure of the earning of and the entitlement to the commission.

On the whole, implied consent by the principal is not available to protect the agent in retaining the commission, and express consent by way of disclosure to the principal is the safest way for the agent to retain the commission. Those principles are not relevant to addressing the amount of the commission; they are only relevant to its factual earning by the agent.

#### Undisclosed agent commission

# **34** If a third party pays a commission to an agent that is not disclosed to the principal, can the principal claim the commission from the third party?

When a commission is paid by an auction house to an agent without disclosure to the principal consignor of the sold goods at the auction, the effect is that the payment of the commission reduces the profit made by the consigning principal to the auction sale. This is

prima facie open to objection and legal action by the principal whether against the auction house through the making of the undisclosed commission payment or to the receiving agent.

However, properly drawn auction house conditions of business for a seller will expressly reserve to the auction house the right to pay out of its own commissions a fee to any third party introducing to the auction house bidders or property to be sold.

#### **CONSIGNING ITEMS**

#### Protection of interests in consigned works

# **35** How can consignors of artworks to dealers protect their interest in the artwork if the dealer goes into liquidation?

Protection of the ownership of a consigned asset is very important, in particular where the consignee, being an individual, enters bankruptcy or, being a corporation, enters into liquidation.

It is, therefore, extremely important for the consignee to issue a clear printed receipt recording the identification of the item, its condition and the fact that it has been the property of the consignor and consigned to the consignee solely for the purposes of the intended uses by both parties, such as storage or sale. Similarly, the consigned item should be clearly labelled as being the consigned item, identified against the number, date and description of the receipt issued by the consignee.

There is no register in Hong Kong for consignors to register an interest in consigned artworks.

#### AUCTIONS

#### Regulation

# **36** Are auctions of art, antiques or collectibles subject to specific regulation in your jurisdiction?

The Sale of Goods Ordinance provides that where goods are put up for sale by auction in lots, each lot is prima facie deemed to be the subject of a separate contract of sale.

A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner. The customary manner in Hong Kong is for the fall of the hammer to establish completion of the sale.

Until any such announcement is made on the fall of the hammer or other customary manner, any bidder may retract his or her bid.

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 him or herself or to employ any person to bid at the sale,

or for the auctioneer knowingly in the absence of notification to take any bid from the seller or any such person.

Any sale contravening this rule may be treated as fraudulent by the buyer.

A sale by auction may be notified to be the subject of a reserve or upset price, and a right to bid may also be reserved expressly by and on behalf of the seller. Where a right to bid is expressly reserved, but not otherwise, the seller, or a person on his or her behalf, may bid at the auction.

**37** May auctioneers in your country sell art, antiques or collectibles privately; offer advances or loans against art, antiques or collectibles; and offer auction guarantees?

An auctioneer may sell art, antiques or collectibles privately either after the auction or independently of the auction.

#### **SPOLIATION DURING THE NAZI ERA**

#### **Claims to Nazi-looted art**

**38** In what circumstances would the heirs of the party wrongly dispossessed typically prevail over the current possessor, if a court in your country accepted jurisdiction and applied its own law to a claim to art lost during the Nazi era?

There is no Hong Kong case history of claim to art lost during the Nazi era.

#### **39** Is there an ad hoc body set up to hear claims to Nazi-looted art?

There is no ad hoc body set up in Hong Kong to hear claims to Nazi-looted art.

#### **LENDING TO MUSEUMS**

#### **Responsibility for insurance**

# **40** Who is responsible for insuring art, antiques or collectibles loaned to a public museum in your jurisdiction?

Responsibility for insurance of loaned art, antiques or collectibles to a public museum is a matter of negotiation between the lender and the museum.

In general terms, public museums do not accept insurance liability. This is one of the reasons why private loans to public museums in Hong Kong are not frequent.

#### Immunity from seizure

# **41** Are artworks, antiques or collectibles loaned to a public museum in your country immune from seizure?

There is no legal provision in Hong Kong entitling seizure of artworks, antiques or collectibles in the name of any authority.

#### **CULTURAL PATRIMONY**

#### National treasures

#### 42 Is there a list of national treasures?

There is no listing of national treasures as such with regard to movables of artworks, antiques or collectibles.

However, under the <u>Antiquities and Monuments Ordinance</u>, the government has designated 114 monuments at the Grade 1 level, confirmed as having outstanding merits, and at the Grade 2 level, confirmed as having special merits. There is a third category of 134 historic buildings, which are graded as having certain merits. There is no and there is no requirement of listing of works of art per se.

#### **Right of pre-emption**

**43** If the state is interested in buying an artwork for the public collections, does it have a right of pre-emption?

There is no statutory or practical system providing for a right of pre-emption to the government in respect of buying an artwork for public collections.

#### Automatic vesting in the state

**44** In what circumstances does ownership in cultural property automatically vest in the state?

Hongkongers are entitled to bequeath their movable assets, such as artworks, antiques or collectibles, to whoever they wish by will, conforming to the legal formal requirement. In the absence of a will, an intestate estate will be subject to claims on all assets, including artworks, antiques or collectibles, pursuant to the <u>Intestates' Estates Ordinance</u>.

In the event that there is no legally maintainable claim to ownership of any asset of art, antiques or collectibles, ownership will vest in the government as bona vacantia.

#### Illegally exported property claimed by foreign states

# **45** How can a foreign state reclaim in your jurisdiction cultural property illegally exported from its territory?

There is no mechanism for a foreign state to claim in the Hong Kong jurisdiction any cultural property legally exported from the claiming foreign state or territory.

Legal action by the foreign state or territory is possible, but full supporting evidence of the undisturbed ownership of the foreign state must be put in evidence in the legal action in Hong Kong.

There are no bilateral agreements between Hong Kong and any third party related to the protection of cultural property.

#### **NON-FUNGIBLE TOKENS**

#### **Regulation and case law**

**46** How are non-fungible tokens (NFTs) regulated in your jurisdiction? Is there any case law on NFTs in your jurisdiction?

Answer pending.

#### ANTI-MONEY LAUNDERING

#### Compliance

# **47** What are the anti-money laundering compliance obligations placed on the art trade?

Under the Organised and Serious Crimes Ordinance (OSCO), a person commits an offence if, knowing or having reasonable grounds to believe that any property in whole or in part directly or indirectly represents any person's proceeds of an indictable offence, they deal with that property.

Further, under the OSCO, where a person knows or suspects that any property:

- 1 in whole or in part directly or indirectly represents any person's proceeds of;
- 2 was used in connection with; or
- 3 is intended to be used in connection with,
- 4 an indictable offence, he shall as soon as it is reasonable for him to do so disclose that knowledge or suspicion, together with any matter on which that knowledge or suspicion is based to an authorised officer.

In proceedings against the person for the above offence under the OSCO, it is a defence for them to prove that:

- he or she intended to disclose to an authorised office the relevant knowledge, suspicion or matter relating to the offence; and
- there is a reasonable excuse for their failure to disclose.

A person committing the above offence under the OSCO is liable:

- on conviction to a fine of HK\$5 million and imprisonment for 14 years; or
- on summary conviction to a fine of HK\$500,000 and imprisonment for three years.

#### **ENDANGERED SPECIES**

#### CITES

# **48** Is your jurisdiction a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)?

CITES is engaged by various worldwide territories through their own enactment of CITES, reflecting legislation to give effect to it.

The <u>Protection of Endangered Species of Animals and Plants Ordinance</u> (the Endangered Species Ordinance) was enacted to give effect in Hong Kong to CITES and to regulate the import, introduction from the sea, export, re-export, and possession or control of certain endangered species of animals and plants and parts and derivatives of those species, as well as to provide for incidental and connected matters.

CITES incorporates three appendices that reflect the level of threat to endangered species from commercial trade.

The Endangered Species Ordinance provides for criminal offences in relation to the unauthorised import, export, re-export and possession of certain CITES scheduled species. The three schedules to CITES are replicated in the three linked appendices to the Ordinance.

The import of Appendix 1-listed species requires a licence. The licensing authority is the Agriculture and Fisheries Department (AFD).

Appendix 2 identifies live animals and plants that were taken from the wild.

Licences are required to possess Appendix 1-listed species within Hong Kong or an Appendix 2 live animal or plant taken from the wild (for commercial purposes).

An importer of an Appendix 1 species must possess an export permit or re-export permit certificate from the country of original export (or re-export), which is to be presented to the Hong Kong authorities on import.

Under the Endangered Species Ordinance, the maximum penalty for unauthorised import, export, re-export or possession of Appendix 1-listed species is 10 years' imprisonment and a fine of HK\$10 million. The maximum penalty for offences involving Appendix 2- and Appendix 3-listed species is seven years' imprisonment and a fine of HK\$1 million.

On 18 August 2021, the Organised and Serious Crimes Ordinance was amended to include an extension of its provision to wildlife trafficking offences under the Endangered Species Ordinance. These new provisions give the authorities increased power to investigate such illegal activities so that they can go up the chain of possession of the asset to reach the syndicates and leaders of the traffic behind the wildlife trade.

# **49** Is the sale, import or export of pre-CITES endangered species subject to a licence?

Yes, the sale, import or export of pre-CITES endangered species is subject to a licence.

The licence is granted for import on evidence of an export permit or re-export certificate from the country of export (or re-export) to Hong Kong, which must be issued and presented to the AFD in Hong Kong on import.

Consistent with article 3(2) of CITES, an export permit will only be granted upon the satisfaction of four specific conditions:

- the import is not detrimental to the survival of the species being exported;
- the specimen being exported was not obtained in contravention of the fauna and flora protection laws of the state of export;
- any living specimen will be prepared and shipped in a manner that minimises the risk of injury, damage to health or cruel treatment; and
- an import permit has been granted for the specimen concerned.

The obtaining of a licence from the licensing authority is usually relatively quick – within several weeks.

# **50** Is the sale, import or export of post-CITES worked or antique endangered species authorised? On what conditions?

In 2018, the Hong Kong legislature voted to ban trade in elephant ivory. The resolution provided for ivory sales to be phased out gradually in Hong Kong, stopping completely in 2021.

#### Specific endangered animal products

## **51** Are there any special rules for works of art made of elephant ivory, rhino horn or other specific endangered animal products?

China has a very long and distinguished history of carving elephant ivory, extending back over 2000 years. The Qing Dynasty (1644–1921) was the most prolific period of Chinese ivory carving.

Under the Endangered Species Ordinance, the import, re-export and local possession of elephant ivory is permissible if the ivory can meet the requirements of the antique ivory exception. Antique ivory:

- 1 means a piece of elephant ivory that was, before 1 July 1925-
- 2 removed from the wild;

- 3 significantly altered from its natural state for jewellery, adornment, art, utility or musical instruments; and
- 4 acquired by a person after the alteration in such altered state that required no further carving, crafting or processing to effect its purpose; and
- 5 does not include an elephant hunting trophy

Antique ivory can be imported, re-exported or possessed for commercial purposes, provided that it can be proved to be antique and all other statutory requirements are met.

The burden of proof on a person claiming the benefit of the antique ivory exception is upon that person, to the satisfaction of the director of AFD. An example of acceptable proof may be: a qualified appraisal or any method that documents the age of the ivory by establishing its provenance, such as detailed history of the piece, but is not limited to ethnographic field work; or other information that authenticates the article and assigns the work to a known period or, where possible, a known artist. Scientific test method results carried out by an accredited laboratory or facility, whether a local or overseas, are also acceptable.

Full details of the ivory, the appraiser or his or her qualifications and the date of appraisal must be supplied to the AFD.

Antique ivory can be legally imported into Hong Kong, provided it has been issued with a pre-conservation certificate issued by the previous exporting territory and is the subject of an import licence issued by AFD. Antique ivory must be inspected by an authorised officer upon arrival in Hong Kong.

Otherwise, possession of antique ivory for commercial purposes is allowed in Hong Kong and does not require a licence to possess, provided that the ivory piece can be proved to meet the requirements for the antique exception.

In this context, 'commercial purposes' means a purpose:

- relating to trade or business; or
- of obtaining profit or other economic benefit (whether in cash or in kind) and directed towards sale, re-sale, exchange, provision of a service or other form of economic use or benefit, whether direct or indirect.

#### **CONSUMER PROTECTION**

#### **Cancelling purchases**

**52** In what circumstances may consumers cancel the sale of art, antiques or collectibles?

The Consumer Council is a watchdog body without statutory authority to control consumer interests; however, it takes its watching responsibilities seriously and issues frequent reports on consumer protection.

Over a number of years, the Consumer Council has advocated cooling-off periods for contracts involving goods, including art, antiques and collectibles; however, various voices of opposition in the business sector have opposed any such move. It is, therefore, only a matter of current discussion. Accordingly, there is no current ability of a consumer to cancel a sale.

#### Duties of businesses selling to consumers

#### 53 Are there any other obligations for art businesses selling to consumers?

The <u>Trade Descriptions Ordinance</u> (TDO) prohibits false trade descriptions and unfair trade practices. Those offences are enforced by the Customs and Excise Department.

Section 7 of the TDO covers the application of any false trade description to any goods or the use of any false trade description with any goods being sold that is likely to be taken as referencing the goods.

'False Trade Description' is defined as a trade description that is false to a material degree or that, although not false, is misleading and, therefore, likely to be taken as a trade description and would be false to a material degree.

The TDO further sanctions any commercial practice (including advertising) where the trading activity includes any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) that is directly connected with the promotion of an artwork to consumers or the sale or supply of an artwork to consumers, whether occurring before, during or after the commercial transaction (if any) in relation to that artwork.

The TDO does not distinguish between this, that or the other forms or modes of communication of a false trade description. Accordingly, sale – whether face to face or by telephone, email, text, social media or online – is covered by the TDO.

The Consumer Goods Safety Ordinance (which excludes certain consumer goods in a schedule that does not include works of art or other assets traded in an art business) provides that goods that are ordinarily supplied for private use or consumption (which can extend to works of art) must be reasonably safe with regard to all circumstances, including the manner in which – and the purpose for which – the consumer goods are presented, promoted or marketed. It is further provided that a person shall not supply, manufacture or import into Hong Kong consumer goods unless they comply with the general safety requirement set out above. However, this ambiguous referencing of 'reasonably safe with regard to all circumstances' is unclear and is likely to be interpreted as being in favour of the consumer in any particular alleged transgression of this Ordinance.

#### REGULATION

#### Art market regulator

**54** Is there a specific regulatory body overseeing the art market or certain business activities carried out within the art market in your jurisdiction?

There is no specific regulatory body that oversees the art market or any business activities carried out within the art market in Hong Kong. The Customs and Excise Department effectively polices the sanctions under the Trade Descriptions Ordinance.

#### **Other regulators**

# **55** What other forms of regulation are professional art market participants in your jurisdiction subject to?

The business of banking, including the making of loans, is regulated by the Monetary Authority, which ensures that only licensed banks can carry on banking business. Money lending is subject to controls under the <u>Money Lenders Ordinance</u>, which is more a law to monitor and control the activities of money lenders and to record and license money lenders that are not actually carrying on banking business and are, therefore, not controlled by the Monetary Authority under the Banking Ordinance.

A storm of enthusiasm has gripped the art market through the virtual cryptoasset market for non-fungible tokens traded on the blockchain. Because non-fungible tokens are a virtual asset without registration in any hard copy public register, both their asset identity and the extension of existing law to apply to those who deal in non-fungible tokens are currently in a state of flux, although the relevant government authorities are seeking ways to identify and control both such assets and those who deal in them. The best that can be said in a very fluid virtual marketplace in which art or art-related NFTs are being minted in profusion is that it would be beneficial for the cost of minting the NFT to be made available to a charitable cause, which is often stated to underline the NFT in question. However, this would not, in itself, grant exclusive ownership in the NFT to the minter or to any user in the market, or to the charity in question that benefits from it.

There is no regulation on the dealing in, offering of or providing for non-fungible tokens as such but to the extent that non-fungible tokens are virtual assets there is now with effect from 1 January 2023 an amendment to the Anti-Money Laundering and Counter-Terrorist Financing Ordinance providing for the new compulsory licensing and registration by the Hong Kong Securities and Futures Commission of any person or entity offering or dealing in virtual assets thatare defined to include non-fungible tokens.

#### **UPDATE AND TRENDS**

#### Key developments of the past year

**56** Are there any other current developments or emerging trends that should be noted?

There are no updates at this time.



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**RETURN TO CONTENTS** 

#### Summary

BUYING AND SELLING	163
Passing of title	163
Implied warranty of title	164
Registration	165
Good-faith acquisition of stolen art	165
Acquiring title to stolen art through prescription	166
Risk of loss or damage	167
Due diligence	168
Other implied warranties	169
Voiding purchase of forgeries	169
Voiding inadvertent sales of works by masters	170
EXPORT AND IMPORT CONTROLS	170
Export controls	170
Import controls	172
Export and import tax	174
DIRECT AND INDIRECT TAXATION	175
Taxes	175
Tax exemptions	176
BORROWING AGAINST ART	176
Types of security interest	176
Consumer loans	177
Register of security interests	177
Non-possessory security interests	177
Sale of collateral on default	177
Ranking of creditors	178
INTELLECTUAL PROPERTY RIGHTS	178
Creator copyright	178
Copyright duration	178
Display without right holder's consent	179
Reproduction of copyright works in catalogues and adverts	179
Copyright in public artworks	180
Artist's resale right	180
Moral rights	181
AGENCY	181
Accounting to the principal	181
Disclosed agent commission	181

PAGE 163	RETURN TO SUMMARY
Undisclosed agent commission	182
CONSIGNING ITEMS	182
Protection of interests in consigned works	182
AUCTIONS	182
Regulation	182
SPOLIATION DURING THE NAZI ERA	183
Claims to Nazi-looted art	183
LENDING TO MUSEUMS	184
Responsibility for insurance	184
Immunity from seizure	184
CULTURAL PATRIMONY	184
National treasures	184
Right of pre-emption Automatic vesting in the state	185 185
Illegally exported property claimed by foreign states	185
NON-FUNGIBLE TOKENS	187
Regulation and case law	187
ANTI-MONEY LAUNDERING	187
Compliance	187
ENDANGERED SPECIES	188
CITES	188
Specific endangered animal products	189
CONSUMER PROTECTION	190
Cancelling purchases	190
Duties of businesses selling to consumers	190
REGULATION	191
Art market regulator	191
Other regulators	192
UPDATE AND TRENDS	192
Key developments of the past year	192

#### **BUYING AND SELLING**

#### Passing of title

# 1 When does ownership of art, antiques and collectibles pass from seller to buyer?

In the Italian legal system, property is generally transmitted by the legitimately expressed consent of the parties, according to <u>article 1376 of the Italian Civil Code</u> (ICC).

As soon as this exchange of mutual consent occurs, the seller transfers the item's ownership to the buyer.

Therefore, ownership of movable art, antiques or collectibles passes from the seller to the buyer when the parties enter into a sale agreement. No formality is required for finalising the sale agreement of a movable good.

It is customary in the Italian art market that sale agreements are made with retention of title, meaning that the title passes to the buyer when the seller has received full payment of the sale price in cash or cleared funds.

#### Implied warranty of title

**2** Does the law of your jurisdiction provide that the seller gives the buyer an implied warranty of title?

<u>Article 1476</u>, paragraph 1(2), ICC provides that sellers must warrant that they are the owners or have been legitimately authorised by the owners to sell the asset.

Pursuant to <u>article 1483</u>, ICC, sellers shall warrant buyers against dispossession. If buyers are dispossessed by a third party, they are entitled to rescind the contract if they had ignored in good faith that sellers did not own the purchased item when they entered the contract. Furthermore, they are entitled to the reimbursement of the price paid, the expenses connected to the purchased asset (including restoration expenses) and the damages suffered as a result of the dispossession (<u>article 1479</u>, ICC).

The parties may agree a limitation or exclusion of the seller's warranty of title, but the seller always remains liable if the buyer suffers dispossession as a result of the seller's misconduct.

If a third party sues the buyer alleging that it is the owner of the asset, the buyer can file a third-party complaint against the seller. If they fail to do so and an irrevocable judgment by a court order them to release the purchased asset to the third party, they no longer have a warranty of title against the seller, if the latter proves that there was a sufficient ground to dismiss the dispossession claim.

The warranty of title claim limitation period is 10 years (article 2946, ICC) and starts on the date the dispossession is confirmed by an irrevocable judgment (Court of Cassation, 10 January 1997, No 184).

The buyer can file a third-party complaint against the seller. If they fail to do so and an irrevocable judgment by a court orders them to release the purchased asset to the third party, they no longer have a warranty of title against the seller, if the latter proves that there was sufficient ground to dismiss the dispossession claim.

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#### Registration

**3** Can the ownership of art, antiques or collectibles be registered? Can theft or loss of a work be recorded on a public register or database?

In general, ownership of artworks is not subject to registration, but <u>article 85</u>, Legislative Decree No. 42 of 22 January 2004 (the Italian Cultural Heritage Code – ICHC), establish a register for stolen cultural goods, available on the following Carabinieri, an Italian police department, <u>webpage</u>.

#### Good-faith acquisition of stolen art

4 Does the law of your jurisdiction tend to prefer the victim of theft or the acquirer in good faith of stolen art?

Italian law favours the good-faith acquirer against the victim of theft.

According to <u>article 1147</u>, ICC, if buyers are – not recklessly – unaware that they are in possession of stolen property and infringing the theft victim's rights, they are considered bona fide possessors. Good faith possession is presumed and its existence at the time of purchase suffices.

<u>Article 1153</u>, ICC, adds that the person who receives a movable property, from someone who is not the owner, acquires ownership through possession, if he is in good faith and owns a valid title attesting to the transfer of ownership.

However, good faith does not suffice if the buyer has not exercised even the minimum degree of diligence requested by law (ie, the average diligence required of those performing the same kind of activity), which would have enabled them to sense that the purchase was likely to result in the impairment of others' rights.

The presumption of good faith implies that whoever intends to challenge its existence has the burden of proving serious and concrete – hence, not merely hypothetical – circumstances that support the formulation of a doubt.

Therefore, the purchase of an artwork is valid if it is accompanied by good faith and when no concrete element reasonably suggests its non-existence. On these grounds, buyers of artworks are protected by the law, rather than the victims of theft.

If the acquirer is in bad faith, they shall become the owner of the asset after 20 years of uninterrupted possession (article 1161, paragraph 1, ICC).

The above principles do not apply to assets that were either stolen or illegally removed from collections of the Italian 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 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 (article 828, ICC).

However, the victim of the theft can address the competent court and initiate an *azione di rivendicazione*. According to <u>article 948</u>, ICC, who claims to be the owner of a good, but is not in possession of it, may address the court to have their right of ownership ascertained and the person who owns or holds it without any valid title ordered to return it.

This kind of claim is characterised by a particularly onerous and difficult burden of proof for the plaintiff.

The action aims at the ascertainment of the existence of the alleged right of ownership of the plaintiff, as well as the restitution of the property owned or held by others, as a result of a judgment.

#### Acquiring title to stolen art through prescription

5 If ownership in stolen art, antiques or collectibles does not vest in the acquirer in good faith, is the new acquirer protected from a claim by the victim of theft after a period of time?

The claims provided for in <u>article 948</u>, ICC, are not subject to prescription, but so is the right of ownership, which can be acquired through peaceful, non-violent and uninterrupted possession of property for at least 20 years (so-called 'usucapione', <u>article 1158</u>, ICC).

To acquire ownership through possession, the interested parties shall exercise the rights arising from an ownership title throughout the above-mentioned term. They shall not act as bailees or custodians.

It is irrelevant whether possession is of good or bad faith, but it must be manifested to the public and freely enjoyed.

# **6** Can ownership in art, antiques or collectibles vest in the acquirer in bad faith after a period of time?

Pursuant to <u>article 1161</u>, paragraph 2, ICC, bad-faith acquirer of a movable asset becomes its rightful owner, by maintaining its possession for an uninterrupted period of 20 years. However, if the possession was acquired with duress or in a clandestine manner, the term will start running from the date the duress or the secret possession has ceased (<u>article 1163</u>, ICC).

The above principle does not apply to goods that were either stolen or illegally removed from collections belonging to the State or other public entities.

# 7 Must the professional seller of art, antiques or collectibles maintain a register of sales?

According to <u>article 63</u>, ICHC, and <u>article 128</u> of Royal Decree No. 773/1931, any professional seller who trades in antiquities or used goods above certain monetary thresholds must maintain a register of the operations carried out on a daily basis, on which daily operations and the identity of the counterparts in such operations must be recorded, along with the

description of the characteristics of the goods. The monetary thresholds are determined at a municipal level.

This register is prescribed by public security regulations, describing the artworks' characteristics (see <u>Annex A, point a)</u>, ICHC).

Law No. 124/2017 amended article 63, paragraph 2, ICHC, by introducing the electronic register.

