

Art Law

Contributing editor
Pierre Valentin



2018

GETTING THE
DEAL THROUGH

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Art Law 2018

Contributing editor
Pierre Valentin
Constantine Cannon LLP

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Preface

Art Law 2018

First edition

Getting the Deal Through is delighted to publish the first edition of *Art Law*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Pierre Valentin of Constantine Cannon LLP, for his assistance with this volume.

GETTING THE 
DEAL THROUGH 

London
April 2018

Introduction

Pierre Valentin

Constantine Cannon LLP

The art market has changed considerably over the past 30 years and is now considered a global marketplace. Geographically, its centres are New York, London and Hong Kong, where the most expensive fine art and collectibles are sold. There are also national markets, where lower-priced art and collectibles are sold, together with works by artists with national appeal.

The art market used to be a relatively small club of scholars, connoisseurs and dealers. Most transactions were concluded on a handshake – you knew your counterpart, and honour and trust were paramount. That is no longer the case. The art market has become increasingly anonymous; in fact, the tradition of secrecy that pervades the art market today means that many art transactions are concluded via intermediaries who do not disclose the identity of their client. Often, you simply do not know who you are selling to or buying from.

From an economic perspective, the art market is a collection of sub-markets, each with its own characteristics and trends. The market in Chinese works of art functions differently from the market in European old masters, for instance. The art market can also be analysed by reference to price points: the market for high-end, blue-chip art is booming; the middle market, which covers artworks up to US\$5 million, is somewhat stable; and the lower end of the market, which covers artworks up to US\$500,000, is stagnant. Owing to changes in taste, twentieth-century and contemporary art and collectibles are doing well at all price points. Old masters and older furniture are not doing as well, unless they are exceptional examples. There is also the phenomenon of artists as international brands – Andy Warhol, Jean-Michel Basquiat, Jeff Koons and Gerhard Richter are examples of this.

Prices for iconic artworks have become stratospheric. Following the sale of the painting known as *Salvator Mundi* by Leonardo da Vinci for US\$450 million in New York in 2017, some commentators predict that within just a few years, an artwork will sell for over US\$1 billion. There is a relatively small pool of international billionaires and museums competing to acquire trophy pieces. Exceptional prices have been achieved at auction when only two such collectors or museums bid against one another.

In the past 30 years, the main auction houses have become ever more powerful. The four main international auction houses are Sotheby's, Christie's, Phillips and Bonhams, and there are well-established national auction houses such as Artcurial in France, Rasmussen in Denmark and Dorotheum in Austria. Sotheby's and Christie's are increasingly leveraging their exceptional networks to broker private treaty sales. The phenomenon of the global art powerhouse has come as a direct result of the encroachment of auction houses on the gallery sector. Such powerhouses include Gagosian, Pace and Hauser & Wirth, each with gallery spaces in many international cities and an extensive network. This has resulted in the stratification of the galleries' market into four distinct layers, with a first tier of international powerhouses handling the big-ticket artworks, a second tier of galleries with one or two outposts in countries other than that of their principal establishment, a third tier operating at a national level with no foreign outpost, and a final tier that is purely local. Some of these galleries operate in the primary market only, that is, they only sell artworks directly from the artist's studio or estate, while other galleries also operate in the secondary market, where artworks have been bought and sold more than once. Many art dealers operate only in the secondary market, for example dealers in nineteenth- and twentieth-century art.

In the past 20 years, we have seen the birth of 'mega' art fairs, which occur at least every three months somewhere around the globe. Many of these fairs focus on contemporary art, but the Maastricht Art Fair, one of the oldest and most important fairs, as well as a few others, cater for more traditional tastes. Art fairs remain the preserve of galleries and dealers, with auction houses typically being excluded. Many galleries and dealers now hop from one art fair to the next, and do most of their business there.

Given that the value of certain categories of art continues to appreciate, art is increasingly being regarded by some as an asset class. A few years ago, auction houses and galleries would shy away from promoting art as an investment. This is changing. Some of the differences between art as an asset and other asset classes are that, first, art generates no income; second, the art market is notoriously opaque; and third, transaction costs are high. However, art has certain advantages over other asset classes such as real estate: it can be moved easily across borders, allowing for greater tax minimisation opportunities, and, as the art market thrives on inside information, if you are an insider you have a serious advantage.

From a legal perspective, while it is true that the art market is not regulated in the sense that most countries do not have a state-sponsored regulator overseeing the market, it is not regulation-free. There are international treaties, European regulations and national laws aimed directly at regulating certain aspects of the trade in, and ownership of, art and collectibles, for example in the areas of tax and export controls. There are multiple laws regulating the trade in goods that apply to the trade in art and collectibles, for example laws governing the sale of goods and provision of services. Collectors and art market professionals may need to comply with more esoteric laws such as regulations governing the possession of, and trade in, endangered species. Businesses dealing in art must comply with a broad range of regulations like any other business in areas such as anti-money laundering, data protection, consumer protection, intellectual property, customs, online trading, anti-bribery, fraud and criminal law. One of the main challenges facing lawyers working with art collectors, art businesses and not-for-profit art organisations is the fact that every situation is likely to involve the laws of more than one country. This requires a sound knowledge of conflict-of-law rules, and a good enough understanding of how different legal systems address a given situation. If an artwork was stolen in Germany, sold in Switzerland and then again in France before making its way to a New York auction house, who has the better right to the artwork: the victim or the current possessor? Which law applies to the different facets of a gift of art by a UK-based individual holding the art in an offshore trust to a Canadian museum? Such situations are common, not exceptional. This first edition of *Art Law in the Getting the Deal Through* series 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 was prepared in the hope that it will 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.

China

Angell Xi (Minjie)

Jingtian & Gongcheng

Buying and selling

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

As a general rule, ownership passes from seller to buyer upon delivery, unless otherwise stipulated by laws or agreed upon by the parties. The parties may agree on a different time for ownership to pass despite delivery, for example when certain conditions are met, upon the buyer's full payment of prices or full performance of obligations. However, if the sale of a work of art, antique or collectible is concluded through an online judicial auction, ownership will be transferred when the ruling on the auction is served on the buyer.

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

The concept of implied warranty of title does not exist in China as it is a common law term. The Contract Law provides that the object to be sold shall be owned by the seller or the seller shall have the right to dispose of it. A similar legal requirement can also be found in the Auction Law and the Administrative Measures for the Operation of Artworks. In addition, unless otherwise provided by law, the seller shall assume the obligation to guarantee that no third party may claim any right against the buyer regarding the object, except that the buyer knows or ought to know, at the time of conclusion of the contract, that a third party has rights on the object, in which case the seller shall be released from the guarantee obligation. If the buyer has conclusive evidence proving that a third party may claim rights on the subject matter, the buyer may suspend payment, unless the seller provides a proper guarantee.

When the seller is in breach of the title guarantee obligation, the buyer is entitled to claim against the seller within the limitation of actions, which in general is three years from the date on which the infringement occurred or the party causing the infringement is known or ought to have been known to the buyer, unless otherwise stipulated by the law. However, if 20 years have passed since the infringement, protection from a people's court will not be granted. The limitation of actions may be suspended or extended under special circumstances, stipulated by the law.

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 open to the public for registration of ownership of art, antiques or collectibles. State-owned cultural relics must be registered with the cultural heritage administrative authorities, which will then send all data to the national authority – the State Administration of Cultural Heritage (SACH). The SACH has been building a consolidated nationwide cultural relics database, with data from state-owned museums across China (<http://gl.sach.gov.cn/collection-of-cultural-relics/index.html>). For the general public, this database is not for registration but for reference, where basic information of the cultural relics can be found, such as name, category, dynasty, and in which museum they are being collected.

Cultural relics owned by civilians are encouraged to be voluntarily registered, however no official register has been opened for this purpose. In 2016, it was announced that a database would be built by a subsidiary of the SACH for registration by civilians, but this has not been

launched. For art and collectibles outside the scope of cultural relics, non-official registers exist, which were established mainly for commercial purposes.

In addition to ownership registration, registration is obligatory for the following:

- any art, antique or collectible being temporarily imported into or exported from China;
- any art, antique or collectible being confiscated according to law;
- any cultural relics being obtained from an archaeological excavation; and
- any cultural relics that are immovable.

Regarding theft or loss of cultural relics, an official public register was jointly launched by the SACH and the Ministry of Public Security (MPS) in 2017. The register is operated in both Chinese and English languages. According to the SACH, the data will be uploaded into Interpol's database of stolen works of art (<http://bdwww.sach.gov.cn>).

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 falls into any of the following categories, it is prohibited from being purchased or sold, therefore neither the victim of theft nor the acquirer in good faith will be preferred:

- state-owned cultural relics, except for those approved by the state;
- precious cultural relics in the collection of cultural institutions not owned by the state;
- mural paintings, sculptures and construction components that are included among the state-owned immovable cultural relics, except for those that have received approval to be dismantled according to the law, which are not collected by the institutional cultural relics collection bodies; or
- cultural relics obtained through channels or resources that are not compliant with the law.

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

If a stolen work of art, antique or collectible was not obtained from an archaeological excavation, and does not belong to any of the above-mentioned categories, when it is assigned to the acquirer by a party that has no right to dispose of it or authorisation to assign it, the original legitimate owner (the victim) is entitled to claim for ownership. However, if the following good-faith conditions are met, the ownership shall belong to the acquirer, unless otherwise provided by law:

- if the acquirer accepted the assignment in good faith;
- if the acquirer paid a reasonable price for the object; and
- if the object was already registered as required by law, or was already delivered to the acquirer if registration is not required.

However, the acquirer's claim for ownership will not be supported if the following occurs:

- the assignment contract is annulled owing to reasons such as fraud, malicious collusion or unlawfulness; or
- the assignment contract is revoked owing to reasons attributable to the acquirer, such as fraud, coercion, undue influence or any other reason as provided by law.

For the unauthorised assignment, the victim is entitled to claim against the unauthorised party for compensation, within a limitation of actions of three years, as calculated from the date on which the victim knew or ought to have known about the infringement or the party causing the infringement, however the ownership shall remain with the acquirer. Under certain circumstances provided by law, the said limitation may be suspended or extended, and the burden of proof shall be borne by the claimant.

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 certain period?

With regard to stolen art, antiques or collectibles that are not cultural relics that are forbidden for purchase and sale, if the ownership was not recognised with the acquirer, there is always a potential risk for any new acquirer that the victim will claim ownership within the limitation of actions. In this case, the new acquirer may use good faith as a defence. The limitation of actions for victims is three years from the date on which the infringement was caused by the new acquirer or the new acquirer becomes known or ought to have been known to the victim, unless otherwise stipulated by law. However, if 20 years have passed since the infringement, protection from a people's court will not be granted. Under certain circumstances, the limitation may be suspended or extended. After expiry of the limitation, if the acquirer or the new acquirer agrees to give ownership to the victim, the victim may still recover the stolen art, antiques or collectibles despite expiry. The acquirer always has the opportunity to present objections to the victim, in addition to the good-faith defence, such as expiry of the limitation of actions, invalidity of the suspension of the limitation or extension of the limitation.

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

No, if ownership is acquired in bad faith, such as fraud, coercion or malicious collusion, the acquirer will not be supported in respect of ownership because of the absence of good faith. In addition, the relevant transaction contract may also be annulled or revoked because of bad faith.

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

As a general rule, the risk of loss or damage shall be borne by the seller prior to delivery of the object, such as artwork, and shall be passed to the buyer after delivery, except as otherwise provided by law or agreed upon by the parties. The buyer bears the risk in the following circumstances:

- if the object cannot be delivered within the agreed time limit for a reason that is attributable to the buyer, he or she shall bear the risk of loss or damage from the date that he or she is in breach of the agreement;
- if the object being sold was already delivered to a carrier for transportation and is in transit, the risk of loss or damage shall be borne by the buyer from the date the contract was established, unless otherwise agreed by the parties;
- if there is no agreement between the parties on the place of delivery or the agreement is unclear, and the object needs to be transported, the risk of loss or damage shall be borne by the buyer after the seller delivers the object to the first carrier;
- if the seller has placed the object at the place of delivery, and the buyer fails to take delivery of the object and is therefore in breach of the agreement, the risk of loss or damage shall be borne by the buyer from the date when the buyer breached the agreement; and
- if the seller delivers the object to the carrier as designated by the buyer according to the contract, the risk of loss or damage shall be borne by the buyer from the date the carrier obtains possession of the object.

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

No, there is no legal requirement for the buyer to conduct due diligence enquiries. The buyer may use his or her discretion to decide whether to carry out due diligence and what shall be included. Typically, a prudent

buyer will pay attention to the title, authenticity, transferability, condition, appraisal and value of a work of art, antique or collectible to be acquired, and will therefore include this content in the due diligence.