The latter will be accessible by the Ministry in real time and will be divided into two lists: the first one will include goods that must be presented to the Export Office for further inspection before being exported; the second list will include goods that do not need to be presented to the Export Office and can thus immediately obtain a digital free circulation certificate. The Ministry will have the power to request at any time that any of the goods indicated in the second list be presented for direct examination. The electronic register has not been implemented yet.

Every professional seller is also required to register sales for tax purposes only. Therefore, these registers can only be consulted by the owner, by the dedicated staff and by a police force specialising in tax inspections (Guardia di Finanza). SIAE, the Italian collecting society competent for artists' resale rights, can ask to access the business registry to control the regular payment of the resale right.

#### Risk of loss or damage

8 When does risk of loss or damage pass from seller to buyer if the contract is silent on the issue?

Normally, the risk of loss or damage lies with the actual owner of the lost or damaged asset.

Indeed, the transfer of ownership takes place through the simple exchange of legitimately manifested consents between the parties, pursuant to <u>article 1376</u> ICC, and so usually does the risk of loss or damage.

If the contract is silent on the issue, the risk is passed on to the buyer when the contract is entered into, regardless of whether the asset was delivered to the buyer or the latter had paid the purchase price (article 1465, paragraph 1, ICC).

The general rule is subject to two exceptions, when the transfer of ownership: (1) is not immediate, but is deferred until the expiry of an initial term; (2) takes place upon payment of the last instalment, pursuant to <u>article 1523</u>, ICC. Even in these cases, however, the transfer of the risk of loss is immediate, by reason of the conclusion of the contract, provided the loss or damage are not attributable to the seller.

However, if a retention of title clause is agreed and the asset is delivered to the buyer, the risk passes to the latter at the time of delivery, even if not yet the owner of the asset (article 1523, ICC). Instead, if the transfer of title is subject to a precedent condition and the asset is lost before the condition has occurred, the risk remains with the seller (article 1465, paragraph 4, ICC).

If the asset needs to be shipped by the seller to the buyer, the former is released from any obligations related to the asset (and, consequently, to the risk of loss or damage) at the time of delivery to the shipping agent (article 1510, paragraph 2, ICC).

#### Due diligence

**9** Must the buyer conduct due diligence enquiries? Are there non-compulsory enquiries that the buyer typically carries out?

In addition to the general obligation of the parties to negotiate the contract in good faith (article 1337, ICC), the buyer does not have specific due diligence enquiry obligations set forth by the law.

However, due diligence is advisable to conclude a safe transaction, avoiding claims. Therefore, it should be carried out by experts in the field: for transactions involving artworks, the buyer is advised to seek the support of art experts and lawyers.

First, complete data on the original attribution of the artwork are necessary: type, author's name (and whether or not the artwork is signed), title, date and period of execution, possible change of attribution and its cause, bibliography, restorations.

Then, possible illegal provenance of the artwork shall be verified through investigations in international databases, such as the Italian police (Carabinieri) and the Art Loss Register.

Third, the prospect buyer shall reconstruct the artist's biography, identify the previous owners and check the state of conservation of the artwork. It is also useful to search for exhibitions where it was included or museum in which it was hosted and stored.

On the legal aspects, it is important to ascertain who the owner is (museum, private person, etc) and whether they can sell the artwork, if it has a certificate of authenticity and who issued it, if it is subject to Italian copyright law (Law No. 633/1941 Italian Copyright Law) as a work of authorship, and/or to the Italian Cultural Heritage Code as a good of cultural interest, and if it complies with these or other regulations, that might be of interest in particular cases (eg, CITES).

It is good practice to archive all the documentation collected in these verification operations.

Due diligence is key not only for buying and selling, but also for loans to institutions, appraisals, insurance claims, litigation and any operations in the art market.

#### **10** Must the seller conduct due diligence enquiries?

In addition to the general obligation of the parties to negotiate the contract in good faith (<u>article 1337</u>, ICC), the seller does not have due diligence enquiry obligations.

However, professional sellers often need to enquire on the provenance and authenticity or attribution of artworks before the sale, to be able to provide the buyer with a certificate of authenticity and provenance, insofar as it is required by <u>article 64</u>, ICHC.

#### Other implied warranties

# **11** Does the law provide that the seller gives the buyer implied warranties other than an implied warranty of title?

Sellers must warrant they are the owners or have been legitimately authorised by the owners to sell the asset (<u>article 1476</u>, paragraph 1(2), ICC).

In addition to the implied warranty of title, a general rule on sale contracts provides that sellers must guarantee that the asset does not have defects that would impair its designated use or significantly reduce its value, and that it has the qualities promised in the contract (article 1490 et seq, ICC). False provenance or misattribution may be considered as a 'defect' under such general rule.

The above guarantees may be waived or limited, although any waiver or limitation would not apply if the seller has intentionally or by gross negligence undisclosed defects or has not highlighted the absence of certain qualities of the assets (article 1229, ICC).

If the contract is silent, the buyer must denounce the defects and the absence of certain qualities within eight days of the discovery. The warranty claim is time-barred after one year from the delivery date.

According to article 64, ICHC, professional sellers must deliver an authenticity and provenance certificate of the asset or a declaration (possibly printed on an artwork's photograph) including any available information on its authenticity or possible attribution, and provenance.

#### Voiding purchase of forgeries

**12** If the buyer discovers that the art, antique or collectible is a forgery, what claims and remedies does the buyer have?

If the sold artwork is a forgery, the buyer is entitled – without prejudice to criminal proceedings against the counterfeiter or seller – to sue the seller for the restitution of the amount paid, and claim damages (<u>article 1223</u>, ICC). Indeed, an *aliud pro alio* sale occurs when a completely different good from the one agreed upon is delivered to the buyer.

If the buyer discovers that the art, antique or collectible is a forgery, the following claims and remedies are available:

- Termination of the contract because the asset sold is different from the asset that was promised in the contract (article 1453, ICC, for its application to artworks, see Court of Cassation, 27 November 2018, No. 30713). The claim is time-barred after 10 years from the sale.
- Termination of the contract based on alleged defects of the purchased asset (article 1490 et seq, ICC); the claim is time-barred if the defect was not communicated to the seller within eight days of its discovery and one year after delivery of the good to the buyer.
- Termination of the contract based on alleged lack of promised or essential qualities (article 1497, ICC); the claim is time-barred if the defect was not communicated to the

seller within eight days of its discovery and one year after the delivery of the good to the buyer, provided that the absence of the required quality exceeds usual tolerance limits.

• Cancellation of the contract based on mutual mistake or wilful misconduct (articles 1429 and 1439, ICC). 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.

Remedies are likely to include damages in each of the cases mentioned.

The seller would also be obliged to pay statutory interest accrued from the day on which payment of the price was made. As to the damage compensation, it consists in the increased value (unrealisable for the buyer) that the work would have achieved over time if it had been authentic (subject to evidence of such possible increase).

#### Voiding inadvertent sales of works by masters

**13** Can a seller successfully void the sale of an artwork of uncertain attribution subsequently proved to be an autograph work by a famous master by proving mistake or error?

Sellers can request that the sale of an artwork of uncertain attribution, then discovered an autograph work by a famous master, be declared void by proving mistake of fact. In 1998, the Court of Cassation held that the sale of a fifteenth-century wooden statue attributed to an unknown author from Siena at the time of the sale and later re-attributed to Jacopo della Quercia could be voided to the benefit of the seller (Court of Cassation, 2 February 1998, No 985).

#### **EXPORT AND IMPORT CONTROLS**

#### **Export controls**

**14** Are there any export controls for cultural property in your jurisdiction? What are the consequences of failing to comply with export controls?

Italian law allows goods to be permanently moved from the state after obtaining specific permits: (1) a free circulation certificate, for movements within Europe (article 68, Italian Cultural Heritage Code (ICHC)); (2) an export licence, for movements outside Europe (article 74, ICHC), together with the free circulation certificate.

Export control is carried out at a local level by the Export Offices of the Ministry of Culture (Ministry) located throughout Italy.

Pursuant to articles <u>10</u> and <u>65</u>, ICHC, the following categories of goods cannot be exported on a permanent basis from Italy:

 any good having an artistic, historical, archaeological or ethno-anthropological interest owned by the state (or any public entity) or a private non-profit organisation, provided that it was made more than 70 years ago and that its author is deceased; and

 any privately owned good made more than 70 years ago by a deceased author, provided that it is classified as a cultural good by the Ministry.

Privately owned cultural goods that were made more than 70 years ago by a deceased author and have a monetary value of more than €13,500 may be exported on a permanent basis from Italy if the competent Export Office grants an export permit.

To obtain an export permit, the interested party must file an export licence request and physically submit the goods to the export office.

The Export Office can either grant or deny the export permit if the goods show particular cultural significance.

In granting export licences, the Export Offices shall follow the criteria set forth by Ministerial Decree No. 537/2017. It refers to the aesthetic quality, rarity, provenance from a relevant collection and historic relevance of the goods, connection with Italy (for foreign goods) allowing wide discretion to the Ministry.

Export Offices generally conclude the proceeding within 40 days of the date the goods are presented to them, but this time frame is not mandatory.

If the permit is denied, the interested party is entitled to file a complaint within 30 days of the date of service of the denial directly with the Ministry or, within 60 days, serve a petition on the Ministry, which will be filed with the competent administrative regional court within 30 days of the service.

If the first option is chosen, the Ministry has 90 days to decide on the complaint. Then, the party is entitled to file a petition with the administrative regional tribunal after the deadline for the decision by the Ministry on the complaint (60 days for the service on the Ministry and 30 days for the filing with the court).

The administrative court will not assess the merits of the denial decision, but whether the administration correctly applied the law and made appropriate use of its discretionary power (eg, by providing adequate motivation to the export denial, based on thorough art historical research).

Artworks by living artists, artworks by non-living artists that are less than 70 years old and artworks that are more than 70 years old and worth less than €13,500 do not need export permits, but if exported, they must be accompanied by a unilateral declaration by the exporter detailing its characteristic, author and year of creation. For items between 50 and 70 years old by deceased authors, the permanent removal may be prevented if the Ministry declares them to be of exceptional historical or artistic interest within 60 days of the date on which the self-certification is entered in the online SUE (the Export Offices Information System).

The export declaration must be filed through the SUE to the competent Export Office, which shall acknowledge receipt of the declaration by applying a stamp and delivering the original to the interested party.

The violation of export control provisions results in the following sanctions: an administrative fine from  $\notin$ 77.50 to  $\notin$ 465 (article 165, ICHC) and two to eight years' imprisonment, or a criminal fine up to  $\notin$ 80,000 (article 518-undecies of the Italian Criminal Code, recently introduced by <u>Law No. 22 /2022</u>, replacing article 174, ICHC). The judge shall also order the forfeiture of the artwork, unless it belongs to someone not involved in the crime (article 518-duodevicies, Italian Criminal Code).

The denial of the export licence automatically starts the proceeding of declaration of cultural interest. When a particularly or exceptionally important cultural interest subsists pursuant to <u>article 10, paragraph 3</u>, ICHC, a declaration of cultural interest is issued, pursuant to <u>articles 13</u> and <u>14, ICHC</u>: the 'notification' of the item.

In this case, the object's circulation is subject to a particular regime of limitation: it cannot leave the Italian territory permanently and the owner must request an authorisation for the move of the object even within the borders of the state.

Should the sale of the property occur, this must be subject to the state not exercising its pre-emption right within 60 days from the date of the presentation of the communication of transfer set forth by article 59, ICHC (article 61, ICHC).

#### Import controls

# **15** Other than in relation to endangered species, are there any import controls for cultural property in your jurisdiction? What are the consequences of failing to comply with import controls?

Upon request of the interested party, Export Offices may grant import certificates (if the object is imported from outside the EU: CAI) or shipping certificates (if the object is shipped from an EU country to Italy: CAS). In either case, the certificate has a validity of five years upon request (article 72, ICHC). The aforesaid certificates are issued within 40 days from the submission of the application, which must include documentation identifying the asset and provide information on its legitimate foreign provenance. If doubts arise on the documentation or information's reliability, the applicant is informed and the 40-day term is suspended for the duration of the controls, or in any case, for no more than 30 days. Import or shipping certificates grant an extra-territorial status to the objects, they are issued for, ie such objects cannot be classified as cultural properties.

From a customs law perspective, artworks can also be imported using the special regime of temporary importation, whose function is to exempt – totally or partially – from custom duties, other charges and commercial policy measures goods intended for re-exportation, not to be modified, identifiable and whose holder is a person established outside the European Union.

The temporary importation regime must therefore be terminated within period of time, never exceeding 24 months, normally established by the customs authority: for goods imported for an exhibition or an auction, the term will probably be linked to the duration of such event. The customs declaration and the request for authorisation for the special procedure must be submitted to the office located where the works will be exhibited. At the end of the exhibition, the goods, if unsold or sold to a person established outside the European Union

who wishes to re-export them, can be re-exported. At the time of export, to be carried out within the term provided in the temporary admission authorisation, the regime is considered definitively discharged, and the customs operation is concluded.

Diversely, if the work is sold to a subject established in the European Union, it must be definitively imported by lodging a new customs declaration attesting the new customs procedure applicable to the good. In this case too, the new declaration shall be submitted within the period of validity of the temporary importation: indeed, at the end of the period indicated by the customs authorities, the temporary importation procedure must necessarily be discharged. In the case of untimely declarations, the imported goods lose the status of temporarily admitted goods, becoming goods illegally circulating in the territory of the European Union.

This means that the holder of the goods may incur, in addition to the obligation to remedy the irregularity from the customs point of view (through a custom-specific procedure), the penalties provided for in the case of smuggling.

In the case of the purchase of an artwork coming from a non-EU territory and its permanent introduction into the European Union, it will be necessary to proceed immediately to a definitive import procedure. In this case, the importation of the artwork is subject to the same customs formalities applicable to normal goods: the artwork must therefore be presented to the customs authorities and declared in an ordinary declaration, specifying the procedure to be applied to it. This time, obviously, the special regime of temporary admission will not be selected, but it will be necessary to opt for the release into free circulation (ie, definitive importation).

Regarding archaeological goods, the Ministry of Culture issued a regulation (<u>Circolare No. 1/</u>2022) that restates the principle set forth in article 3, of EU Regulation 880/2019 (Regulation) by providing an absolute ban on the introduction into the Italian territory of cultural goods removed from the territory of the third country where they were made or discovered, in violation of the laws and regulations of that country.

Moreover, although the Regulation is not yet fully applicable, it is important to note that the European Union has made special arrangements for the access of archaeological goods within its borders. According to article 4, Regulation, as of 28 June 2025, at the latest, the importation of certain cultural goods shall require an import licence issued by the competent authority of each member state. In particular, this applies to:

- archaeological discoveries on land or underwater that are more than 250 years old, including results of excavations (regular and clandestine); and
- dismembered elements of artistic or historical monuments or archaeological sites, older than 250 years.

The issuance or denial of the import licence shall take place within 90 days from the receipt of the application. Pursuant to article 4, paragraph 7, Regulation, the competent authority shall reject the application under certain reasonably grounded circumstances:

• when information is available about the cultural goods possibly results as illicitly removed from the country where they were created or discovered ('country of origin');

- when evidence on the lawful export of the cultural goods from the country of origin is not provided;
- if it is reasonable to presume that the holder of the goods did not acquire them lawfully; or
- there are pending claims for the restitution of the cultural goods by the authorities of the country of origin.

Cultural goods listed in the Regulation, Annex, Part C, shall not require an import licence but a statement by the importer (article 5, Regulation). These goods are collections and rare specimens of fauna, flora, mineralogy and anatomy, goods concerning history, science, military history, antiques, coins, objects of artistic interest (manuscripts, drawings, paintings, engravings, sculptures, prints, etc) that have reached a certain value and age threshold, different for each category.

The statement, to be submitted through a specific electronic system, shall include:

- a declaration signed by the goods' owner stating that they have been exported from the country of origin pursuant to the relevant law, applicable at the time they were exported; and
- a standard document describing the cultural goods in question in enough detail for the authority to identified them and perform risk analyses and targeted controls.

#### **Export and import tax**

**16** Does any liability to pay tax arise upon exporting or importing art, antiques or collectibles?

Exporting art, antiques or collectibles is not subject to any specific tax.

The submission of the customs declaration for the import of an artwork is accompanied by the fulfilment of the tax obligations arising therefrom (ie, the payment of VAT on importation and customs duties) but taking into account that works of art are duty-free and benefit from a reduced tax rate.

Pursuant to article 39, <u>Legislative Decree No. 41/1995</u>, a rate of 10 per cent value added tax (VAT) applies to the import of artworks (the ordinary rate is 22 per cent).

The above applies to artworks wholly handmade by the artist and that have up to eight sculpture casts (made with supervision of the artists or their heirs).

Pursuant to article 250, EU Regulation No. 952/2013, it is possible to apply the regime of temporary admission, which grants a total or partial exemption from import tax (eg, in case of import for expositions, exhibitions and art fairs).

#### **DIRECT AND INDIRECT TAXATION**

#### Taxes

# **17** Outline the main types of tax liability arising from ownership and transfer of art, antiques and collectibles.

In Italy, there is no wealth tax based solely on the possession of art, antiques and collectibles.

Private sales of art, antiques and collectibles are not subject to VAT or capital gains tax. VAT (22 per cent) and income tax apply to sales made by professional dealers. If the artists or their heirs, are the sellers, a reduced VAT rate of 10 per cent applies.

The inheritance and donation tax varies depending on the degree of kinship between the deceased and the heirs: for the spouse and lineal relatives, 4 per cent of the total value of the inherited goods in excess of the threshold of  $\in 1$  million for each of the heirs; for each of the siblings the tax rate is 6 per cent of the total value in excess of  $\in 100,000$ ; for other relatives within the fourth degree of kinship the rate is 6 per cent; and for any other subjects the rate is 8 per cent. There is no de minimis threshold in the last two instances.

Pursuant to article 9, <u>Legislative Decree No. 346 /1990</u>, artworks kept in private homes are presumed to be included in the hereditary assets for an amount equal to 10 per cent of the total net taxable value of the inheritance, even if not declared or declared for a lower amount.

Goods classified as cultural property are exempted from inheritance and donation taxation.

If the purchase is made in a gallery in the European Union, you pay VAT at the rate of the EU country on the sale price and VAT at the rate in force in the EU country on the margin.

If the purchase is made in an Italian gallery, you pay 22 per cent VAT on the sale price and 22 per cent VAT on the margin.

If the purchase takes place in a non-EU gallery, no foreign VAT is applied. Instead, 10 per cent VAT is paid when the work is brought into Italy through customs. In this case, duties do not apply.

The collector who, outside the exercise of a business activity of buying and selling, even occasionally, resells artworks, even if he realises capital gains on the sale of works, is not subject to personal income tax and the consequent obligations to declare them. The possession of artworks must be declared only if the collector holds them abroad, through the compilation of a specific form of the tax declaration.

The collector, if not professionally engaged in the buying and selling of works of art, is not a VAT-taxable person and, therefore, whenever they sell an artwork, this transaction is not subject to VAT. Obviously, the collector pays VAT at the time of purchase or import, without being able to deduct it.

Artworks, like any other movable property, do not form the taxable base for inheritance tax, since they are included in 10 per cent of the value of the estate if they were located in

the house of the deceased at the time of the succession (article 9, paragraph 3, Legislative Decree 346/1990), and unless (1) they are held in a bank vault or other deposit or (2) they are included in an inventory drawn up pursuant to article 769, Italian Code of Civil Procedure.

Notified goods that obtained the declaration of good conservative status are excluded from the assets of the estate (article 13, Legislative Decree 346/1990).

If artworks are part of a trust, the Italian Income Revenue Authority recently issued <u>Circolare</u> <u>No. 34/E of 20 October 2022</u> containing clarifications on the tax regime of goods assigned to a trust. In particular, such goods shall not be taxed at the time of their assignment to the trust but at the time of their devolution to the trust's beneficiaries.

#### **Tax exemptions**

**18** Outline any tax exemptions or special conditions applicable to art, antiques and collectibles.

There are tax exemptions and special conditions applicable to art, antiques and collectibles. A margin VAT scheme is applicable to sales of used goods. Article 40-bis of Legislative Decree No. 41/1995 introduced a special regime for auction companies acting as intermediaries in the secondary market and operating in their own name and on behalf of the seller. The tax base is the hammer price minus the seller's commission.

Notified cultural goods are not subject to taxation. There is no tax on transfers to the state and other public entities, private foundations and recognised non-profit organisations.

Law No. 106/2014 introduced a tax credit for three consecutive tax years on donations made by individuals or companies through traceable payment instruments for maintenance, protection and restoration of cultural goods belonging to public entities, to support public cultural sites.

Tax benefits are also granted to owners of buildings listed as cultural goods, both when determining their rental income tax and in connection with interventions aimed at the main-tenance, protection or restoration.

#### **BORROWING AGAINST ART**

#### Types of security interest

## **19** In your jurisdiction what is the usual type of security interest taken against art, antiques and collectibles?

Art, antiques and collectibles, as with all movable goods, may be pledged as collateral to secure a loan (article 2784, Italian Civil Code (ICC)).

#### **Consumer loans**

**20** If the borrower borrowing against art assets in your jurisdiction qualifies as a consumer, does the loan automatically qualify as a consumer loan, and are there any exemptions allowing the lender to make a non-consumer loan to a private borrower?

If the borrower qualifies as a consumer (ie, as a natural person who is acting for purposes that are outside their trade, business or profession) and the credit agreement falls within the scope of the Consumer Credit Directive (2008/48/EC), transposed into Italian law by Legislative Decree No. 141/2010, the loan automatically qualifies as a consumer loan.

Consumer credit provisions do not apply, inter alia, to loans to natural persons for an amount exceeding €75,000 (article 122, paragraph 1(a), Legislative Decree No 385/1993).

#### **Register of security interests**

**21** Is there a public register where security interests over art, antiques or collectibles can be registered? What is the effect of registration? Is the security interest registered against the borrower or the art?

There is no public register for security interests over art, antiques or collectibles as collateral for loans.

However, <u>Law No. 119/2016</u> introduced the possibility for professional dealers to create non-possessory liens to secure credits related to their business activity (which are not private loans). Those 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.

#### Non-possessory security interests

# **22** Can the lender against art collateral perfect its security interest without taking physical possession of the art?

Professional dealers can create non-possessory liens to secure credits related to their business activity (which are not private loans). Those can only be granted over movable property intended for their business activity.

#### Sale of collateral on default

# **23** If the borrower defaults on the loan, may the lender sell the collateral under the loan agreement, or must the lender seek permission from the courts?

Lenders can sell the collateral and do not need to obtain a court's permission. However, before selling the pledged item, the creditor must serve a demand notice on the pledger requesting payment within five days of the service date. If no payment is made, the creditor is entitled to sell the collateral at a public auction under the court's supervision. <u>Article</u>

<u>2797</u>, ICC, provides that the parties to a collateral agreement may agree that the sale can be carried out by a private auction company.

#### Ranking of creditors

**24** Does the lender with a valid and perfected first-priority security interest over the art collateral take precedence over all other creditors?

According to <u>article 2748</u>, ICC, the lender with a valid and perfected first-priority security interest takes precedence over the other creditors.

#### **INTELLECTUAL PROPERTY RIGHTS**

#### Creator copyright

**25** Does copyright vest automatically in the creator, or must the creator register copyright to benefit from protection?

Copyright is recognised automatically: the author acquires all the rights related to the artwork by simply creating it. This is established in <u>article 2576</u>, Italian Civil Code (ICC), which resumes <u>article 6</u>, Italian Copyright Law (ICL).

Therefore, the original qualification for the acquisition of copyright is the creation of the work, as a particular expression of intellectual work.

An original work that meets certain minimum requirements is immediately subject to copyright and its creator acquires all the rights and powers provided for by law.

However, <u>article 105</u>, ICL, prescribes the obligation to deposit a copy of the work in a special office (set up at the Presidency of the Council of Ministers); but immediately afterwards, <u>article 106</u> specifies that the omission of this formality does not prejudice the acquisition and exercise of the copyright.

To establish the date of creation, it is advisable to deposit a photograph of the copyrighted work with the Italian Society of Authors and Publishers (SIAE) or a public notary.

#### **Copyright duration**

#### **26** What is the duration of copyright protection?

Copyright expires 70 years after the death of the author (<u>article 25</u>, ICL). This general principle applies to copyright but not to moral right.

Economic exploitation rights offer exclusively to the author to authorise the use and to receive remuneration for each use of the work. They include the right of reproduction, the right of performance, the right of communication to the public, the right of distribution, the right of rental, etc.

Moral right protects the author's persona. It is not subject to a time limit, and can be enforced by heirs at any time after the author's death.

# Display without right holder's consent

**27** Can an artwork protected by copyright be exhibited in public without the copyright owner's consent?

Displaying someone else's artwork without their consent could result in copyright infringement.