9 Must the seller conduct due diligence enquiries?

Yes, if the seller is a professional business operator in the art market, regarding paintings, calligraphy and seal cuttings, sculptures and carvings, fine-art photography, installation art, industrial art and the limited replicas of the aforesaid works, excluding cultural relics, it is obligatory for the seller, upon the buyer's request, to carry out due diligence of the artwork purchased by the buyer and to provide one of the following:

- the document of originality recognised or issued by the artist of the artwork;
- the documents issued by the third-party appraisal institution; or
- another document that can prove or trace the source of the artwork.

When the seller is an auction house, it shall verify the documents submitted by the principal, such as the identification of the principal and the certificate of title or other documents that prove the principal's lawful right to dispose of the artwork. The auction house shall also conduct preliminary appraisal of the artwork and decide whether to accept the buyer's offer based on the result. If the auction house thinks it is necessary to carry out a second appraisal of the artwork it can do so, and if the outcome of that appraisal is different from what is described in the auction contract, the auction house may request to amend or terminate the contract. If a cultural relic is involved in the auction, the auction house must report it to the local office of the SACH and obtain its approval.

10 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 that the seller gives the buyer implied warranties in respect of art, antiques or collectibles. The most relevant legislation is the Law on the Protection of Consumer Rights and Interests (revised in 2013), although it aims to protect consumers in respect of purchased commodities or received services. According to this Law, in addition to warranty of title, the seller must also guarantee the quality, functionality, purpose and term of validity of the commodity or service, and that it will be free from defects and will meet the personal and property safety requirements. With regard to a commodity or service that may endanger personal or property safety, a truthful explanation and explicit warnings must be given to the consumers. The seller's liability can be relieved or exempted if a defect is made known to the buyer prior to the purchase, so long as the defect does not violate the compulsory regulations. If, prior to auction, the auction house makes a disclaimer that it cannot guarantee the authenticity or quality of the auctioned artwork, it will not be held liable.

For a claim against the auction house regarding its failure to make a statement on the defect of the auctioned artwork, the limitation of actions for the compensation claim is one year from the date the claimant knew or ought to have known of the damage. For a claim against the auction house or another general seller for compensation for causing personal injury or damage to assets as a result of the defect of the auctioned artwork, the limitation of actions is generally two years from the date the claimant knew or ought to have known of the damage, unless otherwise provided by law. The right to claim compensation for damage caused by a defect will be void 10 years after the product was delivered to the first consumer, except where the specified safe-use period has not expired (though this is not relevant to artwork).

11 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 litigation lawsuit in a people's court against the seller, based on breach of contract as the cause of action. To obtain the court's support, the buyer needs to prove, with strong evidence, that he or she had reason to believe that the work of art, antique or collectible was authentic, and that he or she therefore paid for or agreed to pay for an authentic work, which was delivered by the seller, and therefore the seller is in substantial breach of the contract owing to the forgery and must be fully liable for it. As a resolution, the buyer may do the following: ask the seller to replace the forgery with the authentic artwork; ask for a refund of the payment; request liquidated damages or compensation (or both); or seek other remedies as desired. If the buyer can prove there was fraud, coercion, undue influence or malicious collusion

during the transaction, which can be attributed to the seller, or if the transaction was made owing to a serious misunderstanding or obvious unfairness, the buyer may seek to have the transaction annulled or revoked, without jeopardising its right to claim for liquidated damages or compensation (or both). In addition to breach of contract, the buyer may also claim against the seller based on consumer protection, and if the seller is proved to be fraudulent, punitive damages may apply.

The buyer may report the forgery to the cultural administrative authority or the comprehensive cultural market enforcement authority, if the forged is a work of art that is not a cultural relic. For a proved forgery, the punishments normally include confiscation of the unlawful income and the forged artwork, and the imposition of fines. If the documents that prove the source of the artwork, the appraisal document or other transaction documents were also forged, the punishment may be increased.

The buyer may also report a criminal case to the local branch of the Ministry of Public Security if the case involves forgery or alteration, or the purchase, sale, theft, seizure or destruction of documents, certificates or seals of state organs. If the forgery, etc., is proved, the criminal will be sentenced to fixed-term imprisonment of no more than three years, criminal detention, public surveillance or deprivation of political rights, and will also be subject to a fine; if the circumstances are serious, the criminal will be sentenced to fixed-term imprisonment of no less than three years but no more than 10 years and will be subject to a fine. In most cases that involve forged cultural relics, there is also the possibility of being prosecuted for the crime of swindling or cheating and bluffing.

Whatever the buyer's choice is, the right to indemnification enjoyed by him or her under civil law will not be jeopardised.

If the seller records the artist's name on the sale documents, these documents can generally be used as crucial evidence for the benefit of the buyer. The buyer may also involve the artist who may consider claiming against the seller based on intellectual property rights infringement.

If the transaction is made through an auction and if, prior to the auction, the auction house made a disclaimer that it does not guarantee authenticity or quality, the buyer may face a significant challenge if he or she wishes to make a claim, unless he or she can prove with sufficient evidence that the disclaimer was made dishonestly and the court supports the claim.

12 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 the seller can prove, with sufficient evidence, any of the following circumstances existing in the sale, he or she can exercise the right to void the sale through civil litigation or arbitration, depending on the dispute resolutions as agreed by the parties:

- the sales 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 (ie, a group of people from the same company) or third party involved in the sale;
- an illegitimate purpose is concealed under the guise of a legitimate purpose;
- the interests of the public are negatively affected; or
- the mandatory provisions of laws and administrative regulations are violated.

In addition, if the seller can prove, with sufficient evidence, any of the following circumstances existing in the sale, he or she can also revoke the sale through civil litigation or arbitration, depending on the dispute resolution as agreed by the parties:

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

In civil litigation, the burden of proof shall be borne by the claimant, therefore the seller needs to build a strong case with sufficient evidence. If the court decides that the sale is void or can be revoked, the artwork will be returned to the seller, and the seller shall refund the buyer. If the original artwork cannot be returned or the return becomes unnecessary for any reason, the seller shall be reimbursed at the evaluated price. If

the seller or buyer suffers loss or damage at the fault of the other party, the loss or damage shall be compensated by the party at fault. To exercise the right to revoke, the seller must comply with the limitation of actions requirements.

Export and import controls

13 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 of export control for cultural property in China: cultural relics exit control; and artwork export control.

For cultural relics, an exit licence is mandatory for every exit, subject to examination and approval by the cultural relics entry and exit examination and approval authority as designated by the administrative department of cultural relics under the State Council. Where an exit is permitted, a cultural relics exit 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 shall release the cultural relics based on the their exit licence. To obtain the exit licence, detailed information on the applicant, export customs and details of the cultural relic must be provided. The application must be submitted for online examination via the National Cultural Relic Import and Export Examination Database operated under the SACH. The website is: <http://jcj.sach.gov.cn/>.

State-owned cultural relics and precious cultural relics not owned by the state and other cultural relics that are prohibited from leaving China may only leave China when they have been approved for overseas exhibitions or for other purposes that have been approved by the State Council. When a cultural relic leaves China for an overseas exhibition, approval must be obtained from the administrative department of cultural relics under the State Council. If the quantity of Grade I cultural relics exceeds the threshold stipulated by the State Council, further approval must be obtained from the State Council. Grade I cultural relics that are unique or fragile cannot be exhibited abroad. Once approval is given for the overseas exhibition, customs will grant release based on the approval documents, and when the cultural relics are returned to China after the exhibition, verification will be conducted by the same authority that originally approved the exit. In case of failure to comply with the exit control, there is a risk of liability under criminal law or administrative regulations, and punishments include imprisonment, fine, forfeiture of property, confiscation of unlawful income and revocation of the relevant licence depending on the seriousness of the case.

Export of artwork requires an export licence. The application for this licence must be submitted to the local cultural administrative authority at the provincial level, with certain information provided including the applicant's business licence, foreign trade operator filing record, origin and destination of the artwork, and a catalogue of artwork and other materials required by the approval authorities. Once approval has been obtained, the applicant must have the artwork cleared by customs. Artwork that is considered to do any of the following cannot be exported from China:

- violates the basic principles stipulated in the Constitution;
- endangers the unity, sovereignty and territorial integrity of the state;
- divulges any national secret, endangers national security or impairs national prestige or interest;
- incites ethnic hatred or discrimination, undermines the ethnic solidarity or injures ethnic customs or habit;
- advocates or disseminates cult or superstition;
- disturbs the social order or undermines social stability;
- promotes obscenity, violence or gambling, or abets the commission of a crime;
- insults or slanders others or infringes others' legitimate rights;
- deliberately distorts or misrepresents history;
- harms social morality or jeopardises the national traditional culture; and
- is prohibited by laws or administrative regulations, or by the state.

If the export control for the artwork is not complied with, administrative punishments will usually be imposed, such as being ordered to comply with the requirements, or confiscation of the illegal artwork and illegal gains and the imposition of a penalty.

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

For export of art, antiques or collectibles, there is no tax liability. For import, there are two kinds of tax: customs duty; and import value added tax (VAT).

For collectibles imported by a public welfare state-owned collection institution, as a result of donation from abroad, return, restitution or purchase, for the purpose of a permanent collection, exhibition, research and other social welfare activities, customs duties, import VAT and consumption tax are exempted.

Direct and indirect taxation

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

Owning art, antiques and collectibles in China does not generate tax liability.

Transferring art, antiques and collectibles will create tax liability for the parties involved, with the type and rate of tax varying depending on the party (eg, the tax rate imposed on a limited liability company may vary greatly to the rate imposed on an individual).

If art is directly sold by the artist as a seller, his or her mandatory tax liability includes income tax and VAT.

If the sale is made by an individual collector, the mandatory tax liability for the seller includes income tax and VAT.

If art, antiques and collectibles are sold by an art business company or gallery incorporated in the form of a limited liability company, the seller's mandatory tax liability includes corporate income tax and VAT. In addition, the seller may often reimburse the artist for the income tax that he or she has paid, although not as a legal liability, but a contractual liability as agreed between parties.

If the sale is made through auction, the mandatory tax liability for the auction house includes corporate income tax and VAT.

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

If the art is acquired through donation, the acquirer needs to pay corporate income tax, unless otherwise provided by law.

If the transferred art is precious jewellery and jade, consumption tax will also be imposed.

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

For collectibles imported by a public welfare state-owned collection institution, which 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 are exempted.

To encourage donations that support public welfare, the law provides that companies or other enterprises shall enjoy preferential treatment for corporate income tax, and individuals or self-employed individuals in industry and commerce shall enjoy preferential treatment for income tax.

According to the Charity Law, charitable organisations, natural persons, legal persons and other organisations that donate property for charitable activities (donors), and beneficiaries receiving charitable donations, are eligible for tax benefits in accordance with the law; therefore, when art, antiques or collectibles are involved in charitable donations, tax benefits will apply (subject to legal requirements). Furthermore, the State Administration of Taxation (SAT) promulgated a new regulation in February 2018, which allows a corporate donor to deduct its costs for charity donation and public welfare donation from its taxable income within the amount equivalent to 12 per cent of its annual total profits for that year, and to deduct the remaining costs that exceed 12 per cent of its annual total profits for that year within a three-year term carried forward. In addition, in China, museums are entitled to tax preferences in accordance with the law, and any person establishing museums or making donations to museums in accordance with the law is also entitled to tax preferences in accordance with the relevant provisions of the state.

Borrowing against art

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

Among the general types of security (ie, guarantee, mortgage, pledge, lien and deposit), pledge is the most common security interest taken against art, antiques and collectibles. However, it is still not widely used in practice, owing to challenges and risks that arise from uncertainty, complexity and a lack of transparency about appraisal, storage of the art objects, and costs, processes and risk control involved. In some cases, lien may be used in transportation of artwork, storage, custody, repair and restoration, or in a brokerage relationship.

18 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, a consumer loan has a clear definition given by law, which is a loan for consumption granted to a borrower by consumer finance companies. Therefore, 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 a private borrower, or prohibiting the lender from granting a loan for the purpose of acquiring art assets. However, Chinese laws explicitly provide that each loan shall be granted with a legitimate purpose, and the loan facilities shall be used only for that purpose. In practice, it is not popular for lenders to grant loans for art assets, mainly because most lenders are concerned about uncertainty and risk control complexity, unless sufficient security is provided.

19 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 law does not prohibit art, antiques or collectibles (excluding cultural relics that are prohibited by law) to be mortgaged or pledged, there is no public register for it. However, in case of pledge of the copyright or patent vested in the art, antiques or collectibles (if any), it is possible to get the pledge registered with the National Copyright Administration for copyright and with the State Intellectual Property Office for patents.

20 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?

When the borrower defaults on the loan, the lender cannot directly sell the collateral, but may agree an alternative method of payment with the borrower. If an agreement is not reached with the borrower, the lender may file a lawsuit in a people's court. After the collateral has been converted into cash, or auctioned or sold off, the lender may enjoy the proceeds.