Artists have the right to publish their work, which includes the right to exhibit their creation in a public venue for the first time (article 12, ICL).

It is questionable whether this right should prevail over the owner's right to display artworks they own. Owners have the full and exclusive right to enjoy and dispose of their property, within the limits established by law (article 832, ICC). It could be argued that when artists sell their work to collectors, especially if during a fair or an exhibition, their right to publish the work is exhausted. However, artists could always try to enforce their moral right when artworks are exhibited in a manner or venue that they consider detrimental to their honour or reputation. Furthermore, the copyright holder's consent is always required for reproductions of the artist's work (eg, catalogues and marketing material related to an exhibition).

Owners and exhibition curators should not be considered liable, if they fail to secure the artist's consent before an exhibition, although it is customary and advisable to obtain it in writing.

Pursuant to article 15, Law No. 37/2019, the acts of reproduction, communication to the public, making available to the public, distribution and lending of works protected by copyright for the benefit of blind, visually impaired persons or persons with other difficulties in reading printed texts are free.

### Reproduction of copyright works in catalogues and adverts

**28** Can artworks protected by copyright be reproduced in printed and digital museum catalogues or in advertisements for exhibitions without the copyright owner's consent?

The copyright owner's consent always needs to be obtained for the reproduction of artworks in printed and digital museum catalogues or in advertisements for exhibitions.

Exceptions have a very narrow scope. Under article 70, ICL, low-resolution partial reproductions, whose publication on the internet is permitted for non-profit, scientific and educational purposes are free; as well as making the digital reproduction of works in the collection of a museum available to the public only at the venue, only for research purposes (article 71ter, ICL).

Pursuant to article 15 of Law No. 37/2019, the acts of reproduction, communication to the public, making available to the public, distribution and lending of works protected by

copyright for the benefit of blind, visually impaired persons or persons with other difficulties in reading printed texts are free.

# Copyright in public artworks

## **29** Are public artworks protected by copyright?

Copyright law protects all creative works, regardless of their form of expression: therefore, copyright protects street art and public works, as well.

No copyright exception allows for reproduction of public monuments (ie, freedom of panorama; see article 5, paragraph 3(h), Directive 2001/29/EC).

Street art is also subject to copyright, although most cases involving street artists have been criminal law cases, where the artist faced criminal liability based on the offence of damaging or spoiling a public space or private property (<u>article 639</u>, Italian Criminal Code).

Regardless of copyright, cultural heritage items owned by public entities or part of public collections cannot be reproduced without the authorisation of the Ministry.

# Artist's resale right

#### **30** Does the artist's resale right apply?

Artist's resale right (ARR) applies when art market professionals are involved in the sale.

In general, ARR provides that after artists sell or donate artworks, a royalty must be recognised and paid to them, or, after their death, to their heirs, in relation to all subsequent sales.

<u>Article 144</u>, ICL, provides that authors of artworks and manuscripts are entitled to royalties on the price of each resale.

ARR does not apply (i) when the seller has bought the work directly from the author less than three years before the resale and the resale price does not exceed  $\in$ 10,000, (ii) when the net price is equal to or less than  $\in$ 3,000 and (iii) to sales between private individuals.

<u>Article 150</u>, ICL, quantifies the amount of the right due in relation to the sale price and provides for different brackets with percentage values inversely proportional to the increase in the price. The amount due as ARR cannot in any case exceed  $\pounds 12,500$  for each sale.

ARR lasts for 70 years after the death of the artist. It is granted to Italian artists or non-EU artists residing in Italy, EU nationals and citizens of a third country, provided the laws of that country recognise the same right applicable to Italian nationals.

ARR is set at the following rates:

- 4 per cent for the portion of the sale price up to €50,000;
- 3 per cent for the portion of the sale price from €50,000.01 to €200,000;
- 1 per cent for the portion of the sale price from €200,000.01 to €350,000;

- 0.5 per cent for the portion of the sale price from €350,000.01 to €500,000; and
- 0.25 per cent for the portion of the sale price exceeding €500,000.

<u>Article 152</u>, ICL, entrusts SIAE to collect ARR. SIAE makes available a special website section where professionals in the art market can fulfil all the obligations connected with ARR.

# **Moral rights**

#### 31 What are the moral rights for visual artists? Can they be waived or assigned?

Moral right protects the author's personality. It is not subject to a time limit. The right to claim or deny authorship and the right of integrity of the work, for example, are part of the artist's moral right. After the artist's passing, moral right automatically arises to the benefit of the heirs.

The right of paternity protects the author's recognition as the author of the work. The right of integrity allows the author or their heirs to object to any alteration of the work that may result in damage to the author's honour or reputation.

Moral right cannot be waived or assigned (article 22, ICL).

### AGENCY

# Accounting to the principal

**32** Does the law require the agent to account to the principal for any commission or other compensation received by the agent while conducting the principal's business?

Pursuant to article 1713, ICC, agents shall account to the principal for any commission or other compensation received by them while conducting the principal's business.

### **Disclosed agent commission**

**33** Does disclosure to the principal that the agent will receive a commission allow the agent to keep the commission unless the principal objects?

The parties are free to negotiate whether the agent is entitled to receive the sale proceeds from the buyer and withhold their commission from that amount (which is customary), or whether the commission shall be paid directly by the principal. Any amount that the agent receives (including from the buyer) or pays (eg, to an introducer) should be adequately disclosed to the principal.

#### Undisclosed agent commission

# **34** If a third party pays a commission to an agent that is not disclosed to the principal, can the principal claim the commission from the third party?

The principal does not have a claim against a third party, which may have paid a commission to the agent, as long as the payment of that commission did not cause damage to the principal. For example, the agent may have introduced the principal to auction company A (which paid the commission), although auction company B offered a better deal to the principal. In such a case, the principal could sue both the agent and the auction company.

# **CONSIGNING ITEMS**

#### Protection of interests in consigned works

**35** How can consignors of artworks to dealers protect their interest in the artwork if the dealer goes into liquidation?

In the case of a voluntary liquidation, the consignor may request immediate restitution of the consigned work and obtain a restitution order pursuant to article 633, Italian Civil Procedure Code.

In case of bankruptcy or other reorganisation proceedings, a court-appointed administrator or trustee will prepare an inventory of the dealer's assets and an inventory of the third party's assets in consignment.

Dealers are obliged to list in a register all the works they have on consignment (article 120, Royal Decree No. 773/1931), to be shown to public authorities upon their request (article 16, Reg 635/1945).

The register will be used by the court-appointed administrator or trustee to process the restitution claims filed by consignors (see articles 87 and 103, <u>Italian Bankruptcy Law</u> – Royal Decree 267/1942).

#### **AUCTIONS**

#### Regulation

# **36** Are auctions of art, antiques or collectibles subject to specific regulation in your jurisdiction?

The sale of artworks by a professional through the internet is covered by the rules on distance contracts laid down in <u>Legislative Decree No. 206/2005</u>, and is subject to a whole series of rules aimed at protecting consumers, who find themselves purchasing a good (such as an artwork) without the possibility of viewing it and negotiating the sale in person.

The Decree applies to auctions and second-hand goods sales.

Consequently, art market professionals using e-commerce must comply with this legislation, requiring that the professional provide the potential customer with all the necessary information (such as the characteristics of the good, the contact details of the professional, the essential elements on price, payment method, delivery of the good, right of withdrawal, etc) in an appropriate manner, in simple and comprehensible language, and protect consumers' rights.

Additionally, article 64, ICHC, requires art market professionals (including auction houses) to provide the buyer with certificates of authenticity or probable attribution and provenance of the work, or at least disclose all the available information, possibly on a photographic reproduction of the work.

# **37** May auctioneers in your country sell art, antiques or collectibles privately; offer advances or loans against art, antiques or collectibles; and offer auction guarantees?

Auction houses are allowed to sell art, antiques or collectibles privately.

Granting loans or other credit facilities are activities reserved for financial institutions subject to the supervision of the Bank of Italy. However, there are no regulatory provisions preventing auction houses from providing auction guarantees to their consignors and also to make advances on such guarantees.

Auction guarantees cannot be considered as activities reserved to banks and financial intermediaries subject to the supervisory authority of the Bank of Italy, pursuant to Directive 2013/36/EU on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, and Italian banking law.

Although irrevocable bids are not common practice in Italy, they should be considered permitted under Italian law and there are no provisions prohibiting the compensation of irrevocable bidders.

### **SPOLIATION DURING THE NAZI ERA**

#### **Claims to Nazi-looted art**

# **38** In what circumstances would the heirs of the party wrongly dispossessed typically prevail over the current possessor, if a court in your country accepted jurisdiction and applied its own law to a claim to art lost during the Nazi era?

There are no specific provisions currently in force in Italy regulating claims to art lost or looted during the Nazi era in Italy. Nazi-looted artworks (or artworks that may have been subject to a forced sale during the Nazi or Fascist regime) that may have been acquired by the Italian state or any other public institution cannot be returned to the heirs of the looted owner(s) because they are considered part of the inalienable patrimony of the Italian state or other public entity.

With regard to privately owned goods, general provisions regarding private ownership and acquisition of movable goods as a result of uninterrupted possession for a period corresponding to the statutory provisions would regulate claims to Nazi-looted art.

As Italian law admits adverse possession in favour of bad faith possessors after 20 years, claims brought by the heirs of a victim of looting during the Nazi era have little chance of succeeding, unless the defendant fails to prove that their possession has been carried out uninterruptedly for the statutory period (starting on the date it became public).

# 39 Is there an ad hoc body set up to hear claims to Nazi-looted art?

No.

# **LENDING TO MUSEUMS**

#### **Responsibility for insurance**

**40** Who is responsible for insuring art, antiques or collectibles loaned to a public museum in your jurisdiction?

Public museums normally provide all-risks nail-to-nail insurance coverage to art, antiques or collectibles exhibited at their premises. The insurance premium is paid by the borrowing institution.

As an alternative to private insurance coverage, a public insurance policy covering the risks of loss and damage may be granted by the state for cultural goods that have been granted participation to exhibitions in Italy or abroad (article 48, paragraph 5, Italian Cultural Heritage Code).

#### Immunity from seizure

**41** Are artworks, antiques or collectibles loaned to a public museum in your country immune from seizure?

There is no legislation on immunity from seizure.

# **CULTURAL PATRIMONY**

# **National treasures**

### 42 Is there a list of national treasures?

There is no list of national treasures accessible to the public. As the heritage law (Law No. 364/1909) dates back to 1909 and there is no central database listing all classified artworks, state authorities themselves do not have an accurate knowledge of the amount of art, antiques and collectibles that have been declared of cultural interest.

The main consequences arising from an object being declared of cultural interest are the following:

- it cannot be permanently exported from Italy;
- the state has a pre-emption right in any sale transaction regarding such object;
- the state must be notified of any event regarding a notified work (eg, succession or relocation of the work following the owner's move to a different house); and
- any restoration, exhibition, intervention must be authorised in advance by the state.

Although the above consequences significantly affect the owner's rights, there is no compensation if an object is declared to be of cultural interest.

### **Right of pre-emption**

# **43** If the state is interested in buying an artwork for the public collections, does it have a right of pre-emption?

According to article 61, Italian Cultural Heritage Code (ICHC), the state has a right of pre-emption when a classified artwork is sold.

Both the seller and the buyer (or the intermediary on their behalf) must inform the local office of the Ministry of the sale and provide all the details (including the price of the artwork) within 30 days of the sale date. Within the following 60 days, the state must communicate whether it intends to buy the artwork at the sale contract price.

Pending the 60-day time frame, the sale contract is subject to the condition precedent that the state will not exercise its pre-emption right and the artwork must not be delivered to the buyer. The payment of the sale price, as well as the buyer's premium and all other costs associated with the sale (such as artists' resale right, are suspended.

If the state exercises its pre-emption right, it will only pay the sale price and will not be obliged to pay the buyer's premium and all other costs associated with the sale.

If the state does not exercise its pre-emption right, the sale between the original parties will become effective.

### Automatic vesting in the state

# **44** In what circumstances does ownership in cultural property automatically vest in the state?

There is a presumption of the state's ownership for archaeological objects discovered after 1909 (article 91, ICHC).

If the owner is not able to prove that the archaeological object in their possession was found or purchased before 1909, the state's ownership of it is established.

# Illegally exported property claimed by foreign states

# **45** How can a foreign state reclaim in your jurisdiction cultural property illegally exported from its territory?

Pursuant to article 77, ICHC (implementing <u>Directive 2014/60/EU</u>), EU member states are entitled to a restitution claim aimed at repatriating cultural property that was illegally exported from the territory of the requesting member state.

The claim must be filed before the court having jurisdiction over the place where the cultural property is located. The claim may not be brought: (1) more than one year after the competent central authority of the requesting member state became aware of the location of the cultural property and of the identity of its possessor or holder; and (2) more than 30 years after the object was unlawfully removed from the territory of the requesting member state.

The procedure is regulated by the Italian lex fori. The requesting member state must submit as exhibits to the complaint a document describing the property and qualifying it as cultural property, and a declaration by the competent authority of the requesting state with regard to the illicit export from the national territory.

The statement of claims must be served on the possessor of the property and the Ministry of Culture.

According to article 79, ICHC, the competent court may order that fair and equitable compensation be paid to the bona fide possessor of an illegally exported cultural object.

Italy ratified the following international conventions related to the export of cultural property:

- 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage;
- 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects;
- 1972 UNESCO Convention concerning the Protection of World Cultural and Natural Heritage;
- 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property;
- 1969 European Convention on the Protection of Archaeological Heritage;
- 1954 European Cultural Convention; and
- 1954 UNESCO Convention on the Protection and Promotion of the diversity of Cultural Expression.

Italy has also entered into a number of bilateral agreements, including the following:

- 2008 bilateral agreement between Italy and Switzerland on the import and repatriation of cultural property; and
- 2001 memorandum of understanding on import restrictions of archaeological material to fight art trafficking between Italy and the United States (amended in 2006).

# **NON-FUNGIBLE TOKENS**

#### **Regulation and case law**

**46** How are non-fungible tokens (NFTs) regulated in your jurisdiction? Is there any case law on NFTs in your jurisdiction?

Currently, there is no specific legislation on NFTs. When the token is related to a pre-existing artwork, ICL applies, just as it does if a new artwork is transferred along with the token.

As far as the digital reproduction of artworks belonging to the national cultural heritage owned by the state and detained by Italian museums is concerned, the Ministry recently established a commission of experts, which will be assigned the task of drafting guidelines on the digitisation of Italy's cultural heritage.

In the meantime, the creation of NFTs representing artworks and cultural heritage belonging to the state has been stopped.

A recent case has granted protection to notorious trademarks used as NFT by unauthorised third parties (Court of Rome, preliminary order of 20 July 2022).

### **ANTI-MONEY LAUNDERING**

# Compliance

**47** What are the anti-money laundering compliance obligations placed on the art trade?

The Fifth Anti-Money Laundering Directive (AMLD – <u>Directive (EU) 2018/843</u>) has been transposed into Italian national law by <u>Legislative Decree No. 125/2019</u>, which amended <u>Legislative Decree No 231/2007</u> (AML).

According to the AML, the following subjects are 'other non-financial operators' that are subject to AML obligations:

- traders in antique goods, persons who trade in artworks or act as intermediaries in the trade of artworks, even when such activity is carried out by art galleries or auction houses referred to in <u>article 115 of the Consolidated Law on Public Security (TULPS)</u> when the value of the transaction (even if fractioned) or of any related transactions is equal to or greater than €10,000 (<u>article 3, paragraph 5, letter b</u>, AML);
- persons who preserve or trade in artworks or act as intermediaries in the trade of artworks, when such activity is carried out within free ports and the value of the transaction (even if fractioned) or of any related transactions is equal to or greater than €10,000 (article 3, paragraph 5, letter c, AML).

The AML requires that art market professionals comply with the following obligations:

- carry out adequate customer due diligence by identifying the customer and the beneficial owner (article 17 et seq, AML);
- conduct ongoing monitoring of the business relationship, which encompasses scrutiny
  of transactions undertaken throughout the course of the relationship to ensure that the
  transactions being conducted are consistent with the knowledge of the customer and
  the business and risk profile, including where necessary the source of the funds and
  ensuring that the documents, data or information held are updated (article 19, AML);
- apply enhanced customer due diligence measures where there is a high risk of money-laundering or terrorist financing (articles 24 and 25, AML);
- store documents, data and information on possible money laundering activities (article 31, AML);
- communicate the suspect transactions to the Financial Intelligence Unit at the Bank of Italy (article 35, AML); and
- a prohibition to communicate to the interested client or third-party information on the communication of the suspect transaction (article 39, AML).

The Ministry of Economy and Finance, based on a proposal by the Financial Security Committee, may exempt persons engaged in a financial activity on an occasional or very limited basis where there is a low risk of money laundering or terrorism financing, and where such financial activity is not carried out as the main activity (<u>article 4, paragraph 3</u>, AML).

Pursuant to <u>article 21, Royal Decree No. 773/1931</u>, legal entities required to be registered in the Business Register and trusts which produce tax-relevant legal effects or related legal entities must communicate the information relating to their beneficial owners to the Business Register. A special section of the Business Register specifically destined to collect information about beneficial owners (Register of Beneficial Owners) is set to be created. At the time of writing, the Register of Beneficial Owners has not yet been enacted.

# **ENDANGERED SPECIES**

# CITES

# **48** Is your jurisdiction a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)?

Italy ratified the CITES Convention through Law No. 150/1992, which is enforced by the Ministry of the Environment. The Ministry of Economic Development is in charge of export and import licences. The Carabinieri and Guardia di Finanza (military enforcement units) both have competence on the enforcement of the Convention and Italian provisions on environmental protection (CITES).

# **49** Is the sale, import or export of pre-CITES endangered species subject to a licence?

A CITES permit must be requested from the Ministry of Economic Development for the export or import of pre-CITES worked endangered species. The permit is normally issued 30 days after the filing date. In the case of import, the applicant should submit the export permit issued by the third country of origin and evidence that the work was legally purchased.

For more details, open this <u>link</u>.

# **50** Is the sale, import or export of post-CITES worked or antique endangered species authorised? On what conditions?

Yes, if approved, an import or export licence will be released within 30 days of the request. This term is suspended if the National Scientific Committee has not released an opinion. Foreign CITES authorities may also be consulted by the Italian issuing authority.

Sale of items made of endangered species listed in Annex B to the EU Regulation 338/1996 imported for personal purposes, under article 7, paragraph 3 of the EU Regulation 338/1996, shall be authorised by the competent authority (ie, Carabinieri – Nucleo CITES), pursuant to article 58-bis of EU Regulation 865/2006. Sale of items made of endangered species listed in Annex B to the EU Regulation 338/1996 imported for personal purposes, under article 7, paragraph 3 of the EU Regulation 338/1996, shall be authorised by the competent authority (ie, Carabinieri – Nucleo CITES), pursuant to article 58-bis of the EU Regulation 338/1996, shall be authorised by the competent authority (ie, Carabinieri – Nucleo CITES), pursuant to article 58-bis of EU Regulation 865/2006.

# Specific endangered animal products

# **51** Are there any special rules for works of art made of elephant ivory, rhino horn or other specific endangered animal products?

Italian rules for works of art made of elephant ivory, rhino horn or other specific endangered animal products are directly linked to European regulations that, after the issuance of Guidance Document 2021/C 528/03 and Commission Regulation (EU) No. 2021/2280, prohibit the sale, import and export for commercial purposes of products made of certain materials.

As far as ivory is concerned, it is no longer possible to import/export it or trade in artefacts containing it for commercial purposes, even if they were introduced into the territory of the state before the time of entry into force of the Convention on International Trade of Endangered Species (CITES) in 1973, except for musical instruments or goods of cultural importance intended for Italian Museums.

Moreover, certificates for intra-EU commercial exploitation (article 8 Regulation No. 338/1997) for objects containing elephant ivory issued before 19 January 2022 will cease to be valid on 19 January 2023.

Pursuant to EU Regulation 2019/220, which amended EU Regulation 865/2006, permits and certificates for live rhinoceros and live elephants shall include a condition stating that horn or ivory from those animals or from their progeny may not enter commercial trade or commercial activities within the Union.

### **CONSUMER PROTECTION**

#### **Cancelling purchases**

# **52** In what circumstances may consumers cancel the sale of art, antiques or collectibles?

Consumers may avail themselves of the remedies set forth by the general provision of the Italian CIvil Code (ICC) if the sale was of a forgery.

Furthermore, consumers are entitled to withdraw, without giving a reason, from the sale of art, antiques or collectibles in the case of distance contracts or contracts negotiated off-premises with professional counterparties (<u>article 52</u>, <u>Legislative Decree No. 206/2005</u> 'Consumer Code'), within 14 days of the day on which the consumer or a third party other than the carrier, and indicated by the consumer, acquires physical possession of the good.

The withdrawal right does not apply in the case of contracts concluded at a public auction (ie, by a method of sale where goods or services are offered by the trader to consumers who attend or are given the possibility to attend the auction in person) through a transparent, competitive bidding procedure run by an auctioneer, and where the successful bidder is bound to purchase the goods or services (article 59, Consumer Code). Conversely, the right of withdrawal exists in case of sales concluded at online-only auctions where the bidder is not able to attend the auction in person.

# Duties of businesses selling to consumers

#### **53** Are there any other obligations for art businesses selling to consumers?

Art businesses selling to consumers must comply with article 1341 ICC, which requires for standard terms and conditions unilaterally drafted by the seller and submitted to the other party (regardless of whether the latter is a professional or a consumer) that the party specifically approves in writing clauses limiting the liability of the proposing party or the right of the assenting party to raise claims against the seller, or modifying the statutory judicial venue in case of disputes.

Professional sellers entering a distance or an off-premises contract must provide the mandatory relevant information prescribed by article 49 et seq. Consumer Code before the consumer is bound to the contract. Such relevant information includes the description of the artwork, the identity of the trader, the total price and means of payment, and whether or not a right of withdrawal exists – and, if it does, the conditions, time limit and procedures for exercising that right.

Finally, pursuant to article 64 Italian Cultural Heritage Code, art businesses must provide the buyer with a certificate of authenticity or attribution and provenance of the artwork.

# REGULATION

#### Art market regulator

**54** Is there a specific regulatory body overseeing the art market or certain business activities carried out within the art market in your jurisdiction?

Regarding art sales, the Italian Competition Authority (AAGCM) is the administrative independent body in charge of vigilance against abuses from market dominance, enforcing both Italian and European consumer protection or competition laws.

To this end, AGCM can conduct investigations and issue sanctions towards art professionals. For example, AGCM can order auction operators to suspend their campaigns for winning over new clients, on the grounds of insufficient transparency and/or lack of information.

With regard to the AML, there are multiple authorities, described in section II of <u>Legislative</u> <u>Decree No. 231/2007</u> (AML), in charge of verifying the compliance of AML subjects (including art professionals) with AML obligations, namely:

- the Ministry of Economy and Finance and its Financial Security Committee (articles 4 and 5 AML);
- the Financial Intelligence Unit of the Bank of Italy (article 6 AML);
- the Sector Supervisory Authority (article 7 AML);
- the Anti-Mafia and Anti-Terrorism Investigation Department (article 8 AML);
- the Special Currency Police Unit of the Guardia di Finanza (article 9 AML);
- public administration (article 10 AML); and
- self-regulatory bodies (article 11 AML).

Such authorities act in strong cooperation, conducting investigations and issuing sanctions in case of breach of AML obligations.

With regard to author resale rights (ARR), the Italian Society of Authors and Publishers (SIAE) is in charge of administering ARR on behalf of all artists, even those not adhering to SIAE. In addition, it receives and distributes to its associated authors ARR collected by its sister companies abroad.

Article 153, paragraph 2, Italian Copyright Law, states that professionals involved in the transfer of an artwork have the obligation to provide SIAE, at the latter's request, all the information needed to ensure payment of ARR for a period of three years following the sale. Failure to comply with such obligation can result in the transfer being considered as having been carried out in breach of the rules on ARR, and therefore in the sanction provided for in article 172, paragraph 3, ICL (suspension of professional or commercial activity from six months to one year, as well as an administrative sanction from €1,034 to €5,165).

# **Other regulators**

# **55** What other forms of regulation are professional art market participants in your jurisdiction subject to?

Art loans are subject to authorisation by the Ministry of Cultural Heritage if the artwork is of cultural interest (article 48, ICHC).

Art-backed loans can only be granted by intermediaries authorised by the Bank of Italy and are subject to supervisory controls. Professional insurance intermediation is an activity reserved to licensed insurance brokers and is subject to supervisory controls by the Institute for Insurance Supervision.

# **UPDATE AND TRENDS**

# Key developments of the past year

**56** Are there any other current developments or emerging trends that should be noted?

In early 2022, Italy implemented new criminal legislation on the protection of artistic and cultural heritage, introducing a new section in the Criminal Code for this purpose.

The reform was introduced by <u>Law No. 22/2022</u> (Law on Provisions on Crimes Against Cultural Heritage), in which the Italian legislator has provided for new criminal offences and has increased the penalties for existing crimes (replacing the already existing criminal provisions of the Italian Cultural Heritage Code).

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# 

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# Mexico

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**RETURN TO CONTENTS** 

# Summary

BUYING AND SELLING	194
Passing of title	194
Implied warranty of title	195
Registration	195
Good-faith acquisition of stolen art	195
Acquiring title to stolen art through prescription	196
Risk of loss or damage	196
Due diligence	197
Other implied warranties	197
Voiding purchase of forgeries	197 197
Voiding inadvertent sales of works by masters	177
EXPORT AND IMPORT CONTROLS	198
Export controls	198
Import controls	199
Export and import tax	200
DIRECT AND INDIRECT TAXATION	200
Taxes	200
Tax exemptions	201
BORROWING AGAINST ART	202
Types of security interest	202
Consumer loans	203
Register of security interests	203
Non-possessory security interests	203
Sale of collateral on default	204
Ranking of creditors	204
INTELLECTUAL PROPERTY RIGHTS	204
Creator copyright	204
Copyright duration	205
Display without right holder's consent	205
	205
Reproduction of copyright works in catalogues and adverts	206
Reproduction of copyright works in catalogues and adverts Copyright in public artworks	206 206
Reproduction of copyright works in catalogues and adverts Copyright in public artworks Artist's resale right	206 206 206
Reproduction of copyright works in catalogues and adverts Copyright in public artworks	206 206
Reproduction of copyright works in catalogues and adverts Copyright in public artworks Artist's resale right	206 206 206
Reproduction of copyright works in catalogues and adverts Copyright in public artworks Artist's resale right Moral rights	206 206 206 206

PAGE 194	RETURN TO SUMMARY
Disclosed agent commission	207
Undisclosed agent commission	207
CONSIGNING ITEMS	208
Protection of interests in consigned works	208
AUCTIONS	208
Regulation	208
SPOLIATION DURING THE NAZI ERA	208
Claims to Nazi-looted art	208
LENDING TO MUSEUMS	209
Responsibility for insurance	209
Immunity from seizure	209
CULTURAL PATRIMONY	209
National treasures	209
Right of pre-emption	210
Automatic vesting in the state	210
Illegally exported property claimed by foreign states	210
NON-FUNGIBLE TOKENS	211
Regulation and case law	211
ANTI-MONEY LAUNDERING	211
Compliance	211
ENDANGERED SPECIES	212
CITES	212
Specific endangered animal products	213
CONSUMER PROTECTION	213
Cancelling purchases	213
Duties of businesses selling to consumers	214
REGULATION	214
Art market regulator	214
Other regulators	214
UPDATE AND TRENDS	214
Key developments of the past year	214

# **BUYING AND SELLING**

# Passing of title

1 When does ownership of art, antiques and collectibles pass from seller to buyer?

Under Mexican law, a purchase and sale agreement is deemed perfect and finalised upon the specific consent of the parties in relation to the goods that are the subject matter

thereto and the price, even if the goods have not yet been delivered and the price not yet paid. Therefore, ownership is deemed to have passed from seller to buyer upon perfection of the agreement.

Notwithstanding the above, article 2312 of the Federal Civil Code provides that the parties may agree for the seller to maintain the ownership of the goods until the price has been paid. In such a case, if the buyer receives the merchandise, until the price is paid and ownership is transferred to the buyer, the buyer shall be deemed as a lessee of such merchandise.

#### Implied warranty of title

**2** Does the law of your jurisdiction provide that the seller gives the buyer an implied warranty of title?

Yes, Mexican law provides an implied warranty of title by imposing on the seller the obligation of restitution in the event of eviction; that is, if the buyer is deprived of the acquired merchandise by a final judgment due to a third-party right existing prior to the acquisition. The parties may increase or limit the effect of such warranty of title or even exclude it. However, if there was bad faith from the seller, any agreement releasing him or her from such warranty of title shall be deemed null; if the buyer renounced its right to restitution, the seller will only deliver the price of the merchandise, except if the buyer acknowledged the risk of eviction and assumed such risk; and if both parties act in bad faith, the buyer shall have no right to restitution.

#### Registration

**3** Can the ownership of art, antiques or collectibles be registered? Can theft or loss of a work be recorded on a public register or database?

Mexico does not have a specific register for the ownership of art, antiques or collectibles. However, registration of ownership of intellectual property rights on any artwork must be made before the National Copyright Institute, and individuals and private entities must register ownership of any historic, archaeological and palaeontological assets with the <u>Public Register of Historic and Archaeological Monuments</u> (registration of those owned by the state and public entities is made directly by the National Fine Arts and Literature Institute and the National Institute of Anthropology and History).

#### Good-faith acquisition of stolen art

4 Does the law of your jurisdiction tend to prefer the victim of theft or the acquirer in good faith of stolen art?

There is no specific regulation regarding stolen art and, therefore, general prescription rules apply. Mexican law provides that ownership of movable assets (such as art or antiques) possessed in good faith, continuously and in a peaceful manner, vests in the acquirer after three years.

# Acquiring title to stolen art through prescription

5 If ownership in stolen art, antiques or collectibles does not vest in the acquirer in good faith, is the new acquirer protected from a claim by the victim of theft after a period of time?

There is no specific regulation regarding stolen art and, therefore, general prescription rules apply. If there is no good faith, Mexican law provides that ownership of movable assets (such as art or antiques) vests in the acquirer after five years. If possession was acquired by means of violence, prescription will apply after five years counted from the moment the violence ceased. If possession was acquired by means of a crime (such as theft), the period for prescription will begin after the corresponding sentence has been extinguished or the criminal action has ceased. In such a case, possession is considered to be in bad faith and a five-year period applies.

# **6** Can ownership in art, antiques or collectibles vest in the acquirer in bad faith after a period of time?

Yes. If possession is not in good faith, they vest in the acquirer after five years. If possession was acquired by means of violence, prescription will apply after five years counted from the moment the violence ceased. If possession was acquired by means of a crime (such as theft), the period for prescription will begin after the corresponding sentence has been extinguished or the criminal action has ceased. In such a case, possession is considered to be in bad faith and a five-year period applies.

# 7 Must the professional seller of art, antiques or collectibles maintain a register of sales?

There are no specific obligations for a professional seller of art, antiques or collectibles to maintain a register of sales.

## Risk of loss or damage

# **8** When does risk of loss or damage pass from seller to buyer if the contract is silent on the issue?

Pursuant to article 377 of the Commercial Code, once the purchase agreement is finalised, any loss of or damage to the goods subject thereto shall be at the expense of the buyer if the goods have been delivered either physically, virtually or legally to the buyer. If the goods have not been delivered in any of those ways, the risk of loss or damage remains with the seller. In the event of gross negligence or wilful misconduct, the author of such misconduct shall be responsible for the loss of or damage caused to the goods.

The Commercial Code considers that the goods have been virtually delivered to the buyer when the buyer accepts that the goods are at their disposal, and therefore the seller shall be deemed as a depositary.

### **Due diligence**

**9** Must the buyer conduct due diligence enquiries? Are there non-compulsory enquiries that the buyer typically carries out?

There is no legal obligation regarding due diligence; however, it is common practice to carry out, at minimum, provenance enquiries.

### **10** Must the seller conduct due diligence enquiries?

There is no legal obligation regarding due diligence; however, it is common practice to carry out, at minimum, provenance enquiries.

# Other implied warranties

**11** Does the law provide that the seller gives the buyer implied warranties other than an implied warranty of title?

Mexican law provides an implied warranty for latent defects. The limitation period is six months, counted from the date the goods were delivered to the buyer.

# Voiding purchase of forgeries

**12** If the buyer discovers that the art, antique or collectible is a forgery, what claims and remedies does the buyer have?

The Federal Criminal Code foresees a term of three to 10 years in prison and a fine of 2,000 to 20,000 days of minimum wage applied in Mexico City, to whoever produces, reproduces, imports, stores, transports, distributes, sells or rents copies of works protected by the Copyright Law, with malicious intent for the purpose of commercial speculation and absent consent from the copyright holder. The fines shall apply regardless of any damages, whose amount shall not be less than 40 per cent of the retail price of each forged product.

From a contractual perspective, the claims and remedies would be subject to the terms of the specific purchase agreement, unless the validity of the contract is challenged in a court of law (due to fraud or bad faith). The purchase agreement would be declared void by a civil court if there is a judicial decision declaring the criminal offence. Therefore, regardless of the absence of an express warranty of authenticity, if a forged artwork (illicit object) is sold, the buyer who subsequently establishes that the artwork is not by that artist could succeed in a claim against the seller and be awarded damages.

#### Voiding inadvertent sales of works by masters

**13** Can a seller successfully void the sale of an artwork of uncertain attribution subsequently proved to be an autograph work by a famous master by proving mistake or error?

Mexican law does not provide a legal basis for any such claim, and therefore it would be subject to the terms and clauses set forth in the purchase agreement.

# **EXPORT AND IMPORT CONTROLS**

#### Export controls

**14** Are there any export controls for cultural property in your jurisdiction? What are the consequences of failing to comply with export controls?

Yes. To protect, conserve and restore artistic, historic and archaeological monuments, the <u>Federal Law of Archaeological</u>, <u>Artistic and Historic Monuments and Areas</u> (FLAHAM) provides export controls when goods such as art, antiques and collectible items qualify as national monuments in terms of the FLAHAM. Moreover, to export goods such as artwork from the twentieth and the twenty-first centuries, which do not qualify as monuments, it is necessary to submit an electronic notice. Finally, artwork can be subject to an anti-bribery notice before the tax authorities when its value exceeds 999,000 Mexican pesos. The procedures and criteria to obtain and submit such permits and notices are explained below.

#### Export permits for artistic and historic monuments

In accordance with article 33 of the FLAHAM, artistic monuments are those movable assets with a significant aesthetical value created by Mexican and foreign artists. When an artistic work is considered a monument, it must have an export permit issued by the National Fine Arts and Literature Institute (INBAL).

Under this category of artistic monuments, art antiques and collectible items may be classified. Currently, INBAL considers as artistic monuments paintings, drawings, sculptures, engravings, prints, serigraphs and lithographs, and other works of José María Velasco, José Clemente Orozco, Diego Rivera, Gerardo Murillo Coronado, David Alfaro Siqueiros, Frida Kahlo, Saturnino Herrán, María Izquierdo and Remedios Varo Uranga. According to article 32 of the <u>FLAHAM Regulations</u>, these artistic monuments can only be exported on a temporary basis.

Moreover, antiques that are over 100 years old are subject to an export permit issued by the National Institute of Anthropology and History (INAH) or INBAL when they qualify as a historical monument. According to articles 35 and 36 of the FLAHAM, historical monuments are those goods linked to the history of Mexico since the establishment of the Hispanic culture, in terms of the corresponding declaration statement or by law determination. In this regard, historic monuments determined by law include movable assets located inside properties built during the sixteenth to nineteenth centuries. Relevant documents, manuscripts and books related to the history of Mexico may be considered historic monuments. The term for temporary export depends on its purpose and is determined by INBAL or INAH.

To obtain the 'Export permit for temporary export of artwork declared as an artistic or historical monument' from INBAL it is necessary that applicants submit their request through the Foreign Trade Window (VUCEM). Based on the provisions of article 36 of the Regulations, a bond must be placed in favour of INBAL, to guarantee the return and conservation of the monument.

To obtain a 'Permit for temporary or definitive export of monuments or historical movable assets' from INAH, it is necessary to file an application through VUCEM.

Article 53 of the FLAHAM provides that anyone extracting or intending to extract an artistic or historic monument without permission from INBAL or INAH will be subject to five to 12 years of imprisonment and a monetary fine up to 1,035,000 Mexican pesos. In addition, when non-tariff regulations, such as export permits, are not filed before customs authorities, article 151, section II and article 178, section IV of the Customs Law provide for a precautionary seizure of the goods and a monetary fine equivalent to at least 70 per cent of the commercial value of the goods.

It is important to mention that archaeological monuments are movable assets and real estate resulting from cultures prior to the establishment of Hispanic culture in Mexican territory, as well as human remains, flora and fauna related to these cultures. However, when goods qualify as archaeological monuments, they cannot be exported except for exchanges or donations to governments or foreign scientific institutes by agreement of the President of Mexico.

#### Export notice of artwork from the twentieth and twenty-first centuries

When exporting artworks from the twentieth and twenty-first centuries that do not qualify as artistic monuments in terms of the FLAHAM, a notice must be submitted before the <u>National</u> <u>Organisation of Visual Arts</u> (CNAV). Through this notice, the CNAV issues an opinion on the artworks to be exported, notifying that they do not qualify as monuments.

If the interested person is a foreign individual or entity, it must file a writ electronically through VUCEM before the CNAV explaining the reasons for exporting such artwork, the duration of the export and the destination of the goods, among other specific requirements.

### Import controls

**15** Other than in relation to endangered species, are there any import controls for cultural property in your jurisdiction? What are the consequences of failing to comply with import controls?

The importation of art, antiques or collectible items may be subject to the following permits when certain conditions are met.

#### Notice for the importation of artwork from the twentieth and twenty-first centuries

To import artworks into Mexico from the twentieth and twenty-first centuries that do not qualify as artistic monuments in terms of the FLAHAM, it is necessary to submit a notice before the CNAV, which issues an opinion on the artworks to be imported, notifying that the items do not qualify as monuments.

If the applicant is a foreign individual or entity, it must file a writ electronically through VUCEM before the CNAV from INBAL explaining the details of importing the artwork, the duration of the import, the destination of the goods and technical information on the artwork.

# Notice for the importation of plastic works from artists whose work has been declared as an artistic or historic monument

With the notice of import of plastic works of artists whose work has been declared as artistic or historical monuments, INBAL, through the General Subdirectorate of Artistic Heritage, issues an authorisation for those works to enter the country.

In accordance with article 33 of the FLAHAM, artistic monuments are those movable assets with a significant aesthetical value created by Mexican artists. Foreign artists' works can also be considered artistic monuments when created in Mexico. INBAL may declare that certain artworks are artistic or historic monuments. Regarding historic monuments, INBAL may declare that a plastic work is a monument when those goods are linked to the history of Mexico after the establishment of Hispanic culture.

# **Export and import tax**

**16** Does any liability to pay tax arise upon exporting or importing art, antiques or collectibles?

According to the Law of General Taxes on Importation and Exportation (LIGIE), artwork, antiques or collectibles classified under Chapter 97 (Works of art, collectors' pieces and antiques) are exempted from the payment of import or export taxes. However, the importation and exportation of these goods result in liability to pay customs processing fees (DTA). DTA for the importation is calculated as .008 per cent of the customs value of the goods, while an export operation is subject to a fixed fee of 379 Mexican pesos.

In general, the importation of goods is levied with a 16 per cent rate of VAT. However, some exceptions may apply when importing certain artwork. In accordance with article 25, sections V and VI of the VAT Law, artwork that, due to its quality and cultural value is recognised as such by authorised institutions such as INBAL, is exempted from the payment of VAT, provided that it is intended for permanent public exhibition and is imported by the author.

The above-mentioned exemptions apply specifically to paintings, drawings, engravings, stamps, lithography, sculptures and other artwork classified under HTS codes 9701.21.01, 9701.91.01, 9702.10.01, 9702.90.99, 9703.10.01, and 9703.90.99 of the LIGIE. In connection to exports, under article 29, section I of the VAT Law, artwork as other goods are subject to a zero per cent VAT rate when they are exported on a permanent basis.

### **DIRECT AND INDIRECT TAXATION**

#### Taxes

# **17** Outline the main types of tax liability arising from ownership and transfer of art, antiques and collectibles.

Mexican tax legislation does not establish any type of tax liability arising from ownership of assets comprising art, antiques and collectibles.

However, the transfer of property of such goods triggers a direct tax on the income and, in some cases, an indirect tax, such as VAT or duties.

For direct taxes (income tax), the seller of the art, antiques and collectibles must accrue as taxable income the profits from the sale, and pay the corresponding income tax in Mexico. If the seller is a corporation, as a general rule, the profits will be taxed with a fixed rate of 30 per cent; if the seller is an individual, the profits will be taxed with a progressive rate of up to 35 per cent.

In both scenarios, some deductions may be applied to the taxable income.

Regarding individuals, if the sale exceeds 227,400 Mexican pesos, a monthly payment of the estimated income tax on account of the corresponding annual tax must be made. Such monthly payments are subject to the 20 per cent rate applied to the total value of the consideration; if the acquirer is a national resident or a foreign resident with a permanent establishment in Mexico, he or she is obliged to withhold the corresponding monthly income tax of the seller.

In addition, in the case of individuals, the income from the alienation of art of their authorship shall be accrued and taxed as income derived from entrepreneurial activities, in which case, the specific rules applicable to said activities shall apply.

For indirect taxes (eg, VAT), an exemption is provided for sales of art, antiques and collectibles. In these cases, instead of applying the general tax rate of 16 per cent, the tax will not be paid on the transfer of 'used personal property or used goods'; however, this exemption is only applicable when these objects are not alienated by enterprises. If these goods are alienated by enterprises, or by individuals carrying out entrepreneurial activities, the seller shall levy the VAT that results from applying the 16 per cent rate to the total amount of the consideration.

### **Tax exemptions**

# **18** Outline any tax exemptions or special conditions applicable to art, antiques and collectibles.

The Income Tax Law provides that individuals who obtain income from the sale of goods may deduct the verified acquisition cost; however, this cost shall not be reduced by reason of the passage of years.

By an executive order issued in 1994, national resident individuals that independently dedicate themselves to creating plastic art may opt to pay with paintings, prints or sculptures of their authorship the income tax and VAT that correspond to the income generated by the sale of their works. This option is also applicable for foreign resident individuals that totally or partially create works of art in Mexico that are sold in the country and trigger federal taxes. This executive order also establishes a special tax regime for individuals that alienate works of art or antiques not of their authorship. Under this regime, as long as the acquirer of the art or antique is a corporation with national residence whose commercial activity is art trading, the individual may opt to pay the income tax triggered by the sale through a withholding tax of 8 per cent applied to the total amount of the transaction. The 8 per cent rate

is significantly lower than the standard progressive rate that ranges from zero per cent to 35 per cent for individuals. This special tax regime is also applicable to trade commissions between individuals and corporations whose activity is art trading.

The VAT Law sets an exemption for the 16 per cent import VAT when recognised works of art are imported to the national territory for permanent public display. The same exemption applies for recognised works of art created on foreign territory by Mexican nationals or national residents that are imported to Mexico by their authors.

In those cases of exporting goods, article 29 of the Mexican VAT Law provides that 'the companies resident in the country shall calculate VAT by applying the rate of 0% to the value of the sale of goods when they are exported.' However, this article will not be applicable to individuals who do not meet the rules to be considered as a 'company' and therefore does not update the normative precept for the application of the zero per cent rate in the exportation of goods.

In addition, article 9, part IV of the LIVA, expressly provides for an exemption in which no VAT will be paid on the disposal of goods which are regarded as 'used movable goods'. Some Art such as paintings or certain antiques are considered as 'used movable property', as they have already been used and are in accordance with the provisions of Rule 11.1.6 of the Miscellaneous Tax Resolution applicable in 2023, which states that 'works of plastic arts and antiques are regarded as used movable goods within the meaning of Article 9, Section IV of the VAT Act'.

# **BORROWING AGAINST ART**

#### Types of security interest

**19** In your jurisdiction what is the usual type of security interest taken against art, antiques and collectibles?

Property that constitutes movable tangible or intangible assets of the debtor can be used to secure obligations of the debtor by means of a pledge agreement granted in favour of the creditor. Traditional pledge agreements may cover art, antiques and collectibles. For this type of pledge, according to Mexican law, it is necessary to dispossess the debtor of the pledged assets to perfect the security interest created by the pledge agreement. This can be achieved by delivering the pledged assets to the creditor or to a third party to act as a depository for the benefit of the creditor.

Mexican law also contemplates another form of pledge without dispossessing the debtor of the pledged assets in which the debtor may retain possession of its assets and would be allowed to use it in its ordinary course of business. The pledged assets must be movable tangible or intangible and may be existing or future assets. Art, antiques and collectibles may be also covered by this type of pledge when the debtor maintains the possession of the art, antique or collectible.

However, as these types of assets can be considered manifestations of national culture, the Mexican government can impose certain limitations by declaring them to be artistic

monuments through an administrative procedure established in Mexican law. Artistic monuments can still be granted as collateral and be transferred or sold, provided that certain registration and notification requirements are fulfilled.

# **Consumer loans**

**20** If the borrower borrowing against art assets in your jurisdiction qualifies as a consumer, does the loan automatically qualify as a consumer loan, and are there any exemptions allowing the lender to make a non-consumer loan to a private borrower?

Loans against art assets will not automatically be considered consumer loans.

### **Register of security interests**

**21** Is there a public register where security interests over art, antiques or collectibles can be registered? What is the effect of registration? Is the security interest registered against the borrower or the art?

To be enforceable against third parties, the pledge agreement must be recorded with the Public Registry of Movable Collateral.

Although the pledge is perfected between the parties by the delivery of the assets, it will be necessary to notarise it and record it with the public registry of the domicile of the debtor to have preference for payment over other creditors, except for other mandatory preferred creditors (eg, employees of the debtor and the tax authorities) and so that the guarantee is opposable against third parties.

Regarding artistic monuments, the owner must register the artwork in the Public Registry of Monuments and Artistic Areas (this registration does not guarantee the authenticity of the artwork) and notify the National Institute of Fine Arts of (1) any change of owner or holder (which should be made by public deed), (2) any lien or guarantee constituted over the artistic monument, (3) any change of location even if the move is temporary and (4) any alteration, change or deterioration.

#### Non-possessory security interests

# **22** Can the lender against art collateral perfect its security interest without taking physical possession of the art?

Yes, a non-possessory pledge allows the pledgor to grant a security interest in favour of the pledgee over specifically identified movable assets (eg, art) allowing the pledgor to retain possession of the pledged assets and to use such assets in accordance with the terms agreed upon in the financing arrangements.

# Sale of collateral on default

# **23** If the borrower defaults on the loan, may the lender sell the collateral under the loan agreement, or must the lender seek permission from the courts?

The execution of the pledge depends on whether the pledge is with or without dispossession of the debtor's pledged assets.

In a traditional pledge, the creditor is entitled to request the court to authorise the sale of the pledged assets if any of the following occurs:

- a default in the secured obligations;
- the price of the pledged assets is reduced to an amount not sufficient to equal the amount of the underlying obligation plus 20 per cent; or
- the debtor fails to provide the creditor with the necessary funds to pay any required exhibitions under negotiable instruments on time.

For a non-possessory pledge, the pledge would provide for the circumstances under which the assets that comprise the security could be sold or in any other way disposed by the debtors and the manner in which the proceeds of such sale or disposition would be treated, allowing the possibility of including a non-judicial foreclosure procedure that would have to be agreed by the pledgor. The creditor would follow the non-judicial foreclosure procedure set forth in the pledge agreement in case of any breach of the secured obligations. Nevertheless, the debtor shall have the option to authorise the payment of the underlying debt with the pledge cash, if any, avoiding all foreclosure procedures.

#### Ranking of creditors

# **24** Does the lender with a valid and perfected first-priority security interest over the art collateral take precedence over all other creditors?

The pledge would provide a first-priority security interest on the pledged assets in favour of the creditor, subject to the rights of mandatory preferred creditors, such as employees of the debtor and certain tax authorities.

#### **INTELLECTUAL PROPERTY RIGHTS**

#### **Creator copyright**

# **25** Does copyright vest automatically in the creator, or must the creator register copyright to benefit from protection?

The Federal Copyright Law (LFDA), building on the international standards set forth by the Berne Convention, establishes that original works of authorship shall be protected even absent registration or publication. Nevertheless, registration before the National Copyright Institute (INDAUTOR) – an independent agency of the Ministry of Culture responsible for the administrative enforcement of copyright laws – grants legal certainty and publicity to the copyrighted work. Therefore, although registration in Mexico is not mandatory, it is

advisable to register copyrighted works as this grants pre-emptive rights in favour of its owner (meaning that the burden of proving the ownership over the copyrighted work will shift to benefit the author, who will be the one stated on file unless proven otherwise).

The basic requirements for obtaining authors' rights protection are outlined below.

- Fixation: authors' rights protection exists in Mexico as a matter of law from the moment of fixation, which is defined as '[t]he incorporation of letters, signs, sounds, images and others elements in which the work has been expressed, or the digital embodiment of said elements, which, in any form or material, including electronic means, permits its perception, reproduction or any form of communication.' The lack of formalities required to obtain authors' rights protection is expressly mentioned in the LFDA. This statute provides that the '[r]ecognition of authors' rights and neighbouring rights does not depend on prior registration nor on any document or formality'.
- Authorship: only individuals can be granted authors' right protection. The LFDA makes clear that legal entities (or corporations) may only be holders of authors' rights as agents or representatives of the original author, and may only exploit or acquire the patrimonial rights of a work.
- Originality: under the LFDA, a work must be original to qualify for authors' rights protection.