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

In general, the lender with a valid and perfected first-priority security interest may take precedence over other creditors. However, if the tax default by the borrower occurred before the mortgage, pledge or lien was created, the tax authority shall have priority over the lender. In case of bankruptcy of the debtor, the priority the lender enjoys will not be impacted, as the security interest is not insolvent property according to law.

Intellectual property rights

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

Copyright is automatically generated on the date a work is created. Copyright registration is voluntary in China (ie, the author or another lawful copyright holder will enjoy copyright regardless of whether it is registered); however, for copyright protection purposes, it is advisable

to get the copyright registered as it is a low-cost and efficient way to prove copyright ownership in an enforcement case.

23 What is the duration of copyright protection?

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

For moral rights such as the right of publication, if the author is a legal person or other organisation, or if it is a work made for hire, the protection duration is 50 years, ending on 31 December of the 50th year after the date on which the work was first published, but if the work is not published within 50 years after its completion, it shall no longer be protected by law. If the author is an individual, in general the protection duration is the term of the author's life plus 50 years after the author's death, ending on 31 December of the 50th year. In the event of a joint work, this term shall end on 31 December of the 50th year after the death of the last surviving co-author. For cinematographic work or a work created by a process analogous to cinematography or a photographic work, the protection duration is a term of 50 years, ending on 31 December of the 50th year after the date on which the work was first published, but if the work is not published within 50 years after its completion, it shall no longer be protected under the law.

For economic rights such as the right of reproduction, the right of distribution, the right of rental, the right of exhibition, the right of performance, the right of projection, the right of broadcasting, the right of communication via information networks, the right of cinematization, the right of adaptation, the right of translation, the right of 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 duration is a term of 50 years, ending on 31 December of the 50th year after the date on which the work was first published, but if the work is not published within 50 years after its completion, it shall no longer be protected by law. If the author is an individual, the protection duration is a term of the author's life plus 50 years after the author's death, ending on 31 December of the 50th year.

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

The right of exhibition is an economic right of the copyright holder – it belongs to the owner of the original artwork. The owner's consent must be obtained prior to exhibition to the public, otherwise it may cause infringement, unless it can be proved with sufficient evidence that the artwork had already been published, and that the exhibition is for the purpose of individual study, research or enjoyment, and will not cause infringement to other rights enjoyed by the copyright holder. The name of the author and of the artwork must be clearly displayed.

25 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 right of reproduction, the right of distribution and the right of communication via information networks are economic rights of the copyright holder.

The copyright owner's consent must be obtained prior to reproduction and distribution of the hard-copy museum catalogues, and, in addition, the owner's consent on communication via information networks must be obtained prior to production and distribution of the digital museum catalogues, unless these catalogues are not distributed to the public but are for the museum's internal use only, in which case the name of the author and the artwork must be clearly mentioned, and the rights enjoyed by the copyright holder must not be jeopardised and no impact shall be caused to the normal use of the artwork.

The owner's consent must also be obtained for the purpose of advertising exhibitions.

26 Are public artworks protected by copyright?

Yes, the public artwork is protected by copyright upon its completion.

27 Does the artist's resale right apply?

The artist's resale right does not currently apply in China. However, the Copyright Law (Draft Revision for Review) publicised on 6 June 2014, proposed that the artist's resale right should be added to the existing Copyright Law. According to the Draft, after the first transfer of the

original of the artwork, photograph, manuscript of written work or musical work, the author, the successor or legatee of the author shall be entitled to share the value-added profits achieved from the auction resale of the original or the manuscript of the work. The detailed protection measures will be provided separately by the State Council.

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

For visual artists, the moral rights include right of publication, right of authorship, right of modification and right of integrity.

For the following moral rights, the protection duration is unlimited:

- the right of authorship, which means the right to claim authorship of a work by being named on the work as its author;
- the right of modification, which means the right to modify or authorise others to modify a work; and
- the right of integrity, which means the right to protect a work from being misrepresented or distorted.

With regard to the moral right of publication, if the author is a legal person or other organisation, or if it is a work made for hire, the protection duration is a term of 50 years, ending on 31 December of the 50th year after the date on which the work was first published, but if the work is not published within 50 years after its completion, it shall no longer be protected by law. If the author is an individual, in general the protection duration is a term of the author's life plus 50 years after the author's death, ending on 31 December of the 50th year. Moral rights cannot be waived.

The right of authorship, the right of modification and right of integrity shall, after death of the author, be protected by the heir in title and or another beneficiary. In the absence of an heir in title or another beneficiary, these 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 author's heir in title or other beneficiary within a period of 50 years after the death of the author, unless the author had expressly stated not to publish it. In the absence of an heir in title or other beneficiary, the said right will be exercised by the owner of the original of the work.

In the case of a work of an unknown author, the copyright, except the right of authorship, shall be exercised by the owner of the original of the work. Where the author has been identified, the copyright shall be exercised by the author or the heir in title.

Agency

29 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 explicitly requires the agent to account to the principal for commission or compensation received by the agent while conducting business for the principal; however, based on the General Rules of the Civil Law and the Contract Law, with several articles taken into consideration, it is considered fair and reasonable for this to be the case. There is a legal requirement that 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 shall be binding on the principal. In addition, if a contract is signed with a third party by the agent in his or her own name, within the scope of agency power, when the third party is aware of the relationship between the agent and the principal at the time of concluding the contract, the contract will be directly binding on the third party and the principal, unless there is conclusive evidence proving that the contract is only binding on the third party and the agent.

30 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 on this matter. If the agent makes transparent and full disclosure, the terms of the agreement reached between the principal and the agent will apply.

31 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 legislation on this matter. To claim against the third party, the principal must have a cause of action and bear the burden of sufficient proof to support the claim, as the case may be. The cause of action may be breach of contract, or infringement, both of which may result in challenging claims.

Consigning items

32 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 important to prevent the consigned artwork from being identified as the property of the debtor (the dealer). For that purpose, the consignor must, prior to a consignment sale, sign a consignment contract with the dealer that contains a protection clause, and clearly mark the consigned artwork and make it recognisable as the consignor's property and not the dealer's property. In case of bankruptcy, as soon as a people's court accepts the bankruptcy application, the consignor must request to take back the consigned artwork through the bankruptcy administrator, with necessary documents provided as evidence, to prove that the artwork belongs to the consignor and was kept by the dealer because of the consignment relationship. The consignor must be able to take the artwork back, unless he or she is prevented from doing so by the law. If the administrator objects, the consignor has a remedy to file a lawsuit in a people's court to verify the ownership of the consigned artwork, and with the court ruling, take back the artwork from the administrator.

Auctions

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

Auctions of cultural relics are highly regulated in China – in addition to the Auction Law and regulations, they are also subject to legislation that provides for cultural relics protection.

Cultural relics can be auctioned only at an auction house that is licensed for that specific purpose. To obtain a licence, the auction house must meet certain conditions, such as having registered capital of no less than 10 million yuan; having more than five cultural relics auction experts; having no involvement in unlawful cultural relics operations within at least the recent two years; and complying with other requirements stipulated by the relevant legislation.

Only approved cultural relics are eligible for auction. Prior to auction, the cultural relics to be auctioned must be reviewed and approved by the provincial-level SACH authority and be filed with the SACH. Cultural relics cannot be auctioned if they are not approved by the authority, which includes cultural relics that have been stolen, smuggled, excavated or illegally plundered; cultural relics that have been confiscated or recovered by law enforcement bodies; state-owned and collected cultural relics; precious cultural relics in a collection that is not owned by the state; state-owned immovable cultural relics and their components; and other cultural relics as provided by law. The auction records shall be filed with the SACH local authorities and sent to the SACH.

The state enjoys right of first refusal to purchase precious cultural relics that are being auctioned. The SACH may specify which state-owned cultural relics collection institution can exercise the right to purchase. The price shall be decided by negotiation or through an invitation-only auction.

Auction houses that auction cultural relics are prohibited from engaging in any business or operation related to cultural relics. Foreign investment is also prohibited from a cultural relics auction.

To regulate an auction of cultural relics and artwork, a special regulation was promulgated in 2010, which focuses on process and requirements, some of which have been replaced by the Law on the Protection of Cultural Relics (revised in 2017) and the Auction Law (revised in 2015).

34 May auctioneers in your jurisdiction sell art, antiques or collectibles privately; offer advances or loans against art, antiques or collectibles; and offer auction guarantees?

Auction houses in China cannot sell cultural relics privately, and cultural relics cannot be purchased through channels other than the auction houses licensed to auction cultural relics or the stores licensed to sell cultural relics. The lawful exchange or transfer among individuals of cultural relics legally owned by them in accordance with the law is also permitted, as well as lawful inheritance or gifts, and other legitimate ways provided by the state. No such prohibitions exist for the auction of artwork, and, in any case, the auction house is prohibited from auctioning artwork or cultural relics that it owns.

In China, financial services is a highly regulated industry – to carry out financial business, such as offering advances or loans, or providing guarantees, it is mandatory to be qualified with the necessary licences and permits and to meet various legal requirements. An auction house is not a financial services provider, therefore it cannot lawfully provide financial services. Nevertheless, in practice, it is possible for a qualified third-party financial services provider to be involved in financial art-related transactions.

Spoliation during the Nazi era

35 In your jurisdiction, in what circumstances would the heirs of the party wrongly dispossessed typically prevail over the current possessor, if a court accepts jurisdiction and applied the local 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 for stolen or illegally exported art. It can be very difficult to have this kind of case accepted by a court in China, mainly owing to a lack of sufficient jurisdiction and appropriate cause of action. Nevertheless, if a case were accepted by the court, for it to be successfully supported, the heirs of the party wrongly dispossessed should first seek to ensure that the case will be accepted by the court despite the challenge of jurisdiction, which is likely to be initiated by the current possessor.

The heirs must also make every effort to prove, with sufficient evidence, that, according to the relevant conventions, the stolen or illegally exported art should be returned to them, and as legitimate heirs they should be protected in respect of ownership. The current possessor is likely to claim for ownership based on the good-faith principle, which can be a legitimate reason for the possessor to retain ownership; however, the heirs may use evidence to prove there was no good faith or the good faith was not genuine. Under certain circumstances, it is possible that the court may order the heirs to pay compensation to the current possessor for return of the lost art. As a two-tier judicial system is applied in China, the heirs must ensure that they are supported by both tiers of courts, and that the judgment is supported and enforced.

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

No.

Lending to museums

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

There is no legal requirement regarding who shall be responsible for insuring art, antiques or collectibles on loan. However, according to the Regulation on Museums, the legal representative of a museum is responsible for the safety of the collections, which is of paramount importance, particularly if art, antiques or collectibles have been leased out. In most cases, insurance is arranged based on an agreement reached between the lender and the borrower – in some cases it is paid by the lender and in others, by the borrower. As a general practice in China, when art, antiques or collectibles are to be loaned to a museum for an exhibition, the insurance is normally arranged together with the logistics services as part of a package. When a bidding procedure is carried out by a lender and a borrower to look for competent logistics service providers, they will include insurance as a part of it, which means that it is the logistics service provider that will identify the competent

insurance company, with the key terms decided by the lender and the borrower, such as the premium, coverage and period of cover. In most cases, the premium will be already included in the total fees charged by the logistics company.

38 Are artworks, antiques or collectibles loaned to a public museum in your jurisdiction immune from seizure?

There is no specific legislation in China that renders art, antiques or collectibles loaned to a public museum immune from seizure. However, to seize a property in China, there must be a legitimate cause of action, and certain legal proceedings must be undertaken successfully for the applicant to obtain approval for seizure. If the property owner objects to the seizure, legal procedures must be followed to verify whether the seizure is legitimate. In most cases, seizure may be carried out when there is a criminal offence involved.

Cultural patrimony

39 Is there a list of national treasures?

No. From a legislative perspective, there is no concept of national treasures in China; instead, the movable cultural relics are designated as precious or ordinary. The former are further divided into Grade I, Grade II and Grade III. The movable cultural relics include important material objects, artwork, documents, manuscripts, books and materials, and typical material objects.

Immovable cultural relics, which 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, can be identified as needing to be protected at the national, provincial and city level based on their historical, artistic and scientific value. For artwork other than cultural relics, there is no such classification.

Numerous restrictions are applied to precious cultural relics, which are mostly relevant to the sale, transfer, loan or exit from China. When a precious cultural relic is to be auctioned, the state enjoys the right of first refusal to purchase it – the SACH may specify which state-owned cultural relics collection institution can exercise the right to purchase, and the price will be decided by negotiation or through an invitation-only auction.

In an opinion issued by the SACH in 2012, it is strictly prohibited to use terms such as ‘national treasures’, ‘rare’ and ‘the only existing’ to describe the auctioned object in the auction catalogues, as these terms can be misleading.

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

See question 39 for cultural relics. Regarding artwork, there is no legislation in China granting the state a right of pre-emption.

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

All cultural relics that remain underground or in inland waters or territorial seas within the territory of China are owned by the state. Sites of ancient culture, ancient tombs and cave temples are owned by the state. Immovable cultural relics (see question 39), designated for protection by the state, except where provisions of the state stipulate otherwise, 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 such relics are attached changes.