# **Copyright duration**

# **26** What is the duration of copyright protection?

The LFDA grants an author both moral and patrimonial rights. Moral rights recognise the author as the first and sole perpetual owner of the rights, and patrimonial rights allow the author to exploit the work exclusively or authorise others to exploit it. An author's patrimonial rights are protected in Mexico for the life of the author plus 100 years. In the case of joint works, the protection is granted for the same period after the death of the last surviving author. Moral rights protection lasts for a perpetual term that can be transmitted to the legitimate heirs or to any person through a will or any other legal means of transmission of rights after an individual is deceased.

#### Display without right holder's consent

# **27** Can an artwork protected by copyright be exhibited in public without the copyright owner's consent?

Under the provisions of the LFDA, holders of an author's patrimonial rights have the right to authorise or prohibit the public communication of the author's literary or artistic works, including through public exhibition by any means or procedure. The reproduction, communication and distribution of drawings, paintings, pictures and audiovisual works visible from public places are expressly excluded from this right.

As a general rule, and unless otherwise agreed to, the sale of any pictorial, sculptural or plastic artwork does not include the right to reproduce such work. Although the acquirer may, at its discretion, display it and include it in catalogues, the author may oppose the

exercise of these rights when the exhibition is carried out in conditions that may harm the author's honour or professional reputation.

# Reproduction of copyright works in catalogues and adverts

**28** Can artworks protected by copyright be reproduced in printed and digital museum catalogues or in advertisements for exhibitions without the copyright owner's consent?

Pursuant to the provisions of the LFDA, the patrimonial right of reproduction and publication permits the making of one copy or several copies of an artwork. These copies can be made in any tangible form, including temporary or permanent storage by electronic means. However, this right is subject to several limitations.

Artworks protected by copyright may be reproduced under certain circumstances without the copyright owner's consent (including for scientific, literary or artistic criticism) provided the normal exploitation of the work is not adversely affected thereby and that no alteration is made to the work. For instance, a lawful user of a literary or artistic work can make one copy of such works for private use, provided that the copy is made without intent to profit.

On the other hand, the LFDA establishes that literary and artistic works may be used in shops or establishments open to the public that distribute copies of such artworks, provided that no charge is made for admission and that the use does not go beyond the place in which the sale is effected, and serves the sole purpose of promoting the sale of copies of the relevant artworks. The holders of the patrimonial rights of the author may claim compensatory remuneration for any copying or reproduction done without their consent.

## **Copyright in public artworks**

### **29** Are public artworks protected by copyright?

Original works of art that have been fixed into public spaces are not excluded from protection according to the provisions of the LFDA; therefore, an argument can be made that they are protected by copyright laws in Mexico.

# Artist's resale right

#### **30** Does the artist's resale right apply?

The artist's resale right is not regulated or covered in the LFDA.

#### Moral rights

#### **31** What are the moral rights for visual artists? Can they be waived or assigned?

In Mexico, moral rights are considered attached to the author – hence, they are perpetual, inalienable, irrevocable and cannot be waived, seized or pledged. Under the LFDA, an author has the moral right to:

- determine if the work is to be published and the way to do it, or to determine the mechanisms to keep his or her work unpublished (unedited);
- demand the recognition of author status with respect to the work and order its publication as an anonymous or pseudonymous work;
- demand respect for the work, opposing any deformation, mutilation or modification, as well as to any action or attempt that causes a demerit or prejudice to the author's reputation;
- modify the work;
- withdraw the work from commerce; and
- oppose any attribution of a work that is not of his or her creation.

Heirs may exercise only the rights provided for in subparagraphs I, II, III and VI, whereas the state (where applicable – ie, when the works are of interest to the national cultural heritage) may exercise only the rights provided for in subparagraphs III and VI.

# AGENCY

# Accounting to the principal

**32** Does the law require the agent to account to the principal for any commission or other compensation received by the agent while conducting the principal's business?

There are no rules under Mexican Law and, therefore, it would be subject to the terms of the agency agreement between the parties.

## Disclosed agent commission

**33** Does disclosure to the principal that the agent will receive a commission allow the agent to keep the commission unless the principal objects?

There are no rules under Mexican Law and, therefore, it would be subject to the terms of the agency agreement between the parties.

#### Undisclosed agent commission

**34** If a third party pays a commission to an agent that is not disclosed to the principal, can the principal claim the commission from the third party?

There are no rules under Mexican Law and, therefore, it would be subject to the terms of the agency agreement between the parties.

# **CONSIGNING ITEMS**

#### Protection of interests in consigned works

**35** How can consignors of artworks to dealers protect their interest in the artwork if the dealer goes into liquidation?

The Commercial Code provides that a commercial consignation is an agreement under which a person transfers the possession and availability (but not the ownership) of certain movable assets to a third party known as the consignor, for the consignor to pay him or her a price in the event of a sale under the terms agreed to or to return the assets if a sale is not obtained. Since ownership is not transferred in favour of the consignor, such assets are not bankruptcy remote; however, if a sale is obtained by a consignor and the owner does not or cannot transfer the assets to the buyer, he or she is obliged to pay for losses and damage as well as restitution in the event of eviction of the consigned assets or any latent defects.

# **AUCTIONS**

#### Regulation

**36** Are auctions of art, antiques or collectibles subject to specific regulation in your jurisdiction?

There is no specific regulation in Mexico regarding auctions or provisions to transactions related to them.

**37** May auctioneers in your country sell art, antiques or collectibles privately; offer advances or loans against art, antiques or collectibles; and offer auction guarantees?

As there is no specific regulation, auctioneers may sell art, antiques or collectibles privately, and offer advances or loans in the same terms as any individual or private entity.

# **SPOLIATION DURING THE NAZI ERA**

#### **Claims to Nazi-looted art**

**38** In what circumstances would the heirs of the party wrongly dispossessed typically prevail over the current possessor, if a court in your country accepted jurisdiction and applied its own law to a claim to art lost during the Nazi era?

Mexico has no specific regulation or precedent on the matter and general prescription rules will most likely apply.

#### **39** Is there an ad hoc body set up to hear claims to Nazi-looted art?

No.

# **LENDING TO MUSEUMS**

#### **Responsibility for insurance**

**40** Who is responsible for insuring art, antiques or collectibles loaned to a public museum in your jurisdiction?

Obligations such as insurance would have to be agreed and established between the parties in the corresponding agreement.

### Immunity from seizure

**41** Are artworks, antiques or collectibles loaned to a public museum in your country immune from seizure?

There is no specific regulation. In addition, there is no legal definition of 'museum'. However, general seizure rules apply, which means that only assets owned by the debtor (or the joint guarantor) are subject to seizure.

### **CULTURAL PATRIMONY**

### National treasures

### 42 Is there a list of national treasures?

Under Mexican law, national treasures are classified as artistic monuments, which are assets with a relevant aesthetic value declared as such by the Mexican government with the following considerations:

- only the artworks of dead artists can be declared as artistic monuments, which means that while the artist is still alive, the art can be traded without further limitations;
- the artworks of Mexican artists can be declared as artistic monuments regardless of the place they are produced; however, in the case of artworks produced by foreign artists, they can only be declared as artistic monuments if they are produced in Mexico;
- the declaration of artistic monuments can include all or only part of an artist's work; and
- works of artists whose identity is unknown can be declared artistic monuments.

Currently, the National Fine Arts and Literature Institute (INBAL) considers as artistic monuments those paintings, drawings, sculptures, engravings, prints, serigraphs and lithographs, and other works of José María Velasco, Jose Clemente Orozco, Diego Rivera, Gerardo Murillo Coronado, David Alfaro Siqueiros, Frida Kahlo, Saturnino Hérran, María Izquierdo and Remedios Varo Uranga.

The owner of an artistic monument must comply with registration and notification requirements and must preserve the artwork and, if necessary, restore it, with authorisation from INBAL. The Mexican Ministry of Culture and INBAL may conduct inspection visits to monitor compliance with the law.

Likewise, as a general rule, the export of artistic monuments is forbidden; however, INBAL can authorise exceptions for a specific period of time provided that certain actions are granted to ensure re-entry to Mexico, or indefinitely when the artistic monuments are acquired by a museum or gallery of recognised prestige to be exhibited publicly in a manner convenient to the cultural interest of Mexico. Likewise, artistic monuments whose integrity could be affected by their transportation or by changing the conditions in which they are located cannot be temporarily exported.

# **Right of pre-emption**

**43** If the state is interested in buying an artwork for the public collections, does it have a right of pre-emption?

No.

#### Automatic vesting in the state

**44** In what circumstances does ownership in cultural property automatically vest in the state?

Ownership of archaeological monuments (movable assets and real estate resulting from cultures prior to the establishment of Hispanic culture in Mexican territory, as well as human remains, flora and fauna related to these cultures) vests in the Mexican state.

### Illegally exported property claimed by foreign states

**45** How can a foreign state reclaim in your jurisdiction cultural property illegally exported from its territory?

On 4 January 1973, Mexico became a signatory to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property. The Convention was one of the first worldwide agreements on the protection of cultural property to reduce illicit trade in antiques and cultural goods. Furthermore, as of 27 December 2021, Mexico is officially part of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (the UNIDROIT Convention).

Under the UNIDROIT Convention, the possessor of a cultural object that has been stolen must return it. According to article 5 of the Convention, a state party may request the court or other competent authority of another state party to order the return of a cultural object illegally exported from the territory of the requesting state. Under this scenario, the court or the competent authority of the state addressed shall order the return of an illegally exported cultural object if the requesting state establishes that the removal of the object from its territory significantly impairs one or more of the following:

- the physical preservation of the object or its context;
- the integrity of a complex object;
- the preservation of information of, for example, a scientific or historical nature; or

 the traditional or ritual use of the object by a tribal or indigenous community, or if it has been established that the object is of significant cultural importance for the requesting state.

The request for return must contain or be accompanied by information of a factual or legal nature that may assist the court or the competent authority of the state addressed in determining whether the above-mentioned requirements have been met. This request shall be brought within a period of three years from the time when the requesting state knew the location of the cultural object and the identity of its possessor, and in any case within a period of 50 years from the date of the export or from the date on which the object should have been returned (temporary exportation for purposes of exhibition, research or restoration).

Moreover, and according to the information provided by the Ministry of Culture and the Ministry of International Affairs, Mexico has signed different bilateral agreements regarding the protection, preservation, return and restitution of cultural property and the prevention of theft, clandestine excavation, and illegal import and export of cultural property.

# **NON-FUNGIBLE TOKENS**

#### **Regulation and case law**

# **46** How are non-fungible tokens (NFTs) regulated in your jurisdiction? Is there any case law on NFTs in your jurisdiction?

Non-fungible tokens (NFTs) are not regulated in Mexico and, therefore, there is no case law to date in connection to such. However, under certain circumstances NFTs can be interpreted as analogous to certain rights recognised under Mexican law (including copyrights or property laws), depending on the nature of the specific NFT and the asset to which the NFT relates to, or is referenced (eg, art, shares or stock, etc).

# ANTI-MONEY LAUNDERING

#### Compliance

# **47** What are the anti-money laundering compliance obligations placed on the art trade?

According to article 17 of the Anti-Money Laundering Law, regardless of whether an artistic work qualifies as a monument or not, paintings and drawings are subject to an anti-money laundering notice when their value exceeds 999,000 Mexican pesos. This notice must be filed electronically by those who, with authorisation granted by the Ministry of Finance and Public Credit, promote on behalf of others the customs clearance regarding the export of the artwork (customs brokers). In terms of aticles 53 and 54 of the Anti-Money Laundering Law, failure to comply with the filing of notices under this law carries a penalty of 41,500 to 414,900 pesos.

### **ENDANGERED SPECIES**

### CITES

# **48** Is your jurisdiction a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)?

Yes, CITES entered into force in Mexico in September 1991. Thus, regarding its implementation in Mexico, there are three CITES authorities, as follows:

- the administrative authority is the General Directorate of Wildlife of the Ministry of Environment and Natural Resources (SEMARNAT);
- the scientific authority is the National Commission for the Knowledge and Use of Biodiversity; and
- the law enforcement authority is the Federal Prosecutor's Office for Environmental Protection.

# **49** Is the sale, import or export of pre-CITES endangered species subject to a licence?

According to article 55 of the General Law of Wildlife and article 56 of its Regulations, the importation, exportation and re-exportation of specimens, parts and derivatives of wild species included in CITES shall be carried out in accordance with the Convention. The General Law of Wildlife does not establish a distinction between pre- or post-CITES endangered species, but prior permits apply to species regardless of whether they are listed in CITES.

In this regard, article III of CITES establishes that the export and import of species included in Appendix I (Endangered species) shall require the prior grant and presentation of an export or import permit, which shall only be granted when certain conditions are met, for instance:

- the scientific authority of the state of import or export has advised that such import or export will not be detrimental to the survival of that species;
- a management authority of the state of export is satisfied that the specimen was not obtained in contravention of the state's laws on flora and fauna;
- a management authority of the state of export is satisfied that any living specimen will be so prepared and shipped as to minimise the risk of injury, damage to health or cruel treatment;
- a scientific authority of the state of import has advised that the import will be for purposes that are not detrimental to the survival of the species involved; and
- a management authority of the state of import is satisfied that the specimen is not to be used for primarily commercial purposes.

In connection with the above, according to Mexican laws, a permit must be obtained from the SEMARNAT when importing, exporting or re-exporting specimens, parts and derivatives of wildlife regardless of whether they are listed in the CITES Appendices. For these purposes, the procedure is carried out before the SEMARNAT.

# **50** Is the sale, import or export of post-CITES worked or antique endangered species authorised? On what conditions?

The General Law of Wildlife does not differentiate between pre- or post-CITES endangered species, but establishes that it is necessary to obtain a permit from the SEMARNAT when importing, exporting or re-exporting specimens, parts and derivatives of wildlife regardless of whether they are listed in the CITES Appendices.

The procedure is carried out before the SEMARNAT and the corresponding form must be filled out. The applicant must submit the documentation that proves the legal origin of the specimens, parts or derivatives (through invoices or sales notes, authorisation of use or subsistence authorisation). Finally, proof of payment of fees must be submitted, taking into account that for the reception and processing of each application, regardless of its resolution, a fee of 778 Mexican pesos must be paid.

### Specific endangered animal products

# **51** Are there any special rules for works of art made of elephant ivory, rhino horn or other specific endangered animal products?

The General Law of Wildlife provides that the import, export and re-export of specimens, parts and derivatives of wildlife species (including elephant ivory and rhino horn) are covered by CITES, and that all activities in connection with the trade of these specimens, parts or derivatives, or goods comprising them, are ruled by the Convention.

CITES states that the import of any specimen of a species comprising parts of endangered animal products requires a specific authorisation, a special import permit and an export permit or a re-export certificate issued by the Mexican authorities.

In addition, Mexico strictly regulates the export of its native animal and plant species, such as parrots, reptiles, cacti, palms, cycads and orchids, some of which are rare and endangered in the wild. If a person considers trading any piece of art or goods made from the leather of endangered species, the corresponding permits and authorisations must be complied with in all circumstances.

### **CONSUMER PROTECTION**

# **Cancelling purchases**

# **52** In what circumstances may consumers cancel the sale of art, antiques or collectibles?

There are no specific rules regarding art, antiques or collectibles. However, general rules would apply and consumers may report deceiving advertisements, which may result in the authorities imposing certain fines or cancelling the sale of such goods.

# Duties of businesses selling to consumers

**53** Are there any other obligations for art businesses selling to consumers?

No.

# REGULATION

# Art market regulator

**54** Is there a specific regulatory body overseeing the art market or certain business activities carried out within the art market in your jurisdiction?

No.

# Other regulators

**55** What other forms of regulation are professional art market participants in your jurisdiction subject to?

Not applicable.

# **UPDATE AND TRENDS**

### Key developments of the past year

**56** Are there any other current developments or emerging trends that should be noted?

There are no updates at this time.

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## Galicia

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# Switzerland

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**RETURN TO CONTENTS** 

### Summary

BUYING AND SELLING	217
Passing of title	217
Implied warranty of title	218
Registration	218
Good-faith acquisition of stolen art	219
Acquiring title to stolen art through prescription	220
Risk of loss or damage	220
Due diligence	220
Other implied warranties	221
Voiding purchase of forgeries	222
Voiding inadvertent sales of works by masters	222
EXPORT AND IMPORT CONTROLS	223
Export controls	223
Import controls	223
Export and import tax	224
DIRECT AND INDIRECT TAXATION	224
Taxes	224
Tax exemptions	225
BORROWING AGAINST ART	226
Types of security interest	226
Consumer loans	226
Register of security interests	226
Non-possessory security interests	226
Sale of collateral on default	227
Ranking of creditors	227
INTELLECTUAL PROPERTY RIGHTS	227
Creator copyright	227
Copyright duration	227
Display without right holder's consent	228
Reproduction of copyright works in catalogues and adverts	228
Copyright in public artworks	228
Artist's resale right	228
Moral rights	228
AGENCY	229
Accounting to the principal	229
Disclosed agent commission	229
	~~ /

PAGE 217	RETURN TO SUMMARY
Undisclosed agent commission	229
CONSIGNING ITEMS	230
Protection of interests in consigned works	230
AUCTIONS	230
Regulation	230
SPOLIATION DURING THE NAZI ERA	231
Claims to Nazi-looted art	231
LENDING TO MUSEUMS	231
Responsibility for insurance	231
Immunity from seizure	232
CULTURAL PATRIMONY	232
National treasures	232
Right of pre-emption Automatic vesting in the state	233 233
Illegally exported property claimed by foreign states	233
NON-FUNGIBLE TOKENS	234
Regulation and case law	234
ANTI-MONEY LAUNDERING	234
Compliance	234
ENDANGERED SPECIES	234
CITES	234
Specific endangered animal products	235
CONSUMER PROTECTION	236
Cancelling purchases	236
Duties of businesses selling to consumers	236
REGULATION	236
Art market regulator	236 236
Other regulators	
UPDATE AND TRENDS	237
Key developments of the past year	237

### **BUYING AND SELLING**

### Passing of title

### 1 When does ownership of art, antiques and collectibles pass from seller to buyer?

In principle, ownership passes to the buyer with the transfer of possession (article 714, <u>Civil</u> <u>Code</u>; article 184, <u>Code of Obligations</u>). Instead of a physical transfer of possession, the parties may agree that the buyer receives the means to access the art, antique or collectible, for example because it will remain stored at a freeport (article 922, Civil Code). However, the

parties may also provide that the buyer takes possession of the art, antique or collectible and acquires ownership only on receipt of payment. In the latter event, the seller's retention of title must be registered in the official debt enforcement register at the buyer's place of residence (article 715, Civil Code).

#### Implied warranty of title

**2** Does the law of your jurisdiction provide that the seller gives the buyer an implied warranty of title?

Statutory law provides a warranty of title according to which the seller must transfer the collectible free from any rights enforceable by third parties against the buyer that exist at the time the contract is concluded (article 192, Code of Obligations). Buyers are therefore entitled to a legal claim if they have bought a collectible that actually belonged to a third party. No implied warranty of title exists if, at the time of the agreement, the buyer knew or should have known of any third-party rights. Actions for breach of warranty of title regarding cultural property as defined by the <u>Cultural Property Transfer Act (CPTA)</u> become time-barred one year after the buyer discovered the defect of title, but in any event, 30 years after the contract was concluded (article 196a, Code of Obligations). To qualify as cultural property under the CPTA, the property must:

- belong to one of the categories provided for under article 1 of 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); and
- be meaningful property from a religious or secular point of view for archaeology, prehistory, literature, art or sciences.

The Swiss federal administration published a checklist to help determine whether a property can be considered as cultural property, which includes a description of categories of the 1970 UNESCO Convention and list of significant areas such as archaeology, art or science.

The implied warranty of title can be limited or excluded by contract. Such an agreement is, however, void if the seller has intentionally concealed the right of a third party. Owing to the protection of the good-faith purchaser, the warranty of title was of little practical relevance. Since the limitation period for a good-faith acquisition has increased to 30 years for cultural property, this is likely to change in the future.

### Registration

**3** Can the ownership of art, antiques or collectibles be registered? Can theft or loss of a work be recorded on a public register or database?

No. Ownership of art, antiques or collectibles cannot be registered in Switzerland, nor is there any public register or database of stolen art. Storing cultural property at freeports is subject to inventory, registering a date of deposit, description of the object, its provenance, its value and the owner's identity.

In sale transactions whereby the buyer acquires possession of the property before payment is made, the parties may register the seller's retention of title in the official debt enforcement register at the buyer's place of residence, but this rarely occurs in practice.

### Good-faith acquisition of stolen art

**4** Does the law of your jurisdiction tend to prefer the victim of theft or the acquirer in good faith of stolen art?

In principle, Swiss law protects the acquirer in good faith. The acquisition in good faith of an artwork in due possession of the transferor is not open to challenge, regardless of whether the transferor lacked actual power of disposal, unless the artwork was either stolen or lost or otherwise taken from the original owner against their will.

In the event of stolen or lost artwork, the original owner can claim it back (article 934, Civil Code). The claim to recover cultural property falling under the definition of the CPTA is limited to one year from the day the owner discovers the current possessor's identity and location of the object, and 30 years since the loss of the object. Before the entry into force of the CPTA on 1 June 2005, artworks and collectibles were subject to a five-year limitation period, which is still applicable for chattels other than cultural property.

For artwork sold at auction or by an art dealer, the original owner may only reclaim his or her property against the reimbursement of the price paid by the good-faith purchaser. This price does not include any increase in value of the artwork since the purchase.

The question of whether the purchaser was in good faith when buying the artwork must be determined based on the facts of the case. The good-faith purchaser must exercise the required care and attention in the particular circumstances. The Federal Court has not imposed a general duty on the buyer to investigate the seller's ownership title. Instead, it distinguishes between businesses that are particularly exposed to the supply of goods of dubious origin and those that are not so exposed. In the latter event, the buyer has a duty to investigate the seller's legitimacy only if any suspicions have arisen. In the former event, the buyer must be inquisitive at the outset of the transaction. Federal case law suggests that the antiquities market is considered a business that is particularly exposed to title risks, whereas the Federal Court has held otherwise for the sale of works of classical modern art from the former Soviet Union (see Federal Court decisions BGE 122 III 1 and BGE 139 III 305). More importantly, the courts take into account the buyer's expertise and knowledge of the market to establish the requisite level of due diligence. Heightened expectations are not only held against dealers and auction houses, but also collectors. Guidelines and ethics codes of dealers' associations may serve judges as a basis to determine the diligence required under the given circumstances. The CPTA provides further details.

In terms of the burden of proof, there is a presumption of good faith (article 3, Civil Code). Hence, the party alleging bad faith bears the burden of proof (article 8, Civil Code), which can be difficult in practice.

### Acquiring title to stolen art through prescription

5 If ownership in stolen art, antiques or collectibles does not vest in the acquirer in good faith, is the new acquirer protected from a claim by the victim of theft after a period of time?

Yes, the acquirer in good faith of stolen or lost cultural property is protected upon expiry of the limitation period, that is if the original owner missed to file a claim one year after they knew about the current possessor's identity and location of the object, and 30 years after the loss.

**6** Can ownership in art, antiques or collectibles vest in the acquirer in bad faith after a period of time?

No, ownership never passes to a purchaser in bad faith (article 936, Civil Code).

7 Must the professional seller of art, antiques or collectibles maintain a register of sales?

Yes if the sale concerns a cultural property item with a purchase or estimate price over 5,000 Swiss francs. The dealer must record the identity of the seller or consignor (such as name, address, nationality, date of birth, etc), the location of origin or discovery of the property, a description (including information such as the kind of object, its dimensions, weight, subject matter, any inscriptions, etc), date of the sale and sale price. The Specialised Body for the International Transfer of Cultural Property at the Swiss Federal Office of Culture (the Specialised Body) may request the dealer to consult the register.

### Risk of loss or damage

**8** When does risk of loss or damage pass from seller to buyer if the contract is silent on the issue?

Risk of loss or damages pass from seller to buyer upon the conclusion of the contract, unless the parties have agreed otherwise (article 185, Code of Obligations). In practice, sale contracts frequently provide that risk passes upon delivery of the artwork to the buyer.

### Due diligence

**9** Must the buyer conduct due diligence enquiries? Are there non-compulsory enquiries that the buyer typically carries out?

Buyers need to perform appropriate due diligence in order to rely on good faith. It will typically involve requesting information from the seller on the provenance of the work and consulting the relevant sale catalogues and stolen art registers.

### **10** Must the seller conduct due diligence enquiries?

The CPTA establishes a general and a specific duty of diligence for the sale of cultural property. Both the general and the special duty of diligence apply only to transactions involving

at least one person active in the art trade or auction business. These are defined as persons domiciled in Switzerland and companies having their registered office in Switzerland that acquire cultural property for the purpose of reselling it for their own account or on behalf of third parties. It also applies to persons domiciled abroad and to companies having their registered office abroad, provided they conduct more than 10 transactions with cultural property with a turnover of more than 100,000 Swiss francs a year for the purpose of reselling the property for their own or a third party's account.

Under the general duty of diligence, any seller must refrain from transferring ownership to the cultural property unless they can assume, under the given circumstances, that the object was neither stolen nor lost against the will of the owner or illegally excavated, and not exported in breach of a bilateral agreement (article 16(1), CPTA). This general duty of diligence only applies to art sales involving a transfer of ownership, unlike loans, storage, donations and other legal relationships. The person bearing the duty is primarily the owner of the cultural property or the intermediary acting on the owner's behalf.

Moreover, under the specific duty, professional sellers are obliged, according to article 16(2) of the CPTA, to:

- establish the identity of the supplier or seller and ask for a written declaration from them of their right to dispose of the cultural property;
- inform their customers about existing import and export regulations of the contracting states;
- maintain written records on the acquisition of cultural property by specifically recording the origin of the cultural property, to the extent known, and the name and address of the supplier or seller, a description as well as the sales price of the cultural property (such records must be stored for 30 years); and
- provide all necessary information on fulfilling this duty of diligence to the Specialised Body.

Art collectors who do not act as professionals pursuant to article 16 of the CPTA may be subject to criminal sanctions should they sell, import, distribute, procure, acquire or export cultural property stolen or otherwise lost against the will of the owner (article 24, CPTA).

Further due diligence requirements are provided by anti-money laundering provisions and import and export laws.

### Other implied warranties

### **11** Does the law provide that the seller gives the buyer implied warranties other than an implied warranty of title?

An implied guarantee of authenticity exists in art sale agreements provided the price paid is commensurate with the price that would have been paid for an original. It allows the buyer to rescind the sale because the artwork is a fake, was attributed to the wrong artist or was wrongly dated.

The seller may expressly or impliedly exclude any liability for authenticity (article 199, Code of Obligations). Such disclaimers are void for defaults that the seller fraudulently concealed from the buyer.

### Voiding purchase of forgeries

### **12** If the buyer discovers that the art, antique or collectible is a forgery, what claims and remedies does the buyer have?

The buyer of a forgery may rescind the sale agreement either on the grounds of a fundamental mistake or under the seller's liability against defects. Both are subject to any disclaimer included in the contract. Under a mistake claim, the seller must allege that the description of the object at sale, which is part of the contract, differed from what the object actually is – a typical example is the sale of a forgery (article 24, Code of Obligations). However, should the buyer have known about the art object's attribution, the court will likely reject their claim based on the principle of fairness in commercial transactions.

Liability against defects is a cause of action specific to sale contracts. Upon the delivery of the object, buyers must immediately verify its condition and notify the seller of any defects. The buyer may then cancel the sale contract and request the reimbursement of the price paid plus interest and expenses against the restitution of the artwork.

### Voiding inadvertent sales of works by masters

## **13** Can a seller successfully void the sale of an artwork of uncertain attribution subsequently proved to be an autograph work by a famous master by proving mistake or error?

Sellers may rescind the sale agreement based on a mistake claim. A cause of action for mistake arises when the seller misconceived the art object's attribution, such as believing the painting to be by a follower instead of the master painter. The seller must show that, had they known about the true situation, they would not have concluded the sale agreement (or at least not under the same subject terms of the contract). Courts further assess whether any third party hypothetically placed in the position of the claimant would have considered the mistake to be decisive to such an extent that it would not have concluded the agreement, or at least only under different conditions. The mistake claim is subject to any disclaimer included in the contract.

For sales at auction, sellers may act based on the auction house's duty of care, the extent of which is determined by the parties' express or implicit agreement, including any disclaimer of liability. The duty of care supposes that the auction house acts in accordance with the level of diligence that may be expected of a knowledgeable professional acting under the same circumstances. Thus, it has an obligation to use all the diligence that a conscientious auction house would use in the same situation to attribute and evaluate the consigned artwork.

### **EXPORT AND IMPORT CONTROLS**

#### Export controls

**14** Are there any export controls for cultural property in your jurisdiction? What are the consequences of failing to comply with export controls?

Under Swiss law, only a narrow range of cultural property, which is listed in the federal or cantonal register, requires specific authorisation to be exported. A specific export licence also applies to objects containing endangered species according to the CITES Convention. Moreover, Iraqi and Syrian cultural property that was stolen or illicitly exported from those countries is protected by specific legislation prohibiting their import, export, transit, sale and distribution. All other cultural property can be exported upon customs clearance.

A person who exports or imports cultural property must include in the customs form the cultural property object type and a description of the place of manufacture, or if it originates from archaeological or palaeontological excavations, its place of discovery. The person importing cultural property from a 1970 UNESCO Convention contracting state must further indicate whether, according to the laws of that state, an export licence was required for the property. If so, the required licence must be submitted with the form.

In case of suspicion, customs authorities may withhold cultural property. Illegally exporting cultural property is a criminal offence, which may lead to fines of up to 200,000 Swiss francs and imprisonment (article 24 et seq, Cultural Property Transfer Act (CPTA)). In some cases tougher criminal rules may apply. Cultural property is confiscated if suspicion exists that it was stolen, lost against the will of the owner or illegally imported into Switzerland.

### Import controls

**15** Other than in relation to endangered species, are there any import controls for cultural property in your jurisdiction? What are the consequences of failing to comply with import controls?

The import of cultural property (defined as 'significant property from a religious or universal standpoint for archaeology, prehistory, history, literature, arts or sciences belonging to the categories under article 1 of the UNESCO Convention of 1970', article 2, paragraph 1, CPTA) is subject to customs clearance requiring a detailed description of the object (eg, kind of object, place of manufacture or discovery, article 25, <u>Cultural Property Transfer Ordinance</u>). Import from a state with which Switzerland has concluded a bilateral agreement is subject to evidence of compliance with that state's export regulations and an export permit must be submitted. An intentionally false declaration or illicit import is punishable by imprisonment up to one year or a fine up to 100,000 Swiss francs (article 24, paragraph 1, CPTA). In the event of negligence, the sanction is a fee of up to 20,000 Swiss francs, and if the offender acts on a professional basis, the sanction is imprisonment for up to two years or a fine of up to 200,000 Swiss francs (article 24, paragraph 2, and 3, CPTA).

#### **Export and import tax**

### **16** Does any liability to pay tax arise upon exporting or importing art, antiques or collectibles?

Import and export of art, antiques and collectibles are subject to the usual customs and tax duties. Customs duty is generally not levied on such items but each property must be related to a specific tariff number to establish its treatment. Import VAT is, in principle, levied on import of art, antiques and collectibles (at a rate of 7.7 per cent and from 1 January 2024 at a rate of 8.1 per cent) and the valuation of these items is key and not always straightforward in practice (the market value must be determined – if documents are missing, an expert valuation can be carried out).

Specific regimes exist for art, antiques and collectibles to avoid taxes upon import. For example, items that will be sold by art galleries can be subject to the temporary admission procedure, which is limited to two years and can be extended. Specific customs declaration must be given and the necessary information must be gathered, such as the size of the painting, the name of the artist and proof of value or, in the case of an antique, its age. Items can also be stored in duty-free warehouses to avoid any tax and duties (transit items can be stored free of import tax; for items that will be sold, import duties only need to be paid upon the end of stockpiling).

### DIRECT AND INDIRECT TAXATION

### Taxes

**17** Outline the main types of tax liability arising from ownership and transfer of art, antiques and collectibles.

Various taxes can be levied on the transfer and ownership of art, antiques and collectibles.

When individuals own art, antiques and collectibles, wealth tax may be levied on the market value of the property (the rates vary greatly depending on the canton, from 0.1 per cent in Nidwalden to 1 per cent in Geneva). For companies, art collections are treated as an asset of the corporation.

Under Swiss tax law, private capital gains are exempt from income tax. However, capital gains will be taxed (as income) if they are considered to be the result of professional trading (it is, therefore, essential to distinguish between the independent activity and the simple management of private assets, but it can be difficult to do so).

Consequently, it will be necessary to determine whether an art collector can be considered self-employed, regardless of their main activity in order to establish the tax treatment of his or her assets (and the potential profit made from selling the works of art).

The Federal Court refers to the following criteria (each of which may be enough to qualify the activity as professional) in order to separate taxable self-employed activity from the simple management of the private assets: the systematic or planned nature of the activities;

the frequency of the transactions and the short period of ownership; the link between the taxpayer's professional activity, the use of special knowledge and the activity in partnerships; the access to foreign funds; and the use of revenue and the reinvestment.

An overview of the rulings of the Federal Court will be required in each case to determine the above criteria. In general, the Federal Court considers that the boundary between a taxable income generated by an independent activity and tax-free capital gains must be assessed by taking into account all of the circumstances of the particular case at hand. From an external point of view, whether the taxpayer takes part in the trade is not decisive. Moreover, the criteria developed by real estate and securities trading case law can be applied by analogy to the sale of works of art, although the peculiarities related to it (such as the irregularity of the income) must be taken into consideration.

If a Swiss company sells works of art, this activity is considered to generate taxable corporate income subject to the different applicable rates depending on the canton of incorporation of the company (eg, 13.99 per cent in Geneva).

A person is subject to VAT (article 10, <u>Value Added Tax Act</u>) if they operate a business and provides assets and services in Swiss territory through that business, or has their registered office, domicile or permanent establishment in Swiss territory (this individual is, however, exempt from tax liability if within one year they generate turnover, in Swiss territory and abroad, from supplies of less than 100,000 Swiss francs that are not exempt from tax).

#### Tax exemptions

### **18** Outline any tax exemptions or special conditions applicable to art, antiques and collectibles.

In Switzerland, wealth tax is levied at the cantonal level (for movable assets, wealth tax applies if the taxpayer resides in Switzerland) and the rates vary considerably (from 0.1 per cent to 1 per cent). In terms of wealth tax, in Geneva the law expressly exempts certain art and scientific collections from wealth tax. However, collections held for a purely speculative purpose are not exempt. In any case, an artwork that is part of the taxpayer's business assets is taxable (professional trade of works of art). Therefore, the purpose and the use of the goods are crucial, and legal scholars mention other criteria that must be taken into consideration, such as the relationship between the value of the work of art and the global assets or the manner in which the work of art is ensured. In this context, the high value of a painting cannot, in principle, constitute grounds for refusing tax exemption. However, collections simply stored in safes or freeports are normally taxable. The taxpayer bears the burden to prove that an artwork is exempt.

Specific indirect tax regimes exist for art, antiques and collectibles to avoid taxes upon import. Thus temporary admission procedures, duty-free warehouses and freeports may lead to avoiding tax and duties or postponing tax liability. Moreover, if an artist brings artwork they created into Switzerland, this may be done duty-free.

If the person liable for tax has acquired collectors' items, such as artwork or antiques, in order to calculate the tax, he or she may deduct the purchase price from the selling price provided they have not deducted input tax from the purchase price (margin taxation). If the

purchase price is higher than the selling price, the loss may be set off, as the difference is deducted from taxable turnover (article 24a, Value Added Tax Act).

In some cantons, works of art may be used to pay a taxpayer's gift or estate tax.

### **BORROWING AGAINST ART**

### Types of security interest

**19** In your jurisdiction what is the usual type of security interest taken against art, antiques and collectibles?

The usual type of security interest is a pledge (the creditor has a right to the sale of the pledged asset if the amount due is not reimbursed) or a transfer of ownership as guarantee (the creditor becomes the owner of the asset).

### **Consumer loans**

**20** If the borrower borrowing against art assets in your jurisdiction qualifies as a consumer, does the loan automatically qualify as a consumer loan, and are there any exemptions allowing the lender to make a non-consumer loan to a private borrower?

No, the loan does not automatically qualify as a consumer loan. The <u>Federal Credit Consumer</u> <u>Act</u> provides that a consumer concludes a loan for a purpose outside their commercial or professional activity (article 3). The Act does not apply to loans in excess of 80,000 Swiss francs and short-term loans of up to three months. If a borrower qualifies as a consumer, the provisions of the Act may not be waived at their expense.

#### **Register of security interests**

**21** Is there a public register where security interests over art, antiques or collectibles can be registered? What is the effect of registration? Is the security interest registered against the borrower or the art?

No.

### Non-possessory security interests

### **22** Can the lender against art collateral perfect its security interest without taking physical possession of the art?

In principle, nothing prevents the lender from having the art stored at a third-party place (such as a warehouse) under its control. With regard to the borrower, it cannot keep possession of the art (or have sole control over access to it).

### Sale of collateral on default

### **23** If the borrower defaults on the loan, may the lender sell the collateral under the loan agreement, or must the lender seek permission from the courts?

According to the <u>Federal Act on Debt Enforcement and Bankruptcy</u>, the lender is not required to seek permission from the courts if the borrower has not lodged opposition to the payment order. In the opposite event, they must file a claim with the courts. The parties may not anticipate and forego this procedure by inserting a clause in the loan agreement.

### **Ranking of creditors**

**24** Does the lender with a valid and perfected first-priority security interest over the art collateral take precedence over all other creditors?

Yes.

### **INTELLECTUAL PROPERTY RIGHTS**

### **Creator copyright**

### **25** Does copyright vest automatically in the creator, or must the creator register copyright to benefit from protection?

Copyright automatically vests in the natural person who has created the work. An exception to this general principle concerns publishing contracts. According to statutory provisions (the Code of Obligations), where one or more authors accept a commission to work on a project originated by a publisher, the publisher owns the copyright to the work as a whole. In addition, copyright over software developed by an employee in the course of their professional duties belongs to the employer alone.

No copyright registration system exists under Swiss law.

#### **Copyright duration**

#### **26** What is the duration of copyright protection?

Copyright protection begins upon the creation of the work. For computer programs, the protection lasts 50 years following the death of the author. 'Non-individual' photographs (those without individual character) of three-dimensional objects benefit from copyright protection for a period of 50 years from the date of creation of the photograph. All other types of work are protected for 70 years following the death of the author.

### Display without right holder's consent

### **27** Can an artwork protected by copyright be exhibited in public without the copyright owner's consent?

Copyright owners have a moral right to decide if, when, how and under what name their artwork may be published for the first time (article 9(2), <u>Federal Act on Copyright and Neighbouring Rights (FACN)</u>). Once they have made use of this right and published their artwork, it may be exhibited in public without their consent.

### Reproduction of copyright works in catalogues and adverts

## **28** Can artworks protected by copyright be reproduced in printed and digital museum catalogues or in advertisements for exhibitions without the copyright owner's consent?

An exception to copyright protection exists for printed and digital museum catalogues if issued by the organiser of the exhibition. It extends to public and private collections, and temporary and permanent exhibitions as long as the exhibition is publicly accessible. It does not cover postcards, posters and websites. The same rule applies to the publication of auction, gallery and fair catalogues.

### Copyright in public artworks

### **29** Are public artworks protected by copyright?

Artworks that are permanently situated in a place that is accessible to the public or that are visible from such a place may be reproduced. The reproductions may be made available, sold, broadcast or otherwise distributed. However, the reproductions cannot be three-dimensional or serve the same purpose as the original.

### Artist's resale right

#### **30** Does the artist's resale right apply?

There is no artist's resale right under Swiss law.

### Moral rights

#### 31 What are the moral rights for visual artists? Can they be waived or assigned?

Visual artists have the right to be recognised as the author of their work and to decide whether, when and under what name their work shall be published for the first time (article 9, FACN). They further have the right to prohibit any distortion, mutilation or modification of their work that is prejudicial to their reputation or personality (article 11, FACN). Other moral rights that are less relevant in practice include the artist's right to seek access to their work from the current possessor if the access is essential for them to exercise copyright (article 14(1), FACN). The artist may also request the possessor to provide them with the work for an exhibition in Switzerland (article 14(2), FACN). The latter two moral rights

are only granted upon the balancing of the interests at issue. Finally, artists also have a right to protect their single original work from destruction in that the possessor cannot destroy the work without first offering it to the artist against the price of the raw materials (article 15, FACN).

Moral rights are non-assignable by nature as they are considered to be inextricably linked to an author's personality. Nonetheless, artists often waive the exercise of their moral rights on a contractual basis. This practice is accepted as long as it does not appear inequitable (ie, an excessive restriction as regards the author's own personality (article 27(2), Civil Code)).

### AGENCY

### Accounting to the principal

**32** Does the law require the agent to account to the principal for any commission or other compensation received by the agent while conducting the principal's business?

The agent must perform the contractual obligation faithfully, which gives rise to several responsibilities (article 398(2), Code of Obligations). Primarily, the agent must safeguard the principal's interests and place them above any other interests. Moreover, the agent owes the principal a duty to inform regarding the diligent performance of the services and accountability of their agency activities. The extent of this duty is mainly dependent upon the parties' degree of specialisation and knowledge as well as their access to information. It does not require the agent to inform the principal on all essential facts in the contract. Brokers are not allowed to act for both parties by being involved in the contractual negotiations as this creates a conflict of interest amounting to a breach of his or her fiduciary duties. The Federal Court has not ruled on the matter of secret commissions in art transactions. Nonetheless, it may be held that if an agent conceals from the principal the ultimate price paid in order to earn an additional fee, they breach their fiduciary duty.

### **Disclosed agent commission**

**33** Does disclosure to the principal that the agent will receive a commission allow the agent to keep the commission unless the principal objects?

If the broker is involved in the negotiation of the sale contract, they are not allowed to act for both parties at the same time. Consequently, they lose their entitlement to a commission (article 415, Code of Obligations).

#### Undisclosed agent commission

**34** If a third party pays a commission to an agent that is not disclosed to the principal, can the principal claim the commission from the third party?

There is no specific statutory basis for such a claim. The principal may have to consider the general provisions in tort (article 41 et seq, Code of Obligations).

### **CONSIGNING ITEMS**

### Protection of interests in consigned works

**35** How can consignors of artworks to dealers protect their interest in the artwork if the dealer goes into liquidation?

A consignment contract or a deposit contract that makes it clear that the consignor is the actual owner of the work is the most practicable option. There is no register under Swiss law whereby consignors can register interest in consigned artworks. If the artwork is stored at a freeport, it is listed in an inventory together with the identity of its owner.

### AUCTIONS

### Regulation

**36** Are auctions of art, antiques or collectibles subject to specific regulation in your jurisdiction?

No specific regulation exists on a national level, except for articles 229 to 236 of the Code of Obligations. These statutory provisions concern very specific aspects of compulsory and voluntary auctions. More specifically, provisions on voluntary auctions pertain to: the conclusion of the sale upon the fall of the auctioneer's hammer; the binding nature of bids at auction; the ability to file a claim for auction whose outcome was influenced by any unlawful or immoral means; the applicable warranty and possible disclaimer; and the transfer of ownership for the sale of movable property upon the fall of the hammer.

Several cantons have implemented laws on procedural matters including the required authorisation to conduct an auction sale, the publicising of the sale, and the responsibility of the auctioneer and the bailiff. Most of these cantonal provisions are mandatory and subject to criminal or civil liability.

Switzerland has no law that governs online art sales.

**37** May auctioneers in your country sell art, antiques or collectibles privately; offer advances or loans against art, antiques or collectibles; and offer auction guarantees?

There is no law that specifically prohibits such practices – they are subject to general contract law.

### **SPOLIATION DURING THE NAZI ERA**

### **Claims to Nazi-looted art**

**38** In what circumstances would the heirs of the party wrongly dispossessed typically prevail over the current possessor, if a court in your country accepted jurisdiction and applied its own law to a claim to art lost during the Nazi era?

Title never passes to a purchaser in bad faith (article 936, Civil Code) and no time limitation applies to the restitution claim (see article 641, Civil Code). Hence, the wrongly dispossessed party would have to show that the current possessor acquired the art in bad faith, and that all previous owners did so too.

### 39 Is there an ad hoc body set up to hear claims to Nazi-looted art?

The government has set up the Contact Bureau on Looted Art, which responds to claims regarding Nazi-looted art in public collections (the federal art collections, the National Museum and the National Library). The Bureau also relays claims regarding art held by other institutions or private parties to the relevant institution or person. It promotes an amicable resolution approach to such disputes with the aim of reaching a just and fair solution as promulgated by the 1998 Washington Principles on Nazi-Confiscated Art. Factors to be considered are the unequivocal determination of the artwork's provenance and the multitude of solutions in respect of ownership and acknowledgment of the circumstances. In terms of the dispute resolution process, the Bureau either intervenes as an intermediary facilitator or refers to the UNESCO mediation and conciliation process, and to the International Council of Museums art and cultural heritage mediation.

The Swiss government is in the process of establishing a commission to hear claims to Nazi-looted art. So far, no details on the scope of action and procedure of this commission have been published.

### LENDING TO MUSEUMS

#### **Responsibility for insurance**

### **40** Who is responsible for insuring art, antiques or collectibles loaned to a public museum in your jurisdiction?

The framework contract of the Swiss Museums Association provides that all fees resulting from the loan, including insurance costs, are borne by the borrowing institution. The property on loan must be insured for its full value as per the lender's evaluation agreed by the borrower before its delivery. Moreover, the insurance must designate the lender as the beneficiary and cover all risks on a nail-to-nail basis, including transit, transport and storage. Regular insurance cover limitations for damage caused by events such as ordinary wear and tear, cleaning or restoration, war, terror, strikes, nuclear radiation, and earthquakes or volcanic eruptions are permitted.

#### Immunity from seizure

### **41** Are artworks, antiques or collectibles loaned to a public museum in your country immune from seizure?

The Cultural Property Transfer Act (CPTA) provides for an anti-seizure regime regarding cultural property on temporary loan from a 1970 UNESCO Convention contracting state for an exhibition in a museum or other cultural institute in Switzerland (articles 10 to 13, CPTA). The art must qualify as cultural property according to the 1970 UNESCO Convention and be the subject of a loan agreement for a temporary exhibition. The loan agreement must stipulate that the cultural property will be returned to its country of origin following the conclusion of the exhibition. The lender may be either a private or a public institution, or an individual. The borrower must be a museum or any other cultural institution in Switzerland that has a collection open to the public. To obtain such a return guarantee, the borrowing institution must file a request with the Specialised Body to issue a return guarantee to the lender for the period of the exhibition. The application must be submitted at least three months before the intended import date of the cultural property into Switzerland, together with a copy of the loan agreement.

If the request meets these requirements, the application form, together with a description of the item and information on the provenance of the cultural property, is published in the Federal Bulletin. Any person whose rights might be affected by the contemplated immunity, in particular any person asserting title to the cultural property, may file a written objection to the Specialised Body within 30 days of publication. In the absence of any objection, the return guarantee will be issued provided the import meets the requirements of the CPTA (articles 7 and 8). The effect of the guarantee is to protect the cultural property from any legal claims by private parties or authorities while in Switzerland. However, the guarantee does not stand in the way of action by Swiss criminal enforcement authorities.

### **CULTURAL PATRIMONY**

### **National treasures**

### 42 Is there a list of national treasures?

The Cultural Property Transfer Act (CPTA) provides for a federal inventory of cultural objects that are of significant importance for cultural heritage and are the property of the state (article 3). It also enables the cantons to draw up their own inventories of cultural property. As a consequence of their registration, these objects cannot be acquired in good faith, and their return is not subject to any statute of limitation. Their export from Switzerland is also prohibited. Listed objects must qualify as cultural property according to the 1970 UNESCO Convention. The federal inventory is published online. Cantons have established inventories of monuments that may not be exported out of the canton without a licence or without notifying the authorities. No process exists under Swiss law whereby private property can be considered as national treasure and therefore be blocked from being exported.

### **Right of pre-emption**

**43** If the state is interested in buying an artwork for the public collections, does it have a right of pre-emption?

No.

#### Automatic vesting in the state

### **44** In what circumstances does ownership in cultural property automatically vest in the state?

Excavation findings of scientific interest belong to the canton in which they were found (article 724, Civil Code). Ownership in such objects is thus automatically vested in the canton.

### Illegally exported property claimed by foreign states

### **45** How can a foreign state reclaim in your jurisdiction cultural property illegally exported from its territory?

Switzerland has signed and implemented the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Moreover, Switzerland signed the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects on 26 June 1996, but it has not ratified it.

Switzerland has concluded nine bilateral agreements thus far allowing for the repatriation of cultural property imported into Switzerland in breach of the contracting state's export regulation (article 9, CPTA). The agreements are with Italy, Greece, Colombia, Egypt, Cyprus, China, Peru, Mexico and Turkey. All of the agreements have entered into force except for the most recent one concluded with Turkey. Repatriation claims must be filed within a year of the authorities gaining knowledge of where and with whom the cultural property is located and, at the latest, within 30 years of its illicit export. The requirements of the repatriation claim, applicable law and rules governing the procedure are laid out in the respective bilateral agreement.