The following are also owned by the state:

- cultural relics unearthed within the territory of China, except where otherwise provided for by state regulations;
- cultural relics collected and preserved by state-owned cultural relics collection institutions and other state organs, armed forces, state-owned enterprises, public institutions, etc;
- cultural relics collected and purchased by the state;
- cultural relics donated to the state by citizens, legal persons and other organisations; and
- other cultural relics owned by the state as provided for by the law.

Ownership of movable cultural relics owned by the state shall remain unchanged when institutions for their preservation or collection cease to exist or are replaced. Ownership of state-owned cultural relics is protected by the law and shall brook 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, shall be protected by the law. Owners of cultural relics must abide by state laws and regulations for their protection.

42 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 also a state party to the Convention, theoretically it may apply to a people’s court in China or another competent authority to order the return of the cultural objects that were stolen or illegally exported. In order to successfully establish the case, the foreign state must convince the court or competent authority that it is within the limitation of actions and has sufficient jurisdiction, and that the Convention is applicable because the cultural object was stolen or illegally exported after China became a state party to it. If the foreign state can prove, with sufficient evidence, that the removal of the object from its territory significantly impairs one or more of the following interests, a people’s court or another competent authority must, according to the Convention, order the return of that illegally exported cultural object: the physical preservation of the object or of its context; the integrity of a complex object; the preservation of information regarding, for example, a scientific or historical figure; the traditional or ritual use of the object by a tribal or indigenous community; or the significant cultural importance of the object for the foreign state.

To succeed in the claim, the foreign state must meet all the requirements of the Convention, complete all the necessary legal proceedings with the court that has sufficient jurisdiction or the competent authority, and provide all necessary and sufficient evidence within the valid limitation of actions. Although the Convention may allow a case to be submitted to another competent court or authority in a country other than China, it is important for the foreign state to know that a foreign judgment is unlikely to be enforced in China, unless the enforcement can be explicitly guaranteed by a bilateral judicial agreement. If there is a third party with good faith, a people’s court or the competent authority will take that into consideration together with all the necessary facts before making a conclusive decision.

According to the Convention, the following two scenarios may also have a substantial impact on the possibility of return: (i) if export of the cultural object is no longer illegal at the time that the return is requested; or (ii) the object was exported during the lifetime of the person who created it or within a period of 50 years following the death of that person.

The parties may also try to submit the dispute to arbitration if an agreement can be made between the parties, or any other parties that have jurisdiction according to the law, at the same location as the cultural object.

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.

Anti-money laundering

43 What are the anti-money laundering compliance obligations placed on the art trade?

In China, there is no specific legislation on anti-money laundering compliance in respect of the art trade. Despite continuous prosperity in the art trade in China, the need for anti-money laundering compliance has been comparatively underestimated, not only by financial services providers, but also by the business community. In practice, art transactions in China are frequently concluded with payment in cash or on a barter basis, which means there is a distinct lack of transparency and traceability. In the People’s Bank of China’s Guidelines for the Assessment of Money Laundering and Terrorism Financing Risks and Categorized Management of Clients of Financial Institutions (promulgated in 2013), art collection and auctions were categorised into ‘cash-intense industries’ that might lead to a high risk of money laundering, therefore the PBOC advised financial institutions to keep a close watch and to

monitor the risk. There has been no noticeable improvement, however, as China's focus on anti-money laundering obligations remains the same: establish the client's identity and preserve the data (eg, name, address), keep records of transactions, and report transactions of large amounts of money and those that appear suspicious. This applies to the art trade when business is carried out by companies or corporations.

With regard to anti-money laundering compliance, a financial institution is obligated to establish and implement identification policies and processes, which require clients to provide identity documents for verification, irrespective of whether the services are for a long-term client, or for a remittance or foreign exchange service. If a third party is involved in art dealing, whether as an agent, dealer, beneficiary or guarantor, the financial institution must verify its identity. For anyone suspicious or unidentified, the financial institution may decide, at its discretion, whether to provide services or decline to do so. If identification is carried out through a third party, the institution must ensure the third party's compliance with anti-money laundering procedures – if necessary, the institution may check this with a government authority, such as a public security bureau or the State Administration for Industry and Commerce. The third party must also keep accurate and complete records, which must be completed in a timely manner.

Financial institutions must immediately report suspicious transactions (either in relation to the amount involved or the transaction details) to their headquarters, where it will subsequently be reported to the China Anti-Money Laundering Monitoring and Analysis Centre.

To enhance anti-money laundering compliance awareness, the financial institution must also provide compliance training for its clients and the relevant business partners.

Financial institutions are also requested to strictly protect their clients' private data and information.

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

Endangered species

44 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. In April 2006, the Regulation on the Administration of the Import and Export of Endangered Wild Animals and Plants was promulgated, and took effect on 1 September 2006. This Regulation implemented the CITES Convention in China. The Endangered Species Scientific Commission is the relevant 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 administration relating to enforcement.

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

In China, it is prohibited to import or export for commercial purposes endangered wild animals, plants and the products made of them that the CITES Convention prohibits from import or export for the purpose of commercial trading. If there are justified reasons for import or export (such as scientific research, training and breeding, and cultural exchange), approval must be obtained from the state wild animals and plants administrative authority, or from the State Council if the relevant regulation requests it. If the species is recognised as endangered, it does not matter whether it is pre-CITES; approval must be obtained prior to import or export.

For import, the following conditions must be met: utilisation of the goods must be compliant with state requirements; control measures must be effective and compliant with ecological safety requirements; and all documents submitted by the applicant must be true and valid. From time to time, the state wildlife and plants administrative authority may publicise other additional conditions that must be met by the applicant, in order to obtain import approval.

For export, the following conditions must be met: ecological safety requirements and public interests must be satisfied; the source of the goods must be lawful; all documents submitted by the applicant must

Update and trends

Confidence in Chinese culture has been mentioned by President Xi Jinping on many occasions in recent years, and has been described as being important for the nation's revival. The President has placed emphasis on supporting sustainable protection of China's cultural relics and nurturing the creative development of China's artists.

Designing and producing 'cultural and creative' objects based on cultural relics has been encouraged as an innovative way to protect and publicise cultural relics – for example, replicas of cultural objects and artwork sold in museums. The Palace Museum and the National Museum of China have both produced examples of this, and many other museums have been encouraged to follow suit. In this regard, there may be more opportunities for museums regarding art licensing; however, this may present challenges regarding intellectual property protection, which will need to be managed and controlled.

be true and valid; and the endangered species to be exported must not be prohibited for export according to the State Council or the state wild animals and plants administrative authority. It typically takes 30 to 40 working days to obtain an approval.

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

See question 45. The same regulations apply to pre-CITES and post-CITES endangered species.

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

The Circular on progressively stopping the commercial processing and sale of ivory and ivory products, issued by the General Office of the State Council, specified that such processing had to be partially stopped by 31 March 2017 and 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 that have a legitimate source will be given a specific mark, which means that they can be displayed and exhibited at museums, galleries and other non-commercial sites, and can be transported, gifted or inherited. Cultural relics that have a legitimate source, upon being appraised by professionals, are able to be auctioned under strict monitoring, and once an administrative licence has been obtained.

There are several other restrictive laws and regulations, which are outlined below.

According to the Law on the Protection of Wildlife (revised in 2016), it is prohibited to sell, purchase or utilise any wildlife under the state's special protection or any product made of it. If the sale, purchase or utilisation of wildlife under the state's special protection or the products made thereof is necessary for scientific research, artificial breeding, public exhibition and show, preservation of cultural relics or any other special purposes, the party concerned must seek approval from the wildlife protection authority at the provincial level, and obtain and use special identifiers in accordance with related regulations to ensure traceability, unless otherwise provided by the State Council.

According to the Implementing Rules of the Law on the Protection of the Land Wildlife, for utilisation of wildlife that is not under the state's special protection or any product made of it for operation, registration must be made with the competent branch of the State Administration of Industry and Commerce, and the operation shall be carried out within the quota approved. Economic profits received from the overseas exhibitions carried out based on the wildlife and the products made of it shall be used for the protection of the wildlife.

According to the Implementing Rules of the Law on the Protection of Water Wildlife, if, for special purposes such as exhibition, research, etc, there is a need to sell, purchase or utilise water wildlife that is under the state's Grade I protection, or any product made of it, approval shall first be sought from the provincial authority, and ultimately from the state authority for fishing administration. Economic profits received from the exhibitions carried out based on water wildlife and the products made of it shall be used for the protection of the water wildlife.

According to the Criminal Law (revised in 2015), whoever illegally catches or kills precious and endangered species of wildlife under the

state's special protection, or illegally purchases, transports or sells these species as well as the products thereof, will be sentenced to fixed-term imprisonment of no more than five years or criminal detention, and will also be fined; if the circumstances are serious, he or she shall be sentenced to fixed-term imprisonment of no less than five years but no more than 10 years and will also be fined; and if the circumstances are particularly serious, he or she shall be sentenced to fixed-term imprisonment of no less than 10 years and will also be fined, or have his or her property confiscated.

If a person, in violation of the law or regulations on hunting, hunts wildlife in an area or during a season closed to hunting or uses prohibited hunting gear or methods for the purpose, and in doing so damages wildlife resources, he or she will be sentenced to fixed-term imprisonment of not more than three years, criminal detention, public surveillance or be fined, if the circumstances are considered serious enough.

According to the Administrative Measures for the Operation of Artworks, it is prohibited to deal in artwork made of the animals, plants, minerals, metals, fossils and other materials that are prohibited from being traded by the law, with limited exceptions.

Consumer protection

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

Consumers are entitled to cancel the sale under various circumstances and pursuant to different laws.

For example, under the Contract Law, where 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, the consumer may render the sale null and void.

Under the Law on the Protection of Consumer Rights and Interests (revised in 2013), where the purchased object fails to meet the quality requirements, the consumer may ask for the object to be returned, replaced, repaired, or he or she may cancel the contract, within the requested time, pursuant to the law or the contract. If the purchased project is deemed to be substandard by the competent administrative authority, the business operator shall agree to return it if that is what the consumer requests.

In addition, if an internet sales platform operator uses a standard template contract containing liabilities exclusion or restriction clauses without reminding the consumer, the consumer may submit the case to a people's court and request annulment of the contract.

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

For art businesses selling to consumers, the following applies:

- right to know: the art business seller shall provide the buyer with accurate and appropriate information, in respect of the artist, about the artwork, the provenance and the other important information;
- right to choice: the seller shall provide necessary assistance to the buyer, but leave the choice to the buyer;
- right to safety: the seller shall ensure that the artwork will not cause personal injury or loss to assets;
- right to fair trade: the buyer and seller will be considered as having equal and fair positions in their dealing;
- right to compensation: the buyer shall be indemnified if he or she suffers from damage or loss caused by the seller, as a result of purchasing the artwork; and
- right to privacy: the seller shall respect the buyer's privacy and personal data such as name, address, bank account information and information on family members, and not disclose any of the above to any third parties, or use it for other purposes.

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Buying and selling

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

Under Czech law, ownership of a movable asset is generally transferred from seller to buyer on the effective date of the purchase agreement (usually the date that all the parties enter into the agreement or a later date specified in the agreement). The parties may agree otherwise (eg, ownership passes on the date the artwork is handed over) or they may conclude an 'ownership title reservation' under which ownership passes to the buyer once the purchase price is paid in full to the seller.

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

The seller shall enable the buyer to acquire full ownership to the artwork, implying that the title is good and free of any encumbrances that might affect it. The seller must not limit the scope of its liabilities for defects in advance. The buyer is entitled to waive his or her rights resulting from defects in the contract (in writing). The warranty may also be indirectly limited by the seller's explicit declarations in the contract informing the buyer of all the defects to the title of which the seller is aware. Any defects to the title must be claimed immediately after the buyer realised or could have realised their existence with due care, but no later than within two years from the handover of the asset (as regards hidden defects) unless the seller knew about the defect at the time of the handover.

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 ownership of art, antiques or collectibles is not registered in a public register; if there is a pledge established over them, they may be entered in the pledge register maintained by the notaries public. Artworks that have been stolen may be recorded with the Czech police, which makes evidence available to the public to a certain extent.

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

In general, if a buyer unknowingly acquires stolen art (ie, if he or she had a convincing, objective reason to believe that he or she did actually acquire ownership to the artwork in good faith), he or she may become the owner of the artwork by 'prescription' after three years of uninterrupted faithful possession of it if there is a legal title favourable for the possessor under which ownership would have otherwise been acquired if the seller were the owner of the artwork. If the legal title does not exist but the buyer is still the good-faith possessor, the period is prolonged to six years. If the artwork was acquired from any other good-faith possessor, its faithful possession is accounted for in this period. The prescription period is interrupted if the possession is not executed for more than one year. The law presumes that there is good-faith possession unless proven otherwise by the victim. Case law provides that the good faith may be lost when the possessor begins to doubt whether he or she is the owner of the relevant object. The criteria must be objective, so the buyer's inexperience is not relevant. If there is a legally effective judicial decision confirming the ownership right of the victim or the buyer's possession as illegal or unfaithful, the buyer is

considered a bad-faith possessor and, as such, he or she cannot acquire the ownership by 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 certain period?