Where no bilateral agreement exists, the import of cultural property into Switzerland may only be held to be illegal under Swiss law if the object was lost against the will of the owner or incorrectly declared during import or transit.

If the current possessor acquired the cultural property in good faith and must return it owing to a repatriation claim, they have a right to be compensated. Such compensation is based on the purchase price and necessary and useful expenses for protecting and maintaining the object. It is due by the requesting state and must be paid before the repatriation.

### **NON-FUNGIBLE TOKENS**

#### Regulation and case law

**46** How are non-fungible tokens (NFTs) regulated in your jurisdiction? Is there any case law on NFTs in your jurisdiction?

There is no specific regulation applying to NFTs, nor is there any known case law on NFTs to date. Some scholars suggest that certain kinds of NFTs may fall under the legal regime applicable to ledger-based securities (article 973d et seqq Code of Obligations).

### ANTI-MONEY LAUNDERING

### Compliance

**47** What are the anti-money laundering compliance obligations placed on the art trade?

Under Swiss criminal law, any person who carries out an act that is aimed at frustrating the identification of the origin, the tracing or the forfeiture of assets that he or she knows or must assume originate from a felony or aggravated tax misdemeanour is liable to a custodial sentence not exceeding three years, or to a monetary penalty (article 305-bis, <u>Criminal Code</u>).

Since 1 January 2016, the <u>Anti-Money Laundering Act</u> applies to all natural persons and legal entities that deal in goods professionally and receive cash payments of more than 100,000 Swiss francs. Accordingly, they must comply with specific obligations (unless the amount above 100,000 Swiss francs is processed by a financial intermediary covered by the Act), including verifying the customer's identity and transaction, establishing the identity of the beneficial owner and keeping records. In some cases, a clarification of the economic background of a transaction is necessary (eg, if the transaction appears unusual, unless its legality is clear). In the event of serious suspicion, the dealer or intermediary must report the transaction to the Money Laundering Reporting Office Switzerland.

Moreover, the <u>Customs Ordinance</u> stipulates various rules for freeports, which must hold an inventory with the address and name of the owner of the property, etc. However, no inventory of the beneficial owner is compulsory to date.

### **ENDANGERED SPECIES**

### CITES

### **48** Is your jurisdiction a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)?

Yes, Switzerland is a party to the CITES Convention. It entered into force in 1975. The Federal Council has the power to sign international conventions on the cross-border movement

of endangered species. The Federal Food Safety and Veterinary Office (FSVO) (part of the Federal Department of Home Affairs) is the competent authority to approve any changes to CITES Appendices and to deal with any issues that arise with regard to their application.

### 49 Is the sale, import or export of pre-CITES endangered species subject to a licence?

Yes. The FSVO will issue an import licence for species listed in CITES Appendices I-III that were acquired before the provisions of CITES applied to that specimen, provided that the competent authority in the country of origin has issued a certificate to that effect. For the re-export of such species, the FSVO issues a certificate subject to the same condition as when they are imported into Switzerland. In the event of an export of such species out of Switzerland, the FSVO requires sufficient proof that they were acquired before being listed in the CITES Appendices in order to issue a certificate to that effect (article 11, <u>CITES</u> <u>Ordinance</u>).

### **50** Is the sale, import or export of post-CITES worked or antique endangered species authorised? On what conditions?

The import, export and transit of worked endangered species listed in CITES Appendices I-III require authorisation from the FSVO. No import or transit licence is required for products made of skins of animals listed in CITES Appendices II and III (article 10, <u>CITES Control</u> <u>Ordinance</u>). Customs verify the import licence (if applicable) and the CITES export licence issued by the authorities of the country of origin. The requirements to obtain a licence are listed in articles 8 to 10 of the <u>Ordinance on the transfer of animals and plants of protected species</u>. Upon customs clearance, the item must be presented at one of the species conservation control offices that will verify whether they are consistent with the accompanying documents. The process to obtain a licence for the export or import generally takes five working days. As items are originally imported into Switzerland, they are dated and identified by the authorities of the country of origin. The item must be documented by import papers or certificates of origin. For items of a species that is not critically endangered, authorities may also accept purchase receipts, delivery confirmation, photographs or witness testimony as evidence if the likelihood that the item is illegally circulating on the market is low (article 4, CITES Control Ordinance).

### Specific endangered animal products

### **51** Are there any special rules for works of art made of elephant ivory, rhino horn or other specific endangered animal products?

These items are subject to the same licence requirements as any other endangered species falling under the scope of CITES.

### **CONSUMER PROTECTION**

#### **Cancelling purchases**

### **52** In what circumstances may consumers cancel the sale of art, antiques or collectibles?

In contrast to EU law, which allows consumers to cancel an online sale 14 days after the date of sale, Swiss law has no such cancellation right for consumers unless the contract is concluded by phone (article 40a et seq, Code of Obligations). In any other event, statutory law on the sale of goods applies.

Swiss law provides an alternative place of jurisdiction to consumers as they may apply to a court in their place of residence and, in the case of an international contract, invoke the law of their place of residence.

#### Duties of businesses selling to consumers

#### **53** Are there any other obligations for art businesses selling to consumers?

For telephone sales, art businesses must inform the consumer in writing of their right to cancel the contract, as well as how and within what time frame they must do so (article 40(d), Code of Obligations). If the consumer rescinds the sale, both parties must reverse their actions (eg, return the artwork and reimburse the purchase price).

#### REGULATION

### Art market regulator

### **54** Is there a specific regulatory body overseeing the art market or certain business activities carried out within the art market in your jurisdiction?

There is no specific regulatory body overseeing the art market in Switzerland. Several cantonal laws foresee that a third party intervenes in an auction sale. The third party (eg, *huissier* in Geneva, *Gemeindeammann* in Zurich and *Versteigerungsbehörde* in Lucerne) is a representative of the cantonal authorities who ensures the orderly running of auctions. Cantons often require auction houses to obtain authorisation to organise auctions, another supervisory element in the process of auctions.

#### Other regulators

### **55** What other forms of regulation are professional art market participants in your jurisdiction subject to?

Regulations concerning consumer protection, anti-money laundering and terrorist financing and trade in endangered species involve specific regulation and a supervisory authority. However, there is no cross-market supervisory authority for the art market.

### **UPDATE AND TRENDS**

#### Key developments of the past year

### **56** Are there any other current developments or emerging trends that should be noted?

On 1 January 2021, the latest amendment to the Cultural Property Transfer Act (CPTA) came into force. A new article 4a was adopted, following, among other things, a decision of the Swiss Federal Court, which highlighted the lack of definition and clarity regarding the notions of 'illicit import' and 'incorrect declaration'. According to article 4a of the CPTA, 'Any person who imports, carries in transit or exports cultural property [...] must declare it to customs'. Also, the CPTA now provides for two distinct criminal offences for the illicit import of cultural property and an incorrect customs declaration (article 24, paragraph 1, letter c and c-bis, CPTA). As a consequence, the inaccurate or missing customs declaration when importing or exporting cultural property is subject to criminal sanctions, regardless of whether a bilateral agreement pursuant to article 7 of the CPTA exists.



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# **United States**

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**RETURN TO CONTENTS** 

### Summary

BUYING AND SELLING	239
Passing of title	239
Implied warranty of title	240
Registration	240
Good-faith acquisition of stolen art	241
Acquiring title to stolen art through prescription	241
Risk of loss or damage	242
Due diligence	242
Other implied warranties	242
Voiding purchase of forgeries	243
Voiding inadvertent sales of works by masters	244
EXPORT AND IMPORT CONTROLS	244
Export controls	244
Import controls	244
Export and import tax	244
DIRECT AND INDIRECT TAXATION	245
Taxes	245
Tax exemptions	245
BORROWING AGAINST ART	245
BURRUWING AGAINST ART	240
Types of security interest	245
Types of security interest Consumer loans	245 246
Types of security interest Consumer loans Register of security interests	245 246 246
Types of security interest Consumer loans Register of security interests Non-possessory security interests	245 246 246 246
Types of security interest Consumer loans Register of security interests Non-possessory security interests Sale of collateral on default	245 246 246 246 246
Types of security interest Consumer loans Register of security interests Non-possessory security interests	245 246 246 246
Types of security interest Consumer loans Register of security interests Non-possessory security interests Sale of collateral on default	245 246 246 246 246
Types of security interest Consumer loans Register of security interests Non-possessory security interests Sale of collateral on default Ranking of creditors	245 246 246 246 246 247
Types of security interest Consumer loans Register of security interests Non-possessory security interests Sale of collateral on default Ranking of creditors INTELLECTUAL PROPERTY RIGHTS	245 246 246 246 246 247 <b>247</b>
Types of security interest Consumer loans Register of security interests Non-possessory security interests Sale of collateral on default Ranking of creditors INTELLECTUAL PROPERTY RIGHTS Creator copyright	245 246 246 246 246 247 <b>247</b>
Types of security interest Consumer loans Register of security interests Non-possessory security interests Sale of collateral on default Ranking of creditors INTELLECTUAL PROPERTY RIGHTS Creator copyright Copyright duration	245 246 246 246 246 247 <b>247</b> 247 247
Types of security interest Consumer loans Register of security interests Non-possessory security interests Sale of collateral on default Ranking of creditors INTELLECTUAL PROPERTY RIGHTS Creator copyright Copyright duration Display without right holder's consent	245 246 246 246 247 247 247 247 247 247
Types of security interest Consumer loans Register of security interests Non-possessory security interests Sale of collateral on default Ranking of creditors INTELLECTUAL PROPERTY RIGHTS Creator copyright Copyright duration Display without right holder's consent Reproduction of copyright works in catalogues and adverts	245 246 246 246 247 247 247 247 247 248
Types of security interest Consumer loans Register of security interests Non-possessory security interests Sale of collateral on default Ranking of creditors INTELLECTUAL PROPERTY RIGHTS Creator copyright Copyright duration Display without right holder's consent Reproduction of copyright works in catalogues and adverts Copyright in public artworks	245 246 246 246 247 247 247 247 247 247 248 248
Types of security interest Consumer loans Register of security interests Non-possessory security interests Sale of collateral on default Ranking of creditors INTELLECTUAL PROPERTY RIGHTS Creator copyright Copyright duration Display without right holder's consent Reproduction of copyright works in catalogues and adverts Copyright in public artworks Artist's resale right	245 246 246 246 247 247 247 247 247 247 247 248 248 248 248
Types of security interest Consumer loans Register of security interests Non-possessory security interests Sale of collateral on default Ranking of creditors INTELLECTUAL PROPERTY RIGHTS Creator copyright Copyright duration Display without right holder's consent Reproduction of copyright works in catalogues and adverts Copyright in public artworks Artist's resale right Moral rights	245 246 246 246 247 247 247 247 247 247 248 248 248 248 248
Types of security interest Consumer loans Register of security interests Non-possessory security interests Sale of collateral on default Ranking of creditors INTELLECTUAL PROPERTY RIGHTS Creator copyright Copyright duration Display without right holder's consent Reproduction of copyright works in catalogues and adverts Copyright in public artworks Artist's resale right Moral rights AGENCY	245 246 246 246 247 247 247 247 247 247 247 248 248 248 248 248 248

PAGE 239	RETURN TO SUMMARY
Undisclosed agent commission	250
CONSIGNING ITEMS	250
Protection of interests in consigned works	250
AUCTIONS	250
Regulation	250
SPOLIATION DURING THE NAZI ERA	251
Claims to Nazi-looted art	251
LENDING TO MUSEUMS	252
Responsibility for insurance	252
Immunity from seizure	252
CULTURAL PATRIMONY	252
National treasures	252
Right of pre-emption	253 253
Automatic vesting in the state Illegally exported property claimed by foreign states	253 253
NON-FUNGIBLE TOKENS	254
Regulation and case law	254
ANTI-MONEY LAUNDERING	255
Compliance	255
ENDANGERED SPECIES	256
CITES	256
Specific endangered animal products	257
CONSUMER PROTECTION	257
Cancelling purchases	257
Duties of businesses selling to consumers	258
REGULATION	258
Art market regulator	258
Other regulators	258
UPDATE AND TRENDS	259
Key developments of the past year	259

### **BUYING AND SELLING**

### Passing of title

### 1 When does ownership of art, antiques and collectibles pass from seller to buyer?

The Uniform Commercial Code (UCC), which has been adopted in some form by every state in the United States, is a collection of laws governing commercial transactions in the country. Sales of tangible personal property, such as fine art, are governed by article 2 of

the UCC. Section 2-401(2) of the UCC provides that title to artwork will generally pass from the seller to the buyer upon the physical delivery of an artwork. The parties may seek to circumvent this by agreeing that title will not pass until receipt of payment. The majority view, however, is that after physical delivery of the work, the seller will be left with a security interest in the work, but not title to it.

### Implied warranty of title

### **2** Does the law of your jurisdiction provide that the seller gives the buyer an implied warranty of title?

According to section 2-312(1) of the UCC, unless excluded or modified by specific language or circumstances, a contract for the sale of an artwork will include a warranty by the seller that 'the title conveyed shall be good, and its transfer rightful; and the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.' This warranty may be limited with specific language or circumstances that give the buyer reason to know that the seller does not claim title in him or herself, or that the seller is purporting to sell only such right or title as the seller or a third person may have.

Where the seller is a merchant, the UCC also provides the buyer with an implied warranty that 'the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like'. Pursuant to the UCC, a merchant is 'a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction'. In the art context, this definition most often applies to galleries, art dealers and auction houses.

An action for breach of warranty must be commenced within four years after the cause of action has accrued. In general, accrual is measured from the date of the breach, which occurs when 'tender of delivery is made', regardless of a lack of knowledge of the breach. The UCC provides an exception, however, where a warranty 'explicitly extends to future performance' and 'discovery of the breach must await the time of such performance'. Under those circumstances, the cause of action will accrue when the breach is or should have been discovered.

### Registration

### **3** Can the ownership of art, antiques or collectibles be registered? Can theft or loss of a work be recorded on a public register or database?

The United States does not have a public register for recording ownership of artworks. If a work of art is lost or stolen, the Federal Bureau of Investigation's National <u>Stolen Art File</u> is a database that may be consulted. The objects listed in this database are submitted by law enforcement agencies in the United States and abroad. Once an object is recovered, it is removed from the database.

### Good-faith acquisition of stolen art

### 4 Does the law of your jurisdiction tend to prefer the victim of theft or the acquirer in good faith of stolen art?

A basic tenet of US law is that a good-faith purchaser for value cannot 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. Thus, the true owner has the right to reclaim such property unless barred by the statute of limitations or other defence. On its face, this rule tends to prefer the true owner's rights over those of the possessor's. The statute of limitations and other defences such as laches, however, may tip the scales in favour of the possessor. Whether a purchaser is considered to be in good faith depends on the facts and circumstances of the case, but, as a general matter, the possessor's good faith will be contingent on his or her lack of knowledge that the object was stolen.

### Acquiring title to stolen art through prescription

5 If ownership in stolen art, antiques or collectibles does not vest in the acquirer in good faith, is the new acquirer protected from a claim by the victim of theft after a period of time?

Where the possessor is in good faith, in some states, including New York, a 'demand and refusal' rule applies, under which the three-year limitations period will not begin to run until the owner makes a demand of the possessor for the return of the property and the possessor refuses. The majority of states, however, follow a discovery rule. In these states, the limitations 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. Where the statute of limitations runs, a claim for the return of stolen art will typically be barred, unless an equitable doctrine is applied to toll the applicable period. As a counterpoint to the statute 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 a laches defence.

### **6** Can ownership in art, antiques or collectibles vest in the acquirer in bad faith after a period of time?

In the United States, title does not pass to a purchaser in bad faith, irrespective of the amount of time that has elapsed. Nonetheless, a claim for the return of the property may be barred as a result of the statute of limitations or pursuant to the equitable doctrine of laches.

### 7 Must the professional seller of art, antiques or collectibles maintain a register of sales?

US law does not require an art dealer to maintain a register of sale.

#### Risk of loss or damage

### **8** When does risk of loss or damage pass from seller to buyer if the contract is silent on the issue?

Where the contract is silent on the issue, the UCC provides that the risk of loss passes to the buyer from a merchant seller upon receipt of the artwork. If the seller is a non-merchant, the risk will pass to the buyer upon 'tender of delivery' of the artwork (ie, when the buyer receives notification reasonably necessary to enable him or her to take delivery of the artwork). The UCC also sets forth specific provisions concerning risk of loss when the artwork: (1) is either required or authorised by the contract to be shipped by common carrier; or (2) is held by a bailee to be delivered without being moved. The UCC provides that the risk of loss may be altered by contrary agreement of the parties.

### Due diligence

**9** Must the buyer conduct due diligence enquiries? Are there non-compulsory enquiries that the buyer typically carries out?

US law does not impose due diligence requirements on the buyer. Nonetheless, the amount of due diligence conducted may impact a buyer's remedies in the event of a claim. Courts also consider whether a buyer is a merchant or non-merchant in evaluating the reasonableness of the buyer's due diligence. Thus, though not required by law to do so, buyers are typically advised to undertake certain threshold enquiries, such as determining whether there are indications that the artwork may have been stolen and to research the provenance of the work (eg, by contacting former owners of the artwork).

### **10** Must the seller conduct due diligence enquiries?

Although United States law does not impose a requirement on sellers to conduct due diligence prior to selling an artwork, proper due diligence on the part of the seller is advised. Pursuant to the UCC, the buyer is provided with various warranties that relate to, for example, the artwork's authenticity, authorship and title. When the seller is a merchant, the UCC provides the buyer with additional implied warranties with respect to the artwork. Therefore, at a minimum, the seller of an artwork should endeavour to ensure that the artwork conforms to these warranties and avoid liability for a breach.

### Other implied warranties

### **11** Does the law provide that the seller gives the buyer implied warranties other than an implied warranty of title?

Where the seller is a merchant, a warranty of merchantability is provided to the buyer of an artwork. According to the UCC, 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. Where the seller has reason to know of 'particular purposes for which the goods are required' and the buyer is relying on 'the seller's skill or judgment to select or furnish suitable goods', the buyer is also provided with an implied

warranty of fitness for a particular purpose. Typically, this implied warranty will apply where the seller is a merchant, but it may, in particular circumstances, apply in cases where the seller is not. Both implied warranties may be excluded or modified by the parties.

A cause of action for a breach of warranty must be commenced within four years of accrual, which occurs when tender of delivery is made unless the warranty 'explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance'. Under those circumstances, the cause of action accrues when the breach is or should have been discovered.

### Voiding purchase of forgeries

### **12** If the buyer discovers that the art, antique or collectible is a forgery, what claims and remedies does the buyer have?

Where an artwork is discovered to be a forgery or otherwise inauthentic, claims based on breach of warranties, fraud and mistake may be available to the buyer. Pursuant to the UCC, an express warranty may arise from any description or affirmation of fact or promise by the seller relating to the artwork that 'becomes part of the basis of the bargain'. Such statements may be made by the seller in written materials, such as sale documentation, advertisements, brochures and catalogues, or from a seller's oral statements to the buyer. Where the seller is a non-merchant, a court may consider such descriptions, including statements of attribution, to be mere opinion and not an express warranty. But, where the seller is a merchant or is otherwise considered to have a superior level of expertise, and the seller records the artist's name in the invoice, this will generally be considered an express warranty. Good faith on the part of the seller is no defence if the statement proves to be false.

A buyer may also bring a tort action for fraud against the seller. To establish fraud, the buyer must prove that: (1) the seller made a misrepresentation related to a material issue of fact, either by way of a misstatement or nondisclosure; (2) the misrepresentation was intentionally made with intent to induce reliance; and (3) the buyer did, in fact, rely on the misrepresentation to his or her detriment.

A similar tort action that may be available in a claim for negligent misrepresentation. In contrast to a fraud claim, this cause of action may arise where the seller negligently, instead of intentionally, asserts a false statement. Generally, the seller must also owe a duty of care to the buyer.

Alternatively, a buyer may bring a claim on the grounds of mutual mistake, in which both parties are mistaken with respect to a material assumption on which the contract was made – in this case, the authenticity of the artwork. If, however, the seller is aware of the mistake or has reason to know of it, a buyer may have a claim for unilateral mistake.

### Voiding inadvertent sales of works by masters

## **13** Can a seller successfully void the sale of an artwork of uncertain attribution subsequently proved to be an autograph work by a famous master by proving mistake or error?

Where both the seller and the buyer are mistaken as to the attribution of an artwork, the seller may, under certain circumstances, succeed in an action for rescission of the sale. Where, however, the seller could have discovered the true attribution of the artwork prior to the sale but did not do so because of a lack of due care or diligence, a court is unlikely to find that a mistake of fact has been made.

### **EXPORT AND IMPORT CONTROLS**

### Export controls

**14** Are there any export controls for cultural property in your jurisdiction? What are the consequences of failing to comply with export controls?

With the limited exception of export restrictions applying to archaeological objects removed from Native American or federal lands, the United States does not have export controls for cultural property. The Native American Graves Protection and Repatriation Act prohibits the trafficking of Native American human remains and cultural items, imposing criminal penalties. The Archaeological Resources Protection Act similarly imposes criminal penalties for the trafficking in archaeological resources unlawfully removed from federal and Native American lands.

### Import controls

**15** Other than in relation to endangered species, are there any import controls for cultural property in your jurisdiction? What are the consequences of failing to comply with import controls?

US import laws give US Immigration and Customs Enforcement and US Customs and Border Protection the authority to seize cultural property and art that are stolen or otherwise brought into the United States illegally. The persons involved in such violations may also be subject to civil and criminal penalties, including fines, probation, imprisonment or forfeiture of the artwork.

#### Export and import tax

### **16** Does any liability to pay tax arise upon exporting or importing art, antiques or collectibles?

Original works of art, antiques and certain other collectibles are generally not subject to customs duty and are covered under Chapter 97 of the <u>Harmonized Tariff Schedule</u>. Duty does, however, apply to mass-produced reproductions or works of conventional craftmanship of a commercial character, even if these articles are designed or created by artists.

### **DIRECT AND INDIRECT TAXATION**

### Taxes

### **17** Outline the main types of tax liability arising from ownership and transfer of art, antiques and collectibles.

With few exceptions, when an artwork is sold in the United States, the buyer is required to pay a state sales tax at the time of the purchase. This general rule applies unless the buyer first takes possession of the artwork in a state that does not charge a sales tax, or if another exception applies (eg, where an artwork is purchased for resale by a dealer who has registered with the relevant state sales tax department). In addition, most states impose a use tax. This tax applies on account of an artwork's use within the state, in contrast to its sale within the state. Where an artwork is purchased outside a certain state, the buyer may be responsible for paying a use tax once the artwork is brought into the state. In general, sales tax paid on a property will be credited against the owner's use tax liabilities. Nonetheless, a use tax analysis should be undertaken each time art is moved to another jurisdiction, even if merely for a loan.

### **Tax exemptions**

### **18** Outline any tax exemptions or special conditions applicable to art, antiques and collectibles.

An art collector who makes a charitable transfer to a tax-exempt institution may receive a tax benefit as a result of the donation. The availability and amount of the deduction generally hinges on a specific set of requirements, including the status of the organisation, the type of property donated, the use of the donated work and whether a qualified appraisal has been prepared. A collector who transfers an artwork during his or her lifetime may receive an income tax deduction that, depending on the circumstances of the transfer, may be equal to the fair market value of the artwork. Likewise, where the transfer is part of a bequest, the donation may provide the estate with a reduction in the estate tax that is owned by the collector's estate.

### **BORROWING AGAINST ART**

### Types of security interest

### **19** In your jurisdiction what is the usual type of security interest taken against art, antiques and collectibles?

In most cases, a lender perfects its security interest in artwork by filing a UCC-1 financing statement – a legal notice filed by a creditor as a way to publicly declare its rights to a debtor's property. Attachment is a prerequisite to perfection and is achieved when: (1) the lender gives value; (2) the debtor has rights in the artwork or the power to transfer rights in the artwork to the lender; and (3) the lender has possession of the artwork or the debtor enters into a security agreement.

#### **Consumer loans**

**20** If the borrower borrowing against art assets in your jurisdiction qualifies as a consumer, does the loan automatically qualify as a consumer loan, and are there any exemptions allowing the lender to make a non-consumer loan to a private borrower?

This is not applicable in the United States.

### **Register of security interests**

**21** Is there a public register where security interests over art, antiques or collectibles can be registered? What is the effect of registration? Is the security interest registered against the borrower or the art?

UCC-1 financing statements are registered listing the debtor's name and address, the creditor's name and address and the collateral. The financing statement is generally filed with the office of the secretary of state in the state where the debtor resides, which perfects the lender's security interest in the artwork. Perfecting the security interest allows the debtor to retain possession of the artwork while the loan is outstanding.