As mentioned in question 4, after a certain period of time the acquirer in good faith may become the owner of the artwork. The periods of possession of the artwork by all the previous good-faith possessors count in the period for prescription.

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

If the buyer knew (ie, the deceitful intention is proved to it) that the artwork had been stolen, or if the buyer believed without a convincing, objective reason that he or she had acquired ownership to the artwork or had doubts about it, he or she is not a good-faith possessor and cannot acquire the ownership title; therefore, the victim is protected. The bad-faith possessor is obliged to return the artwork to the owner together with any proceeds from it and compensate the owner for all damages incurred. The bad-faith possessor is entitled only to limited necessary costs incurred during the possession. The burdens of proof of bad-faith possession and the rightful ownership of the artwork lie on the victim.

7 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 from the seller to the buyer by law upon the handover (or, if the buyer refused to take over the artwork, at the moment the seller enabled the buyer to take over the artwork). The parties may agree otherwise, for example on a date after the delivery, after the handover or after the payment of the purchase price in full.

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

The buyer is not obliged to conduct due diligence enquiries, but it is highly advisable to do so, typically with respect to the existence of ownership, the right to dispose (sell) of the artwork, the originality and provenance of the artwork, rights of third persons to the artwork (eg, pledges, author rights, the pre-emptive right of the state (see question 40)), potential litigation or enforcement proceedings, export conditions, the condition of the artwork itself, review of stolen artwork registers, etc.

9 Must the seller conduct due diligence enquiries?

The seller is not, in principle, obliged to conduct due diligence; however, when the contract is concluded, the seller must be the owner of the artwork or the contract may be deemed invalid. Therefore, it is advisable that the seller performs due diligence on the provenance of the artwork, its authenticity and all the potential encumbrances on it to avoid liability for defects and in addition, damages liability. The seller (as entrepreneur) should also perform the anti-money laundering review if the seller is the obliged person in this case and, if so, fulfil the relevant obligations.

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

The law requires that the artwork that is handed to the buyer by the seller must meet the required standards of quality and performance, and be of the dimensions specified. If the standards of quality and performance are not agreed then the standards that fit the particular purpose of the contract apply. The quality of the sold object should fulfil the quality or characteristics specified in the description in the contract; if not, there is a defect in performance. The warranty may be excluded by a specific written waiver of the buyer. In practical terms, the implied warranties may also be limited by a declaration of the seller notifying the buyer of all the defects of the artwork of which the seller was aware at the time the contract was concluded. The warranty does not apply to defects that were evident and noticeable with the appropriate level of attention at the time of conclusion of the contract unless the seller explicitly warranted to the buyer that the sold artwork is free of any defects or, if such defect was concealed by him or her maliciously. The buyer is obliged to examine the sold object promptly after the transfer and shall ascertain its quantity and quality (it is advisable to do it prior to the transfer).

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

If the buyer bought a forgery, the sale of the artwork is considered to be defective performance of the contract. The seller shall be liable for defect unless the buyer could have recognised the defect with usual care at the time the purchase contract was concluded. If the seller provided an express warranty of authenticity to the buyer, the seller remains liable (which is not the case when, for instance, the seller claims the artwork to be 'a probable piece of').

If the defective performance is of fundamental importance, which would be true in most cases, the buyer has the following options for a claim: (i) immediate termination of the contract; (ii) removal of the defect by repair; (iii) delivery of the new movable asset without defects; or (iv) an appropriate discount on the price. In most cases of forgeries, the only claim available in practice would be the immediate termination of the contract (and to claim the return of the purchase price against the work). The buyer must announce its choice without undue delay after notifying the seller of the defect (it is feasible to do both together). In addition, the buyer may seek damages to the extent not covered by the claims from the seller's liability for defects. The defects must be claimed immediately after the buyer realised or could have realised their existence with due care; otherwise, the defect rights cease to exist (such cessation, however, will be upheld by the court only upon an objection raised by the seller), but no later than within two years from the handover of the asset (as regards hidden defects) unless the seller knew about the defect at the time of the handover (in such a case the seller is not entitled to raise such objection).

In addition to defects liability claims, under certain circumstances, the buyer might be entitled to claim the disproportionate shortage of fulfilment that equates to the difference between the purchase price actually paid and the real price of the forgery, if the seller knew or should have known with respect to its expertise that he or she was selling a forgery, provided that such a claim is raised in court within one year from the conclusion of the contract. The result of the claim is the nullity of the contract (and the return of the purchase price against the return of the work). The buyer may further consider filing a suggestion for the commencement of criminal proceedings.

12 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?

Under certain circumstances, the seller might be entitled to claim the disproportionate shortage of fulfilment provided that such a claim is raised in court within one year from the conclusion of the contract. The result of the claim is the nullity of the contract (and the return of the purchase price against the return of the work) unless the buyer pays the seller the difference between the purchase price actually paid and the real price of the artwork. Nevertheless, this type of claim is quite limited as the burden of proof lies with the seller, which must prove that the buyer knew or ought to have known of the relevant circumstance.

Export and import controls

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

The export of certain categories of art is subject to a permit issued by the relevant art institution or the Ministry of Culture. If the artwork is a cultural treasure, a specific regime applies (described in questions 39–42). Original artworks by living authors and artworks that were imported temporarily into the Czech Republic are not subject to a permit. The export permit may be issued upon the application of the owner of the artwork (the art dealer or the auction house may file it only upon a power of attorney) for permanent export or temporary export. For permanent export, the artwork must not be, among other things, a declared national treasure (or have the characteristics of such), be protected within the scope of a museum collection or fall within the category of historical books. Artworks that require a permit are divided into categories of age and price, as follows: (i) any painting other than a sacral object older than 50 years and worth more than 30,000 Czech koruna; (ii) any drawings other than sacral works older than 50 years and worth more than 10,000 Czech koruna; (iii) sacral cultural objects older than 50 years; (iv) collages and assemblages older than 50 years and worth more than 30,000 Czech koruna; and (v) sculptures older than 50 years and worth more than 30,000 Czech koruna.

The relevant institution must decide within 21 days from receiving the application whether to issue the export permit. If it refuses to issue the permit, it will submit an application together with a proposal to declare the relevant artwork as a cultural treasure to the Ministry of Culture, which in turn has another three months to consider the proposal and either issue the permit or refuse to do so. If the permit is issued, it is valid for three years. If the artwork is exported outside the European Union, an additional permit must be obtained from the Ministry of Culture, the application for which shall be made together with the above permit; the additional permit cannot be issued without the previous general permit.

If the permit is not issued, the owner cannot export the artwork. If he or she, or someone on his or her behalf, attempts to do so, a fine of up to 5 million Czech koruna may be imposed, and customs may seize the work until it can be examined by the relevant art institution. If the attempt to export the artwork is considered a criminal offence, and the owner is found guilty, the artwork may be permanently seized from him or her.

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

Depending on the circumstances, the export (or supply to another EU member state) of art, antiques or collectibles, as well as their import (or acquisition from another EU member state) can be subject to 21 per cent value added tax (VAT), or can be exempt from VAT. Related input VAT recovery may be available again depending on the circumstances.

Direct and indirect taxation

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

If an artwork is sold by an individual outside his or her business activity, a rate of 15 per cent personal income tax applies on the income unless the exemption outlined in question 16 applies. If an artwork is sold by an individual as a part of the individual's business activity, the 15 per cent personal income tax on the income applies, as well as a solidarity surcharge (applicable if the annual total income of this person exceeds 1,438,992 Czech koruna (2018)). Social security and health insurance contributions are also charged on the income.

If an artwork is sold by a legal entity, the 19 per cent corporate income tax rate is applicable.

Unless the special regime described below applies, a general 21 per cent VAT rate shall be applicable to the sales price (but in general only if the seller is a VAT payer, unless there is a reverse charge to a Czech buyer if imported to the Czech Republic from the European Union. In this case, VAT may be due from a Czech buyer who does not normally pay VAT in specific situations (see question 14).

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

If an artwork is sold by an individual outside the individual's business activity, it can be exempt from tax after one year of possession by the relevant seller, or, regardless of this period, an income of 30,000 Czech koruna or less is exempt from tax.

Under certain circumstances, a special VAT scheme is applicable to art merchants, which is a category that includes art dealers – the general 21 per cent VAT rate does not apply to the full price but only to the margin of the art dealer.

Gifts to certain charitable or public entities for a particular purpose can be exempt from corporate income tax.

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

The typical security interest would be a pledge over the movable asset that may be established either by registration in the Pledges Registry administered by the Czech Chamber of Notaries based on a written agreement made by the notary public in the form of a notary deed or by delivery of the movable asset to the pledgee or to the custodian.

18 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 and does not demand the loan as an entrepreneur for the purposes of his or her business activities, the Act on Consumer Loans applies. The case law specifies that, even if the parties agree in the loan documentation that the loan is a commercial loan, but it is evident that the financial means shall not be used for the borrower's business activities, the loan shall be deemed a consumer loan and all relevant consumer protection provisions shall apply.

19 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?

Yes, the Pledges Registry. A pledge is registered against the artwork and is perfected by registration based on the pledge agreement in the form of a notary deed. After registration, the collateral may remain in the borrower's possession. An advantage of registration is that, if there are more pledges over the artwork, a registered pledge has priority over a pledge that is not registered. For the rank of the registered pledge, the moment of registration is relevant.

20 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 principle, the parties may agree on the means of enforcing the security interest including the direct sale of the collateral in writing in the loan documentation. The lender (the pledgee) must proceed with due care and sell the collateral at the price for which comparable collateral can usually be sold at that time under comparable circumstances; the collateral may never be sold within a grace period of 30 days after the notification of the sale to the borrower and the registration in the Pledges Register (if applicable). If the borrower does not qualify as a consumer or a small or medium-sized enterprise the parties may also agree that the lender may acquire the ownership over the collateral for an arbitrary or predetermined price. If the written agreement on a private sale was not concluded then the lender may sell the collateral only by judicial sale or public auction, which requires an enforceable court judgment unless the borrower agreed in advance, in the form of a notary deed, that his or her obligations arising from the loan will be directly enforceable.

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

The law establishes the priority of the subsequent security interest over a pledge already established (by a pledge agreement) but not yet registered in favour of the liens over movables established by an administrative decision of the state authorities (such as tax authorities to secure payment of due taxes) or the statutory liens over movables. In addition, the retention right of the commission agent on stored items to secure the outstanding payments from the consignment agreement take precedence over the pledge irrespective of whether the pledge has already been perfected.

Intellectual property rights
22 Does copyright vest automatically in the creator, or must the creator register copyright to benefit from protection?

Under Czech law the copyright vests automatically in the creator. However, industrial rights, such as trademarks, patents or industrial designs, have to be registered in the relevant public register for their protection.

23 What is the duration of copyright protection?

Generally, the proprietary rights of the creator last for the lifetime of the creator plus 70 years after his or her death, while the moral rights terminate upon the death of the creator. However, there is an exception in the case of anonymous or pseudonymous copyrighted work, where the proprietary rights last 70 years from the time the work has been lawfully made public.

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

Generally, the exhibition of protected artwork is not possible without the owner's consent (because it is one of the proprietary rights to the copyrighted work), but the borrower does not infringe the copyright by lending the original or a reproduction of a copyrighted artwork to a third party who exhibits the work or provides it for exhibition free of charge, unless such use was excluded during the transfer of ownership.

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

Yes, according to the Copyright Act, the copyright will not be infringed if a visual image of it and a reference is included in the catalogue of an exhibition, auction or fair to the extent necessary for such an occasion; the owner's consent is also not needed for using the visual image in the reproduction and dissemination of the catalogue. It is always necessary, however, to indicate the name of the author, unless the work is anonymous, or the name of the person under whom the copyrighted work is being introduced in public, along with the title of the copyrighted work and the source.

26 Are public artworks protected by copyright?

Yes, if the public artworks meet the definition of copyrighted work according to the Copyright Act, they are also protected by copyright. However, this copyright is not infringed by anybody who records, renders or expresses that copyrighted public artwork by drawing, painting, graphic art, photography or film, or by anybody who further uses it.

27 Does the artist's resale right apply?

Yes, according to the relevant provision of the Copyright Act, where the original work of art (that has been transferred by its author to the ownership of another person) is subsequently sold for a purchase price of €1,500 or more, the author (or his or her heirs for the duration of the proprietary rights of the author) shall be entitled to royalties from any resale of the work as set out in the Annex to the Copyright Act, provided that a gallery operator, auctioneer or any other person who consistently deals in works of art takes part in the sale as a seller, purchaser or intermediary. The royalty ranges from 0.25 per cent to 4 per cent of the relevant part of the purchase price (depending on the amount of the purchase price), but the total amount of the royalty may not exceed €12,500.

Update and trends

The art market in the Czech Republic is developing, and legislation is changing to reflect this. In the past year the obligation establishing the electronic evidence of sales was introduced and the Anti-Money Laundering Act was amended to include art galleries and auction houses within the list of obliged persons that must identify, among other things, the parties to any sale and fulfil the relevant obligations. The sale of antiquities was also introduced to the Act. There is also an ongoing discussion on the limitation of the category of artworks that are subject to an export permit to allow faster growth in the Czech art market; currently most of the works affected are by deceased artists, for example paintings older than 50 years that are worth at least 30,000 Czech koruna.

The persons liable to pay the royalty shall be the seller and the dealer jointly and severally, who pay it to the relevant collective administrator, the Authors Copyright Protection Organisation – Association of authors of works of art, architecture and visual components of audiovisual works.

The right to royalties shall not apply to the first resale if the seller obtained the original work of art directly from the author less than three years before that resale and if the purchase price of the original work, when resold, does not exceed 250,000 Czech koruna.

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

The artist (author) has the following moral rights provided by law, which cannot be waived, transferred or assigned to a third person:

- the right to decide about making his or her copyrighted work public;
- the right to claim authorship, including the right to decide whether and in what way his or her authorship is to be indicated when his or her copyrighted work is made public and further used;
- the right to the inviolability of his or her copyrighted work, in particular, the right to grant consent to any alteration or other intervention in his or her copyrighted work, unless otherwise stipulated in the Copyright Act; and
- the right of supervision over another person's right to use the copyrighted work (ie, the author's supervision), unless its nature or its use implies otherwise, or unless it is not possible to fairly require the user to enable the author to exercise his or her right to supervision.

All the moral rights last for the lifetime of the author, but after his or her death, no one may arrogate authorship of the copyrighted work. The copyrighted work may only be used in a way that shall not detract from its value, and the name of the author must be indicated (unless the copyrighted work is anonymous).

Agency

29 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?

Under an agency agreement, the agent generally acts for the principal to allow the principal to conclude the relevant transaction. In such a case, the agent should not act for the other party to the transaction and should not accept the provision. If the agent does so, then it should be agreed in the agency agreement with the principal or at least not forbidden by the agreement; otherwise, the agent may lose his or her right to commission from the principal. If the agent expects to receive commission from the other party, he or she should explicitly agree this with the principal in the agency agreement.

30 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 should be entitled to keep the commission received while conducting the principal's business, if it is not contrary to the agency agreement.

31 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 it is contrary to the agency agreement, the principal may not request a commission paid by a third party, but it may refuse to pay the commission to the agent based on the agency agreement.

Consigning items

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

Artwork entrusted to an art dealer based on a consignment agreement remains in the ownership of the consignor until the third person acquires the ownership of the work. If the art dealer goes into liquidation (ie, bankruptcy) in the meantime, the insolvency trustee should not be entitled to include the consigned artwork in the insolvency estate; if the trustee does so, the owner may file a petition to the bankruptcy court claiming that the relevant artwork should be excluded from the bankruptcy assets.

Auctions

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

Public auctions of art conducted in an auction house are subject to the Act on Public Auctions; the persons involved must be physically present, or use audiovisual means to attend the auction. Ownership is acquired by the fall of the hammer. Online auctions usually allow an unspecified number of people who are not present to bid and for the price to increase within a certain time limit; the auctioneer is replaced by electronic means, and the Act on Public Auctions is not applicable. Ownership to the work is acquired by offering the highest price that is accepted by the seller, and the contract is concluded, which may take the form of a consumer contract.

34 May auctioneers in your jurisdiction sell art, antiques or collectibles privately; offer advances or loans against art, antiques or collectibles; and offer auction guarantees?

Auction houses usually also operate as galleries (ie, they sell privately those artworks not sold in an auction or even independently of the auction upon a consignment agreement with the owner). In order to operate these services, auction houses require a specific licence, usually for the sale and purchase of cultural goods, and for holding the auction. However, the auction houses do not usually offer loans against the art or auction guarantees because they would need to obtain the relevant financial services licences.

Spoilation during the Nazi era

35 In your jurisdiction, in what circumstances would the heirs of the party wrongly dispossessed typically prevail over the current possessor, if a court accepts jurisdiction and applied the local law to a claim to art lost during the Nazi era?

The Czech Republic enacted the Act on the Alleviation of Certain Property Injustices caused by the Holocaust. This Act allows for a claim for the restitution of art from the property of the state to be raised by the original owners, their spouses or offspring against the state entity managing the particular work of art if the work was dispossessed between 29 September 1938 and 4 May 1945, and the transfer was declared invalid by presidential decrees.

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

The claims for restitution are resolved by Czech courts.

Lending to museums

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

Generally, public museums borrowing art are responsible for concluding insurance agreements for the object on loan – they are entitled to insure the relevant artwork only based on the loan agreement concluded with the owner of the artwork that must contain, among other things, the insured value, the duration of the loan and security, and

logistical and other conditions for the protection of the relevant object. However, it may be agreed with the owner that the object is insured by the owner's insurance during the loan (the public museum may compensate the owner with a proportionate part of the insurance fee). The state indemnity may be provided instead of insurance subject to specific conditions imposed by law if a written agreement on provision of the indemnity is concluded between the state and the public museum.

38 Are artworks, antiques or collectibles loaned to a public museum in your jurisdiction immune from seizure?

The Czech Republic ratified the United Nations Convention on Jurisdictional Immunities of States and Their Property on the basis that the relevant implementing national legislation was enacted in 2011. Under this legislation, an object that has the character of a cultural treasure (eg, all artworks of artistic value) that was loaned to the Czech Republic by a foreign state that declared that such an object is under its ownership is immune from seizure (including enforcement or preliminary ruling).

Cultural patrimony

39 Is there a list of national treasures?

Yes, there is a state record called the 'Central list of cultural treasures', which includes cultural and national treasures. The specification that cultural treasures can be declared national treasures is rather vague: they shall exemplify the most important part of the national cultural heritage without stating any particular characteristics. The owner of the national treasure is obliged to keep it in good condition, protect it against damage or theft at its own costs, and notify the Ministry of Culture of any intended or realised change in its ownership, its replacement or management or its use (and must inform the acquirer of its character as a national treasure). Further, the state has a pre-emption right to national treasures as well as movable cultural treasures.

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

The state has a pre-emption right to movable cultural treasures and national treasures (for payment) unless the sale is made between relatives or co-owners. The owner is obliged to notify the Ministry of Culture of the sale in advance, and the Ministry may decide within three months whether it wishes to acquire the work. After this period, the pre-emption right ceases to exist towards the owner (but applies again in the subsequent sale). If the transfer is not notified to the Ministry in advance, the transfer may be declared invalid by the Ministry within the next three years. In addition to this right, in enforcement proceedings, cultural treasures and extraordinary artworks must first be offered to state institutions, which have 30 days to accept the proposal and pay the relevant price.

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

Archaeological discoveries are put under the ownership of the relevant region and must be transferred to the state upon the request of the Ministry of Culture. This may also be the case when the deceased owner has no heirs or testament.

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

The Czech Republic ratified the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. To transpose the EU legislation, the Act on the Return of Cultural Goods was enacted. This Act covers the situations concerning an illegal export or import from another EU member state after 31 December 1992. The member state must file an application to the Ministry of Culture that notifies the owner or the possessor of the concerned asset of such request. The courts will entertain the claim that must be raised with them within three years from the date the requesting state gained knowledge of where the asset is and who the owner is, but no later than within 30 years from the illegal export of the asset. If the claim is successful, the current owner, or the possessor if the owner is unknown, is entitled to compensation adequate to the circumstances if the owner proves that it executed due care when acquiring the asset.

Anti-money laundering

43 What are the anti-money laundering compliance obligations placed on the art trade?

In the art trade (ie, sale of art, acting as an intermediary in the sale of art, assets without evidence on the acquisition of ownership and the acceptance of these goods), the entrepreneur must, prior to concluding the relevant contract, identify the parties and the subject matter in accordance with the Anti-Money Laundering Act, and keep evidence of this data for five years, including the date on which the agreement was concluded.

Endangered species

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

The CITES Convention came into force for the Czech Republic on 1 January 1993 (adopted for the Czech and Slovak Federative Republic on 28 May 1992). To implement the CITES Convention and the corresponding EU legislation (namely Council Regulation (EC) No. 338/97), the Act on Trade in Endangered Species (No. 100/2004) and its supplemental Decree were enacted. The Ministry of the Environment is responsible for issuing the relevant CITES permits and enforcing the EU Wildlife Trade Regulations.

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

No licence is needed for the sale, export or import of pre-1947 worked items, which means 'specimens significantly altered from their natural raw state for jewellery, adornment, art, utility, or musical instruments, more than 50 years before the entry into force of EU Regulation (3 March 1947) and acquired in such conditions'. These items may not undergo any further carving, crafting or manufacture within the European Union. It is also necessary to prove the date of acquisition. If the item is sent outside the European Union, an export or import permit is still needed.

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

This depends on whether the relevant species is listed in Annex A, B, C or D of Council Regulation (EC) No. 338/97. The conditions specified in Council Regulations (EC) Nos. 338/97 and 865/2006 for export, import, sale and exemptions with respect to the European Union or trade outside the European Union apply to the full extent in the Czech Republic.

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

As stated in question 46, the conditions specified in Council Regulations (EC) Nos. 338/97 and 865/2006 apply in this respect. The Czech Republic further follows the Commission Guidance governing intra-EU trade and re-export of ivory. In addition, the Ministry of the Environment decided to suspend the issuance of the CITES permit for re-export of elephant ivory from the Czech Republic and the import and re-export of rhino horn from South Africa.

Consumer protection**48 In what circumstances may consumers cancel the sale of art, antiques or collectibles?**

The consumer has the right to withdraw from the contract within 14 days without giving a reason. However, this right only applies for contracts concluded away from business premises or at a distance (ie, sales on the telephone, by email, text or social media, or online). The consumer does not have this right in the event of face-to-face sales.

If a consumer has not been advised by the seller of his or her right to withdraw from a contract (as stated above), the consumer may withdraw from the contract within one year and 14 days from the beginning of the time limit for withdrawal. If the consumer has been advised of his or her right of withdrawal within this time limit, the 14-day time limit for withdrawal commences on the date on which the consumer received the advice.

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

There are no specific conditions for art businesses selling to consumers. Generally, the seller is obliged to provide the consumer with a wider range of information in the event of sales on the telephone, by email, by text or social media, or online, such as the right of the consumer to withdraw from the contract.

England & Wales

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Buying and selling

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.

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 property, and in the case of an agreement to sell, he or she will have this right at the time when the ownership is to pass. There are two additional implied terms. The first is that the property is free (and will remain free until the time when ownership 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 property 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; however, the seller can limit the ownership that he or she transfers to the buyer to the ownership that he or she possesses. This limitation can be expressed in the contract, or ownership 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 ownership that he or she possessed.

The statute of limitation 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.

Most business contracts fall within the scope of the Unfair Contract Terms Act 1977 (UCTA), with a few specific exceptions set out in the Act. In the likely event that UCTA applies to a business contract, or if the contract is with a consumer, the seller cannot limit its liability under the implied terms specified in the answer to question 2. Any clause attempting to do so is void.

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 (www.artloss.com). This is done on a purely voluntary basis. The positive database cannot be searched by the public.

If an artwork is stolen, the owner or insurer can register it as such with any of the lost or stolen art databases such as the Art Loss Register or Interpol (www.interpol.int/Crime-areas/Works-of-art/Works-of-art). The stolen art database of the Art Loss Register is not publicly

available but it can be searched on request. Some data on the Interpol database of stolen works of art, including the most recent stolen works of art reported, can be searched by members of the public.

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, 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 limitation 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, he or she is likely to struggle to discharge the burden of proving his or her good faith.

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 certain period?

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 a 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 in bringing a claim, despite the fact that he or she knew (or ought reasonably to have known) the whereabouts 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?

English law does not accept the concept of 'acquisitive prescription'. The thief and subsequent possessors in bad faith cannot acquire ownership.

7 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).

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

There are no mandatory due diligence enquiries that a buyer must legally carry out, but the burden of due diligence rests with the buyer ('buyer beware') 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. Due diligence depends on the type of asset, its value, and the information volunteered by the seller. A buyer should be mindful of the following legislation relating to cultural property: Dealing in Cultural Objects Offences Act 2003; Cultural Property Armed Conflict Act 2017; and any UN security council resolutions enacted from time to time restricting the import or trade in cultural property – those currently in force are the Iraq (United Nations Sanctions) Order 2003 and the Export Control (Syria Sanctions) Order 2013. This legislation creates criminal offences of dealing in cultural property unlawfully excavated, removed or exported from certain countries. A buyer should also be mindful not to acquire criminal property as defined in the Proceeds of Crime Act 2002, which sets out money laundering offences.