### Non-possessory security interests

**22** Can the lender against art collateral perfect its security interest without taking physical possession of the art?

Yes, physical possession of the art collateral is not required by the secured creditor to perfect its security interest.

### Sale of collateral on default

### **23** If the borrower defaults on the loan, may the lender sell the collateral under the loan agreement, or must the lender seek permission from the courts?

The consequences of default, including the lender's rights and remedies, are determined by the contract between the borrower and lender. Pursuant to the Uniform Commercial Code (UCC), however, a secured creditor-lender can, upon default, take possession of the collateral on its own without breaching the peace or pursuant to judicial action. Once in possession of the collateral, the secured creditor may retain or sell the property. Any sale or dispossession of the collateral must be in compliance with the UCC's notice provisions and be commercially reasonable in every aspect, including as to method, manner, time, place and any other terms. The lender also has the option of filing a lawsuit on the debt to obtain a favourable judgment and to levy the debtor's property to satisfy the debt.

### **Ranking of creditors**

### **24** Does the lender with a valid and perfected first-priority security interest over the art collateral take precedence over all other creditors?

A lender with a valid and perfected first-priority security interest over the art collateral in most cases has priority over all other creditors, with some exceptions. For example, one who became a lien creditor before the security interest was perfected may have priority over the secured lender. Another secured creditor may have priority if it perfected its security interest before the secured lender. The rights of the secured lender are complex and differ based on the particular situation regarding the lender and creditor.

### **INTELLECTUAL PROPERTY RIGHTS**

### **Creator copyright**

**25** Does copyright vest automatically in the creator, or must the creator register copyright to benefit from protection?

Copyright generally vests in the creator once the work is fixed in a tangible medium of expression without the need for copyright registration. Registration, however, is a prerequisite to filing a lawsuit for copyright infringement. A copyright registration certificate may be presumptive evidence of ownership of a valid copyright. Further, for a copyright owner to be eligible for an award of statutory damages and attorneys' fees, the registration must have occurred before the copyright infringement or within three months after the first publication of that work.

### **Copyright duration**

#### **26** What is the duration of copyright protection?

For works created on or after 1 January 1978, copyright protection 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. For joint works, the term of copyright is the life of the last surviving author plus 70 years. For an anonymous work, a pseudonymous work or a work made for hire, the copyright endures for a term of 95 years from the year of its first publication or a term of 120 years from the year of its creation, whichever is shorter. The term of copyright for pre-1978 works is complex and depends on several factors. Thus, an attorney should be consulted to determine duration of the copyright for these works.

#### Display without right holder's consent

### **27** Can an artwork protected by copyright be exhibited in public without the copyright owner's consent?

While the copyright owner has the exclusive right to display a work publicly, 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.

### Reproduction of copyright works in catalogues and adverts

**28** Can artworks protected by copyright be reproduced in printed and digital museum catalogues or in advertisements for exhibitions without the copyright owner's consent?

An owner of copyrighted artwork (with some limitations, including the exception of a fair use) has the exclusive rights to reproduce the copyrighted work in copies and distribute copies of the copyrighted work. It is thus advisable and common practice that museums seek permission from the copyright owner in connection with the reproduction of images of the copyrighted work in the museum's publications and marketing for exhibitions.

### **Copyright in public artworks**

### **29** Are public artworks protected by copyright?

Public artwork, including 'street art', is afforded the same copyright protection as other artwork that is fixed in a tangible medium of expression.

#### Artist's resale right

### **30** Does the artist's resale right apply?

Although efforts have been made over several years to enact federal legislation providing for resale royalty rights, the United States does not recognise resale royalty rights. Under US copyright law's first sale doctrine, 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. Artists may contract for resale royalty rights, which has recently become a more popular practice. NFTs configured through 'smart contracts', for example, may automatically pay out royalties to the original artist with every future sale of the NFT on a specific platform.

### Moral rights

### 31 What are the moral rights for visual artists? Can they be waived or assigned?

The United States acceded to the Berne Convention for the Protection of Literary and Artistic Works, an international treaty that governs and protects moral rights (among others), in 1988. In 1990, Congress enacted the Visual Artists Rights Act of 1990 (VARA).

VARA offers an artist of a 'work of visual art' the right of attribution – specifically, the right to:

- claim authorship of that work;
- 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

 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.

VARA also provides the right of integrity, specifically the right to:

- prevent any intentional distortion, mutilation or other modification of the work that would be prejudicial to the artist's honour or reputation; and
- prevent any destruction of a work of recognised stature, and any intentional or grossly negligent destruction of that work.

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. For joint works (two or more authors), VARA rights endure for the life of the last surviving author.

VARA rights may not be transferred but may be waived by a written instrument signed by the author.

### AGENCY

### Accounting to the principal

**32** Does the law require the agent to account to the principal for any commission or other compensation received by the agent while conducting the principal's business?

The law of agency varies from state to state. As a general matter, a fiduciary relationship exists between an agent and a principal, with the agent owing a duty to act loyally for the principal's benefit with respect to actions taken within the scope of the agency. Pursuant to this duty, an agent is required to make a full and fair disclosure to the principal of information that is material to the agent's duties. The agent also has a duty not to acquire a material benefit from a third party that results from the agent's position. Thus, absent an agreement to the contrary, an agent would be required to account to the principal for any commission received.

### **Disclosed agent commission**

### **33** Does disclosure to the principal that the agent will receive a commission allow the agent to keep the commission unless the principal objects?

In general, an agent may keep a commission where, acting fairly and in good faith, the agent has obtained the principal's consent based on a full and fair disclosure of material facts. Nonetheless, a principal and agent are permitted to modify the duties of the agent to the principal, even allowing the principal to consent to conduct that would otherwise result in a breach of the agent's fiduciary duties. Thus, an agent and principal may enter an agreement that allows the agent to withhold certain information, such as the amount of a commission or other compensation.

### **Undisclosed agent commission**

### **34** If a third party pays a commission to an agent that is not disclosed to the principal, can the principal claim the commission from the third party?

If an agent receives a commission that is outside the bounds of his or her agreement with the principal, the principal is generally permitted to reclaim the ill-gotten commission from the agent. Absent a fiduciary relationship between the principal and the third party, however, the principal may not have sufficient grounds for suing the third party for the unauthorised payment.

### **CONSIGNING ITEMS**

### Protection of interests in consigned works

**35** How can consignors of artworks to dealers protect their interest in the artwork if the dealer goes into liquidation?

When a gallery files for bankruptcy, under the Uniform Commercial Code (UCC) and bankruptcy law, repaying creditors may supersede returning the consigned artwork to its owner if the work is not properly protected. 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. The financing statement is generally filed with the office of the secretary of state in the state where the debtor resides, which perfects the lender's security interest in the artwork. 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 the artwork as an asset of the gallery.

#### **AUCTIONS**

### Regulation

### **36** Are auctions of art, antiques or collectibles subject to specific regulation in your jurisdiction?

Laws regulating auctions are generally governed by state law. Recently, in what was considered a stealthy act, New York City eliminated long-standing regulations governing the auction industry on 15 June 2022. Auctioneers will no longer have to obtain a licence to operate. Moreover, auctioneers will no longer be required to make disclosures in their written consignment contracts, such as the amount of the auctioneers' commissions and charges. Nor in their auction catalogues are they required to disclose that a lot being sold is subject to a reserve price (which previously could not be above the low estimate) or that the auction house had a financial interest in the sale. The provisions designed to oversee 'chandelier bidding', whereby auctioneers invent fictitious bids to stir interest, were also repealed, and auctioneers are no longer prohibited from taking chandelier bids above the

reserve price. As the large auction houses have not given any indication that they intend to change their practices as a result of the repeal, its effect on the industry is currently unclear.

Some sections of the Uniform Commercial Code also apply specifically to auction sales, including provisions related to bidding.

## **37** May auctioneers in your country sell art, antiques or collectibles privately; offer advances or loans against art, antiques or collectibles; and offer auction guarantees?

Auction houses may sell art, antiques or collectibles privately, and auction houses have increasingly relied on such sales. Auctioneers may also offer advances or loans against art, which are usually secured by the consigned art as collateral. Auction guarantees are also permitted and commonplace.

### **SPOLIATION DURING THE NAZI ERA**

### **Claims to Nazi-looted art**

## **38** In what circumstances would the heirs of the party wrongly dispossessed typically prevail over the current possessor, if a court in your country accepted jurisdiction and applied its own law to a claim to art lost during the Nazi era?

In the United States, no one, not even a good-faith purchaser for value, can obtain good title to stolen property. Thus, in a civil claim for the return of art misappropriated by the Nazis, the heirs of the wrongly dispossessed party may prevail where the heirs can show that they possess a superior right of possession to the artwork, and that they are entitled to the immediate possession of the artwork. One of the main hurdles in Nazi-looted art actions, however, has been the use of defences such as the statute of limitations to prevent a case from reaching the merits. In 2016, a special statute of limitations was enacted in an effort to address this issue, establishing a uniform federal statute of limitations for recovery cases involving art lost during the Nazi era. Under the terms of the Holocaust Expropriated Art Recovery Act of 2016, a six-year limitation period applies, which begins to run upon the actual discovery by the claimant of the identity and location of the artwork and the claimant's possessory interest in that property. Nonetheless, other technical defences often stymie claims to Nazi-looted art in the United States, including the defence of laches.

### **39** Is there an ad hoc body set up to hear claims to Nazi-looted art?

Unlike in many European countries, there is no restitution commission or other ad hoc body that has been established in the United States for hearing claims to artworks that were lost during the Nazi era.

### **LENDING TO MUSEUMS**

#### **Responsibility for insurance**

### **40** Who is responsible for insuring art, antiques or collectibles loaned to a public museum in your jurisdiction?

The loan agreement between the lender and the public museum should describe the insurance coverage for the artwork, including the work's insurance value. Typically, the borrowing museum will insure the work. International loan agreements should also take into account whether any government insurance will be provided. In the United States, 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.

### Immunity from seizure

### **41** Are artworks, antiques or collectibles loaned to a public museum in your country immune from seizure?

The Immunity from Judicial Seizure Statute protects certain objects from seizure by a US court. 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 Foreign Sovereign Immunities Act of 1976 (FSIA), a foreign state and its agencies and instrumentalities are immune from suit in US courts unless certain exceptions apply. The Foreign Cultural Exchange Jurisdictional Immunity Clarification Act of 2016 (FCEJICA) 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 fall under an exception to the FSIA. The FCEJICA itself, however, contains exceptions, allowing for jurisdiction over claims based on Nazi-era losses or based on other coercive confiscation occurring after 1900 from members of a targeted group.

### **CULTURAL PATRIMONY**

#### **National treasures**

### 42 Is there a list of national treasures?

The United States does not maintain a list of national treasures.

### **Right of pre-emption**

### **43** If the state is interested in buying an artwork for the public collections, does it have a right of pre-emption?

There is no federal right of pre-emption under US law. Moreover, in the United States, the vast majority of museums are privately owned or are owned by state and municipal authorities; very few are national museums.

#### Automatic vesting in the state

### **44** In what circumstances does ownership in cultural property automatically vest in the state?

Ownership of cultural property automatically vests in the state only where such property is found on federal or state land. In addition, the Native American Graves Protection and Repatriation Act provides that any Native American or Native Hawaiian human remains, funerary objects, sacred objects or objects of cultural patrimony found in or on federal or tribal lands vest in the affiliated Native American or Native Hawaiian tribe or, in the case of human remains and funerary objects, in the lineal descendant of the deceased individual.

### Illegally exported property claimed by foreign states

**45** How can a foreign state reclaim in your jurisdiction cultural property illegally exported from its territory?

In 1983, the United States enacted the Cultural Property Implementation Act (CPIA), which implements the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the world's first multilateral treaty to address the illicit trade in cultural property. Pursuant to the CPIA, the United States has entered into special bilateral agreements with a number of countries, including Albania, Algeria, Belize, Bolivia, Bulgaria, Cambodia, Chile, China, Colombia, Costa Rica, Cyprus, Ecuador, Egypt, El Salvador, Greece, Guatemala, Honduras, Italy, Jordan, Libya, Mali, Morocco, Nigeria, Peru and Turkey. These bilateral agreements allow the United States to enforce those countries' export laws and give the government the power to seize and return undocumented archaeological or ethnological objects that were imported into the United States. Significantly, the CPIA allows the United States to do so even without requiring proof of ownership pursuant to those countries' patrimony laws.

The CPIA also provides for emergency implementation of import restrictions without the negotiation of a bilateral agreement for objects that are shown to be in particular jeopardy. The United States currently imposes emergency restrictions on archaeological and ethnological materials from Afghanistan, Iraq, Syria and Yemen. In addition, the CPIA bars the importation of any cultural object that is documented as belonging to a museum or to a public or religious institution located in a country that is a party to the UNESCO Convention.

#### **NON-FUNGIBLE TOKENS**

#### **Regulation and case law**

### **46** How are non-fungible tokens (NFTs) regulated in your jurisdiction? Is there any case law on NFTs in your jurisdiction?

There are currently no specific government regulations in place specifically addressing non-fungible tokens (NFTs), and whether the US Securities and Exchange Commission (SEC) will officially deem NFTs to be securities subject to its rules is yet to be determined. While it is likely that a single work of digital art or collectible will not be considered a security, an NFT sold in groups or fractionalised (ie, sold in shares) may have the characteristics of an investment contract, making compliance with the applicable SEC rules necessary. The SEC has started to look into whether certain NFTS are being used as a means to raise traditional securities revenue and has served subpoenas demanding information about token offerings in connection with its investigations.

A number of lawsuits relating to NFTs have also been filed. Among the most notable are the following.

- Roc-A-Fella Records Inc v Damon Dash, No. 1:21-cv-05411 (S.D.N.Y.) In June 2021, Roc-A Fella Records Inc. brought suit in a New York federal court against one of its shareholders, Damon Dash alleging that Dash was wrongfully attempting to auction off the copyright to musical artist Jay-Z's Reasonable Doubt album through an NFT. A New York federal court issued a temporary restraining order, halting the auctioning off of the NFT. The case ultimately settled out of court.
- Miramax v Tarantino et al, No. 2:21-cv-08979 (C.D. Cal.) In November 2021, Miramax, LLC filed suit in a California federal court against filmmaker Quentin Tarantino for copyright infringement, trademark infringement, breach of contract and unfair competition based on his plan to auction off 'exclusive scenes' from the movie *Pulp Fiction* and related handwritten scripts in the form of NFTs. The case settled out of court.
- Hermès International et al v Rothschild, No. 1:22-cv-00384 (S.D.N.Y.) In January 2022, Hermès International and Hermès of Paris, Inc., filed suit in a New York federal court against Mason Rothschild, a digital artist, for trademark infringement related to his proposed sale of MetaBirkins, a collection of NFTs linked to digital images of faux-furcovered versions of the luxury *Birkin* handbags of plaintiffs. Hermès's claim survived a motion to dismiss. While the Court agreed with Rothschild that it should apply the First Amendment test under *Rogers v. Grimaldi*, 695 F. Supp. 112 (S.D. N.Y. 1988), judgment aff'd, 875 F.2d 994 (2d Cir. 1989), which weighs the artistic relevance and intentional misleadingness of an allegedly infringing mark, it held that Hermés made sufficient factual allegations to avoid dismissal. *Hermes Int'l v Rothschild*, No. 22-CV-384 (JSR), 2022 WL 1564597 (S.D.N.Y. May 18, 2022). Rothschild's motion for interlocutory appeal on the Court's motion to dismiss order was also denied. *Hermes Int'l v. Rothschild*, 590 F. Supp. 3d 647, 657 (S.D.N.Y. 2022).
- Nike, Inc v StockX, LLC, No. 1:22-cv-00983 (S.D.N.Y.) In February 2022, Nike, Inc brought a trademark suit in a New York federal court against StockX, LLC, sneaker resale marketplace, in a New York federal court, alleging that StockX infringed Nike's trademarks by selling NFTs associated with limited-edition Nikes in StockX's custody and linked to images of the sneakers.

Yuga Labs, Inc v Ripps et al, No. 2:22-cv-04355 (C.D. Cal.) – In June 2022, Yuga Labs, a blockchain technology company and creator of the immensely successful Bored Ape Yacht Club (BAYC) NFT collection, filed a trademark infringement lawsuit in a California federal court against Ryder Ripps, and others, based on the creation of their own NFT collection, known as the Ryder Ripps Bored Ape Yacht Club (RR/BAYC), which pointed to the same online digital images as the BAYC collection but used verifiably unique entries on the Ethereum blockchain. In December 2022, the Court denied the defendants' motion to dismiss (Yuga Labs, Inc v Ripps, No. CV 22-4355-JFW(JEMX), 2022 WL 18024480 (C.D. Cal. Jan. 16, 2022)), including its California anti-SLAPP motion, ruling that the Rogers v Grimaldi test (see above) did not apply because the RR/BAYC collection did not express an idea or point of view but merely pointed to the same digital images of the BAYC collection; was not artistically relevant; and its use of the BAYC mark was misleading. The Court also rejected the defendants' nominative fair use argument because defendants were not using the BAYC marks to sell Yuga's BAYC NFTs but to sell their competing ones. Defendants thereafter filed a notice of appeal with the Ninth Circuit Court of Appeals.

### **ANTI-MONEY LAUNDERING**

### Compliance

### **47** What are the anti-money laundering compliance obligations placed on the art trade?

The US art market (as a whole) is not required by law to maintain anti-money laundering (AML) policies. Although 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. 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) to add art to its list of industries that must comply with its requirements. The BSA, which is the primary anti-money laundering law in the United States, 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 – but not generally to dealers in art. On 1 January 2021, Congress passed the National Defence Authorization Act for 2021, which includes a new law, the Anti-Money Laundering Act of 2020 (AMLA), requiring individuals engaged in the antiquities trade to comply with the requirements of the BSA. The BSA includes requirements for monitoring and reporting suspicious activity to federal authorities, establishing and maintaining BSA and AML programmes, and identifying and conducting due diligence on customers. The law also requires the US Treasury department, specifically, the Financial Crimes Enforcement Network (FinCEN), to implement regulations and, in coordination with other government agencies, study and report on the facilitation of money laundering and financing of terrorism through the art market. On 23 September 2021, FinCEN issued an advance notice of proposed rulemaking (ANPRM) to solicit public comment on the implementation of AMLA regarding the trade in antiquities. On 4 February 2022, the US Treasury department released the Study of the Facilitation of Money Laundering and Terror Finance Through the Trade in Works of Art, which examined the high-value art market and its participants that may present money laundering and terrorist financing risks and identified efforts

that government agencies, regulators and market participants could undertake to further mitigate the laundering of illicit proceeds through the high-value art market in the United States. The Study indicates that anti-money laundering regulation of the art market (as a whole) is not coming soon.

### **ENDANGERED SPECIES**

### CITES

### **48** Is your jurisdiction a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)?

The United States is a party to CITES. The United States Fish and Wildlife Service applies CITES provisions through the Endangered Species Act (ESA) and is charged with issuing permits for the import and export of species that are protected by CITES and the ESA. A species may require a permit under CITES or the ESA, or both.

Under CITES, a species is listed at one of three levels of protection in appendices that have different permit requirements for import and export. Appendix I covers species most at-risk owing to international trade, effectively banning commercial international trade. Appendix II include species that, although not yet at risk of extinction, may become extinct without trade restrictions. Appendix III species are those for which a country has requested the assistance of parties to CITES in controlling international trade.

The ESA prohibits interstate or international trade of endangered species, except under a federal permit. The ESA also protects 'threatened' species.

### 49 Is the sale, import or export of pre-CITES endangered species subject to a licence?

If a specimen of a CITES-listed species was obtained prior to the CITES listing date of that species –collected from the wild or held in captivity – it may be granted a pre-Convention certificate that will allow for the specimen to be exported. Documentation, including a signed statement, or other evidence may be required to show that the specimen was obtained or manufactured prior to the CITES listing date. CITES imposes no controls on interstate or intrastate shipments.

Specimens of ESA-listed species held in captivity or in a controlled environment on or before 28 December 1973 or the date the species was listed under the ESA, whichever is later, are exempt from the ESA prohibitions against import or export or violation of any regulation pertaining to endangered or threatened species promulgated under the ESA, provided such holding and any subsequent holding or use of the specimen was not in the course of a commercial activity. An affidavit and supporting material documenting pre-ESA status must accompany the shipment of listed species. The pre-ESA exemption does not apply to wild-life, including parts and products, offered for sale or other activities prohibited under the statute. The ESA does not impose controls on intrastate commerce; however, some states have laws regulating activity involved with protected species.

### **50** Is the sale, import or export of post-CITES worked or antique endangered species authorised? On what conditions?

The import, export and interstate sale of ESA-listed species is prohibited without an ESA permit, except with respect to items that are 'antique'. An item is antique if it is at least 100 years old, is comprised in whole or in part of an ESA-listed species, has not been repaired or modified with any such species after 27 December 1973, and is being or was imported through a port designated for the import of ESA antiques. Items imported prior to 22 September 1982, and items created in the United States and never imported do not need to comply with the designated port requirement. An importer or exporter of ESA antiques must provide documented evidence of species identification and age to demonstrate that the article qualifies as an ESA antique, which may include a qualified appraisal, documents that provide detailed provenance or scientific testing, or a combination of these. The ESA does not impose controls on intrastate commerce; however, some states have laws regulating activity involved with protected species.

#### Specific endangered animal products

### **51** Are there any special rules for works of art made of elephant ivory, rhino horn or other specific endangered animal products?

The US federal government has implemented special rules for elephant ivory items. Different rules apply to African elephant ivory than Asian elephant ivory. On 6 July 2016, the United States instituted a near-total ban on commercial trade in African elephant ivory. The requirements for the import of African elephant ivory are stricter than those for Asian elephant ivory; however, with respect to interstate and foreign commerce, the requirements are stricter for Asian elephant ivory. More information about the specific requirements is available <u>here</u>. Some states also have laws prohibiting or restricting the sale of elephant ivory and rhino horn. The United States has also enacted the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act (which protects endangered birds).

### **CONSUMER PROTECTION**

#### **Cancelling purchases**

### **52** In what circumstances may consumers cancel the sale of art, antiques or collectibles?

Federal Trade Commission regulations and state laws provide for special protections concerning 'door-to-door' sales, which permit a consumer to cancel a sale within a few days of the transaction, where the offer for sale and agreement to purchase takes place outside the seller's place of business.

### Duties of businesses selling to consumers

#### **53** Are there any other obligations for art businesses selling to consumers?

In addition to door-to-door regulations, the Magnuson–Moss Warranty – Federal Trade Commission Improvement Act is a federal law that regulates written warranties with respect to the sale of consumer products, including artworks, which are distributed in interstate commerce or that otherwise affect interstate commerce. The Act requires sellers to provide consumers with detailed information about warranty coverage for such products, including whether the warranty is full or limited. The Act applies to sales that are conducted at the seller's place of business, as well as to sales made through the mail or by telephone. More information about the Act is available here.

### REGULATION

#### Art market regulator

**54** Is there a specific regulatory body overseeing the art market or certain business activities carried out within the art market in your jurisdiction?

There is no specific regulatory body overseeing the art market in the United States that is equivalent to, for example, the Securities and Exchange Commission (SEC), which regulates the US securities market. Many states have, however, enacted specific laws that regulate certain business activities, such as auction sales.

In addition, under certain circumstances, the SEC may deem non-fungible tokens (NFTs) to be securities subject to its rules – though this is yet to be determined. While it is unlikely that a single work of digital art or collectible will be considered a security, an NFT sold in groups or fractionalised (ie, sold in shares) may have the characteristics of an investment contract, making compliance with the applicable SEC rules necessary.

### **Other regulators**

### **55** What other forms of regulation are professional art market participants in your jurisdiction subject to?

There are a variety of regulations that indirectly govern art transactions and the art market participants involved. For example, when selling art to consumers, art dealers are prohibited from using unfair or deceptive acts or practices pursuant to the Federal Trade Commission Act. In the past, the Federal Trade Commission has brought suit against sellers who violated the terms of the Act, seeking injunctive relief and restitution for the consumers damaged by the unfair or deceptive acts. Individual states have also enacted regulations that affect art market transactions.

### **UPDATE AND TRENDS**

### Key developments of the past year

### **56** Are there any other current developments or emerging trends that should be noted?

In the past year, the art market's interest in NFTs and digital art appears to be here to stay, despite the crash in prices of cryptocurrencies in 2022. For example, in September 2022, Christie's launched a new platform exclusively dedicated to NFT art. At the same time, collectors continue to purchase art online, both through the auction houses as well as through other digital channels. In part, this is due to the growing presence of younger collectors in the art market. Individuals and businesses participating in the art market should consider the shifting legal implications of these trends.

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