9 Must the seller conduct due diligence enquiries?

Sellers are subject to the legislation referred to in question 8, and should carry out due diligence to ensure that they are not in breach of the legislation by dealing in such cultural property. However, by making these enquiries, they protect themselves rather than the buyer. The seller is otherwise not legally required to carry out any due diligence prior to selling an artwork, although it is good practice for professional sellers (such as galleries and auction houses) to conduct due diligence on the owner prior to accepting property on consignment for sale.

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

The Consumer Rights Act 2015 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). 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. It is also common practice for condition reports to be provided with artworks and therefore it is more likely that the buyer and seller both agree on the condition of the artwork than for a buyer to attempt to rely on an implied warranty as to 'quality'. 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 Sale of Goods Act 1979 requires the seller to provide similar implied warranties as to satisfactory quality and fitness for purpose. These warranties can be excluded (unlike title) and it is common practice to do so. Instead, the seller may decide to provide limited contractual warranties to buyers on authenticity and condition.

Note that 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.

11 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.

12 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.

Export and import controls

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

Artworks of a certain age with a value exceeding certain thresholds require an export licence to leave the UK. The age and value thresholds depend on the type of artwork.

A UK export licence is required if the artwork is removed to another EU country, and the artwork meets or exceeds the UK age and value thresholds. An EU export licence is required if the artwork is exported to a non-EU country, and the artwork meets or exceeds the EU age and value thresholds. Note that the UK and EU age and value thresholds are not the same.

In England, export licences are issued by the Export Licensing Unit of the Arts Council England.

The application for a UK or an EU 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 Waverley criteria, which are used to decide if an artwork is sufficiently important to warrant being 'saved for the nation'. 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. The Reviewing Committee will consider the application and hold a hearing 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 does meet 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 a period of months (usually up to six months) to allow a UK institution or a private buyer to raise funds to acquire the artwork in order to keep it in the UK. There are certain conditions attached to the purchase by a UK buyer, including that the artwork be accessible to the public. The Reviewing Committee will set the 'fair market price', which a UK buyer must 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. 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. If at the end of the deferral period a UK buyer comes forward with an offer to purchase at the fair market price, the owner has a choice: either he or she accepts the offer, the artwork is sold to the UK buyer and it remains in the UK; or he or she rejects the offer and the export licence is refused. If the export licence is refused, the artwork must remain in the UK, and, in principle, the Arts Council will not consider a new application for a period of 10 years, unless circumstances changes (eg, the artwork is downgraded to a copy or a studio work).

If the provenance of an artwork for which a UK or EU export licence is sought indicates, or the Arts Council is aware, that the artwork was removed from another EU country, the Arts Council will require the applicant to provide evidence that the artwork was lawfully exported from that EU country.

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 the export licence will be granted.

Failure to obtain an export licence or providing inaccurate or misleading information in order to obtain an export licence constitute a criminal offence.

There are export controls in respect of artworks containing CITES listed materials as dealt with in questions 44 to 47, and in certain cultural property as dealt with in questions 39 and 40.

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

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

The standard rate of UK import value added tax (VAT) at the date of publication is 20 per cent. The rate of customs duty varies depending on the classification of the goods. Typically, art, antiques and collectible items are taxed at the lower rate of UK import VAT of 5 per cent, and there is no customs duty. In order to benefit from the lower rate of VAT, the item must fall within the scope of Chapter 97 of the EU Customs Tariff. Once imported into the UK, art, antiques and collectible items can move freely around the EU without further import tax. The UK is often seen as a gateway to the EU for the art market as it has the lowest rate of import VAT for art, antiques and collectibles, compared to France at 5.5 per cent, Italy at 10 per cent and Germany at 19 per cent. With Brexit, this may change.

There are import tax reliefs and deferrals, but most are only available through a registered importer or agent. Special VAT suspension regimes are subject to strict conditions, and the importer may be required to provide a guarantee equal to the amount of import VAT that would be due if the property left the VAT suspension regime. 'Temporary admission' is typically used by the auction houses and dealers when importing art, antiques and collectible items for sale. Art, antiques and collectible items can also be kept under a customs bond in the UK in suspension of import VAT. They must remain in a bonded facility (usually a warehouse) and can only be brought out for a 24-hour period at a time for specific purposes. Public museums offer a system of temporary relief from import VAT when artworks are imported into the UK temporarily for public benefit, such as an exhibition.

Direct and indirect taxation

15 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. The rate of corporation tax is currently 19 per cent.

The resale of artworks by a private collector will typically result in a liability to pay capital gains tax, which ranges from 18 per cent to 28 per cent. There is an annual exemption for individuals currently set at £11,300.

The beneficiary of a lifetime gift or a legacy involving artworks may be liable to paying inheritance tax at 20 per cent or 40 per cent respectively.

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

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

Many art dealers make use of the UK VAT margin scheme, 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).

Under the Cultural Gifts Scheme, 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 Acceptance in Lieu scheme 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

17 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 collectibles 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 collectibles.

18 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.

19 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 & 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.

If the loan is made to a private individual by way of a bill of sale, that is, 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 Bills of Sale Acts (1878 and 1882) are unfit for 21st century lending and a new legislative framework is being considered.

20 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 has been appointed, their permission will need to be sought.

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

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 insolvency practitioner receives his or her fees and the costs incurred in realising the assets subject to a fixed charge from the sale proceeds of the relevant assets, rather than from the assets available to the creditors of the company as a whole. He or she agrees the amount of his or her fees and costs with the holder of the fixed-charge security.

Intellectual property rights

22 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 (Copyright Designs and Patent Act 1988 (CDPA)). There is no need for registration. The predecessor of the CDPA, the Copyright Act 1956, provided for the same. There are exceptions to the general rule, including 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.

23 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;
- for works of joint authorship or co-authorship: 70 years from the end of the calendar year in which the last known author dies;
- if the work is 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 so made available; and
- for computer-generated literary, dramatic, musical or artistic works: 50 years from the end of the calendar year in which the work was made.

24 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, note that under the CDPA, consent is required for the ability to perform, show or play a literary, dramatic or musical work in public.

25 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, the fair dealing exception permits the use of copyright material without consent from the copyright owner for the purpose of criticism and review. It may be possible to rely upon the fair dealing exception in the case of printed and digital museum catalogues. 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 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.

26 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.

27 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 €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	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.

28 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 also to 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. This right 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. This right 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. This right lasts for the life of the author plus 20 years; and
- the right of privacy: the right to privacy of certain films and photographs. This right lasts for the life of the author plus 70 years.

Moral rights can be waived and contracts often seek to do so. 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**29 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 a number of 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.

30 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 (i) that he or she will receive a commission and (ii) the amount of the commission. Ideally, (iii) 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. The courts have held that taking a secret commission is tantamount to fraud on the principal, and the agent must account for it in full. By taking a secret commission, the agent may find that he or she must pay over to the principal all remuneration received by him or her in the course of conducting the principal's business, not just the commission. 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.

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 of its amount.

31 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**32 How can consignors of artworks to dealers protect their interest in the artwork if the dealer goes into liquidation?**

The entry of a company into a formal insolvency process does not defeat the proprietary interest of a third party in assets held by the company. A creditor who can show that it (rather than the insolvent company) has beneficial title to an asset is entitled to have the asset transferred to it. If the liquidator sells the asset, the creditor 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.

Auctions**33 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 (Auctioneers Act 1845), bid rigging is prohibited (Auctions Bidding Agreements Acts 1927 and 1969; Enterprise Act 2002), 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).

34 May auctioneers in your jurisdiction 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 can be available for higher value lots.

Spoliation during the Nazi era**35 In your jurisdiction, in what circumstances would the heirs of the party wrongly dispossessed typically prevail over the current possessor, if a court accepts jurisdiction and applied the local law to a claim to art lost during the Nazi era?**

To find in favour of a claimant, an English judge needs to be satisfied as a matter of English law that:

- ownership of the artwork remains with the party that was wrongly dispossessed between 1933 and 1945; and
- the claim to the artwork is not time-barred under the applicable statute of limitation.

As a general rule, the possessor of an artwork cannot transfer title to it that he or she himself or herself does not have (also known as the 'nemo dat quod non habet' rule; see question 4). This means that, in principle, anyone deriving possession from the thief cannot claim good title. 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 from 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.

36 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 by the Nazis whose artworks are today held in UK national collections, museums or galleries 'for the public benefit'. 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, as discussed in relation to question 35, 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.

Update and trends

Brexit is expected to have a direct or indirect impact on the areas of art law detailed in this chapter. For more information, see the memoranda published on www.paiam.org.

Lending to museums**37 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 Government Indemnity Scheme. In effect, the government covers the risk of loss or damage to the art on loan. The Government Indemnity Scheme is an alternative to commercial insurance. 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. In England, the scheme is administered by the Arts Council England. Note that under the Government Indemnity Scheme, certain risks are excluded. These exclusions are non-negotiable.

38 Are artworks, antiques or collectibles loaned to a public museum in your jurisdiction immune from seizure?

Cultural objects in England and Wales are protected from seizure by the Tribunals, Courts and Enforcement Act 2007. In order 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 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 website of Arts Council England. In order to obtain approved status, the museum or gallery must submit a completed questionnaire 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.

Cultural patrimony**39 Is there a list of national treasures?**

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

40 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 public museums to make an offer to buy it (see questions 13 and 39).

41 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 Treasure Act 1996 (as amended by the Treasure (Designation) Order 2002).

The Act designates several categories of object 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 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.

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

If the foreign state is a member of the European Union, it can seek the return of cultural property illegally exported, by relying on Directive 2014/60/EU of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a member state as implemented in the UK by the Return of Cultural Objects (Amendment) Regulations 2015. The Directive requires the member state in which the cultural property is found to apply the export laws of the country of origin, and if the cultural property is found to have been illegally exported, to order its return. The competent court may award the possessor fair compensation according to the circumstances of the case, provided that the possessor demonstrates that he or she exercised due care and attention in acquiring the item of cultural property.

If the foreign state is not a member of the European Union, the options are limited for cultural property that was illegally exported but not stolen. The UK does not have bilateral treaties with other countries designed to facilitate the return of illegally exported property. While the UK has ratified the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the Convention does not require the English courts to apply the export laws of non-EU countries. The UK has not ratified the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 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.

Anti-money laundering**43 What are the anti-money laundering compliance obligations placed on the art trade?**

The main anti-money laundering legislation in the UK lies in the Proceeds of Crime Act 2002, the Money Laundering Regulations 2017 and the Terrorism Act 2006. While the Proceeds of Crime Act 2002 (POCA) concerns anyone doing business in the UK, the Money Laundering Regulations 2017 only concern individuals and businesses in the 'regulated sector'.

In the UK, art market professionals and businesses fall within the regulated sector only if they qualify as high-value dealers, or if they provide financial-type services such as loans or advances secured by art, antiques or collectible items. A high-value dealer is defined in the Money Laundering Regulations 2017 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 Money Laundering Regulations 2017 impose significant obligations on high-value dealers, including registering with Her Majesty's Revenue and Customs for supervision, determining and verifying clients' identities, and training employees to isolate suspicious transactions.

All art market professionals and businesses, including those that do not fall within the scope of the Money Laundering Regulations 2017, must comply with the POCA. The 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 the POCA is liable to imprisonment for up to 14 years or a fine or both. The main defence against committing a primary money laundering offence under the POCA is to seek consent from the National Crime Agency prior to

concluding the transaction in relation to which there is knowledge or suspicion of money laundering.

The Terrorism Act 2006 sets out a series of offences relating to the funding of terrorism. If you sell cultural property from countries occupied by terrorists, you are at great risk of committing an offence under the Terrorism Act, the most relevant offence being the retention or control of (or facilitation of the retention or control of) terrorist property.

Endangered species

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

The UK implements CITES through the European Union Wildlife Trade Regulations (Council Regulation (EC) No. 338/97). Typically, the EU adopts more stringent restrictions than those required by CITES and these stricter rules apply in the UK.

In England and Wales, CITES licensing is operated by the Department of Environment, Food and Rural Affairs (DEFRA) and has a designated management authority in charge of administering its licensing system.

The UK has enacted national criminal legislation (Control of Trade in Endangered Species (Enforcement) Regulations 1997) that creates criminal offences in relation to breach of the EU CITES Regulations, attracting a maximum conviction of a five-year custodial sentence, a fine or both. The Wildlife Crime Unit is responsible for enforcement.

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

Trade, import and export between EU countries are not considered 'international' for the purposes of CITES, and therefore there are different restrictions and licensing requirements that apply in the UK for intra-EU trade or import and export, and international trade or import and export. Trade with countries that are not party to CITES and do not issue comparable documentation is not permitted.

Currently, many artworks containing CITES-listed species (both pre- and post-1947) can move freely within the EU without import and export licences. However, some artworks require licences before they can be advertised or sold. The decision on whether to issue a licence is based on the guidance set out in the EU CITES Regulations. Alterations to the Annexes are adopted in the EU following each conference of the parties, which typically take place every two or three years between all parties to CITES. It is therefore important to check the current restrictions and requirements regularly.

Licences are required for artworks containing CITES-listed species for:

- import into and export from the EU;
- commercial use of any artwork containing a CITES-listed species on Annex A in the EU CITES Regulations (equivalent to CITES Appendix I); and

- the movement of artworks containing CITES-listed species within the EU where there has been a previous restriction.

Unlike much of the EU, the common licence issued in the UK is an Article 10 Transaction Specific Licence rather than a licence specific to that artwork (similar to a passport).

When applying for a licence to import an artwork containing a CITES-listed specimen into or from the UK, the Animal and Plant Health Agency's Centre for International Trade (which is the part of the UK's management authority that deals with licence applications) will require the corresponding export permit from the exporting country or the application will be refused. The management authority currently aims to decide on each application within two weeks, but for an international export that requires a corresponding import permit from the intended country, the whole process may take much longer.

46 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. However, as with non-antique artworks, there are still distinctions between intra-EU and international import, export and trade.

An artwork is considered antique if it was acquired before 3 March 1947 in its worked state. 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 this date but 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.

Subject to any enhanced restrictions for a particular species (see question 47), antique artworks can generally be traded within the EU.

In the UK, there is currently no requirement to demonstrate that an artwork is antique. The provenance stated on the licence application is generally accepted without investigation, provided the other conditions are met.

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

Subject to exceptional circumstances, the international trade in ivory listed in Appendix I to CITES has been banned since 1989 and this ban is recognised in the UK. This did not affect intra-EU trade. However, trade in raw ivory is completely prohibited in the UK regardless of its age.

In October 2016, the UK signed a non-binding resolution to phase out domestic ivory markets.

Following this resolution, the UK government announced a total ban on trade in post-1947 ivory. However, in 2017 the government announced plans to widen the ban to include pre-1947 worked ivory

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resulting in a near total ban. At the time of writing, the UK government is considering feedback following a 12-week consultation on the proposed near total ban on trade in ivory. The proposed ban contains only narrow exemptions for the most culturally significant works. If implemented as currently proposed, the ban would prevent trade in all ivory (other than those covered by the exemptions), but would not affect ownership, import and export, or sales of ivory works to museums.

Consumer protection

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

Pursuant to the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, 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 their 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 need not 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.

49 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.

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. 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.

France

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Buying and selling

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.

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.

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 (OCBC) 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 Palissy database. This database contains a list of stolen artworks that belong to public entities (www.culture.gouv.fr/culture/inventai/patrimoine).

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, which states that possession equals title as far as movable goods are concerned (article 2276, Civil Code). If the possessor of stolen art, antique or collectible acquired it in good faith, ownership in the art, antique or collectible automatically vests in the acquirer.

Secondly, 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.

Thirdly, if the good-faith possessor of a stolen artwork, antique or collectible acquired it in 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 on 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 – see question 39), 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.

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 certain period?

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?

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, namely a physical element (which consists of material acts similar to those that a legitimate owner would perform) and a psychological element (which consists of the intention to hold for oneself).

In order to adversely possess, the possession must be continuous and uninterrupted, peaceful, public and unequivocal (article 2261, Civil Code). If one of these 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 in order 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 five years or 30 years. Authors generally consider that 30 years of adverse possession is more consistent with the legal framework.

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

Absent 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.

8 **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. Absent 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 third-party claims);
- request documents evidencing the provenance of the art, antique or collectible;
- search available databases of stolen works – and notably the Art Loss Register – if any doubt arises as to 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.

9 **Must the seller conduct due diligence enquiries?**

There is also 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, the courts will take into account the due diligence enquiries carried out by the seller and, absent such enquiries, the courts may find the seller to have been reckless in his or her purchasing of the art, antique or collectible.

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.

10 **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 (see question 2);
- a warranty of conformity, under which the seller warrants to the buyer that the sold asset conforms to its description (article 1603, Civil Code). This warranty is seldom used in the art market. An action based on the 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; 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). This warranty is 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, the title or denomination of a work directly followed by a reference to a historical period, century or era warrants to the buyer that the work or item was actually produced during the period of reference; the use of the term 'attributed to' followed by the artist's name indicates that the work or the object was executed during the period of production of the artist mentioned and that serious assumptions indicate that this artist is the likely author; the use of the term 'school of' followed by the artist's name warrants that the author of the work has been the pupil of the master cited or has been known to have been influenced or to have benefited from his or her technique, etc (Decree No. 81-255 of 3 March 1981 on the prevention of fraud in art and collectible sales, commonly known as the Marcus Decree).

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 such terminology may imply certain warranties.

11 **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 prior to 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.

12 **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 '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 (as it also might not be).

Export and import controls

13 **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 of the European Union) if they fall within the 15 categories listed by the French Heritage Code. The major interest for national heritage is defined in this list according to two criteria: age and value. The following are subject to the prior issuance of an export certificate: paintings, sculptures and drawings that are over 50 years old and worth more than €15,000; photographs that are over 50 years old and worth more than €50,000; and archaeological objects that are over 100 years old and worth more than €1,500.

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 months, 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 (see question 39). 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, three years' imprisonment and confiscation of the item.

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

Tax treatment of international transfers of art, antiques or collectible assets depends of the legal or tax qualification of the assets transferred and of the transaction itself (export, import, sale, gift, etc). Exports are exempt from value added tax (VAT), while imports and transactions realised within the European Union are subject to a 5.5 per cent VAT rate, unless carried out by national or public museums or certain foundations.

Direct and indirect taxation

15 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 of time) exposes the owner to a specific 6.5 per cent tax rate (including additional social charges) on the sale price or customs valuation.

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.

16 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 and Liechtenstein give 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 thousand 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

17 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. The pledge without dispossession confers a fictitious lien to the lender insofar as the collateral is not handed over by the borrower to the lender.

18 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.

19 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, the pledge without dispossession must be published on a registry held at the commercial court register in order to be enforceable against third parties.

20 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.

21 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

22 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). There is, therefore, no formality required, such as registration, for an author to benefit from intellectual property right protection.

23 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.

24 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 exhibition 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 L.111-3 of the Intellectual Property Code)).

25 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.

26 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 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 courts tend to grant intellectual property protection to the artists.

27 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 €10,000 or on any resales for a price lower than €750.

The rates of the royalty applicable are regressive:

- 4 per cent for a sale price between €750 and €50,000;
- 3 per cent for a sale price between €50,000 and €200,000;
- 1 per cent for a sale price between €200,000 and €350,000;
- 0.5 per cent for a sale price between €350,000 and €500,000; and
- 0.25 per cent for a 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 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 there is a pending dispute before the courts over the transfer of the burden of the royalty 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.

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

Agency

29 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).

30 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. Such disclosure must be sufficiently clear so as to comply with the agent's legal obligation to report and account to the principal for his or her management (see question 29).

31 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 (see question 29).

Consigning items

32 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. In order 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

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

Yes, auctions are strictly regulated. 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, the Council of Voluntary Sales, to which all auction houses must declare their activity and that has disciplinary powers.

Online auctions are subject to the same rules (article L.321-3 of the Commercial Code).

34 May auctioneers in your jurisdiction 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 L.321-13). 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 L.321-12 of the Commercial Code).

Spoliation during the Nazi era

35 In your jurisdiction, in what circumstances would the heirs of the party wrongly dispossessed typically prevail over the current possessor, if a court accepts jurisdiction and applied the local law to a claim to art lost during the Nazi era?

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. The 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.

36 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 Commission for the Compensation of Victims of Spoliation, was set up in France in 1999 to examine individual claims presented by the victim or his or her heirs for damage resulting from 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 (www.civs.gouv.fr/home).

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: www.culture.gouv.fr/public/mistral/mnrbis_en?ACTION=RETOUR&USRNAME=nobody&USRPWD=4%24%2534P.

Lending to museums

37 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.

38 Are artworks, antiques or collectibles loaned to a public museum in your jurisdiction 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

39 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:

- The items that form part of the collections of the museums labelled Musée de France. These collections are exhaustively listed on the Joconde database (www.culture.gouv.fr/documentation/joconde/fr/pres.htm).
- Public and historic archives. A number of these archives are available online listed in various inventories.
- Artworks that have been classified as historical monuments. These artworks are listed on the Palissy database (www.culture.gouv.fr/culture/inventai/patrimoine).

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 that 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. These items are those mentioned in question 13, 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 (www.culture.gouv.fr/Thematiques/Circulation-des-biens-culturels/Informations-pratiques/Procedures-d-exportation).

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

40 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.

41 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.

42 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-member states of the European Union to successfully claim the restitution of cultural property illegally exported from their territory. French courts apply French law to these 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.

Anti-money laundering

43 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 anti-money 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. The 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

44 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. Regulation (EC) No. 338-97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein ensures the application of the CITES Convention within the European Union (the EU Wildlife Trade Regulation).

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.

45 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 prior to 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.

46 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).

47 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 rhinoceros horn in the national territory), the trade of post-1975 worked items made of ivory or rhino horn is strictly prohibited, while the trade of worked items made between 2 March 1947 and 1 July 1975 of an amount of ivory or rhino horn below 200 grams and the worked items made prior to 1 March 1947 with less than 20 per cent volume of ivory or rhino horn may be traded subject to a prior declaration. The possessor of such items must be able to prove the date by any expert means and, if necessary, by carbon dating.

Consumer protection

48 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 (see question 11) or if his or her 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.

49 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.



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Buying and selling

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.

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

The German 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.

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.

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 to be not 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.

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 certain period?

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?

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 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.

8 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 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 particular 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).

9 Must the seller conduct due diligence enquiries?

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

10 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).

11 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 being 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.

12 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

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

Under the 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.

The main categories are as follows.

Category	Export to third country	
	Age (in years)	Value (€)
Paintings	50	150,000
Watercolours	50	30,000
Etchings, lithographs	50	15,000
Photographs	50	15,000
Archaeological items	100	0
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, lithographs	75	50,000
Photographs	75	50,000
Archaeological items	100	0
Antiques (furniture, instruments, watches, ceramics, carpets, etc)	100	100,000

Any works which are listed in the register of nationally important cultural goods (www.kulturgutschutz-deutschland.de/DE/3_Datenbank/Datenbanksuche/datenbanksuche_node.html) 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.

14 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, value added tax (VAT) might apply, as well as customs. The latter is determined on a case-by-case basis. Regarding VAT, see question 15.

Direct and indirect taxation

15 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 or not 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.

As regards 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.

16 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

17 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, CC), which entails a risk for the lender.

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

19 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.

20 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.

21 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. Prior to disbursement of the sale proceeds to the borrower, the liquidator's fees will be deducted.

Intellectual property rights

22 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).

Germany knows no registration formalities. 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.

23 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 then 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 12 am.

24 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).

25 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, 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 such 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.

26 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 generally have to 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).

27 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 €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, which therefore includes 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 as to which of the author's works have been resold with their involvement during the past three years or as to 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.

28 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, which gives the author the right to determine whether and how his or her work will first be published, and 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, which 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 (see question 23).

Agency

29 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, CC). This includes the information on compensation received by the agent. This information obligation can be contractually excluded.

30 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 is obligated to 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. In order to do so, the agent must acquire the express or implied consent of the principal. The agent bears the burden of proof.

31 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

32 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, Code of Civil Procedure).

Auctions

33 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), 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).

34 May auctioneers in your jurisdiction 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 into frequent lending, he or she may be required to obtain a banking licence.

Spoilation during the Nazi era

35 In your jurisdiction, in what circumstances would the heirs of the party wrongly dispossessed typically prevail over the current possessor, if a court accepts jurisdiction and applied local 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 period of 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, though 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 (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.

36 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

37 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. To obtain 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.

38 Are artworks, antiques or collectibles loaned to a public museum in your jurisdiction 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

39 Is there a list of national treasures?

There are 16 registers for cultural property of national significance. According to section 7 of the CPPA, cultural property has to be entered into a register of cultural property of national significance (i) 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 (ii) if 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 said cultural property in Germany is not enough.

The 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, alternatively the former owner, is obliged to immediately notify the competent authorities; and
- most importantly, any temporary or permanent export of a registered cultural property is dependent on the permission (license) 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 obligated to seek a fair settlement. This, however, does not mean that the state is obligated to buy the cultural property, but must give support in finding potential buyers.

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

No.

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

Under section 984 of the CC, 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.

42 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 shall be 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 shall be paid for lost profits.

Anti-money laundering

43 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. In order 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 as such (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**44 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.

45 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.

46 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.

47 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**48 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.

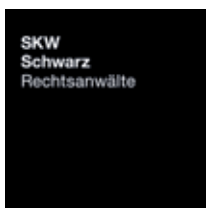
In case of distance contracts (online sale, etc) consumers generally have a 14-day right of withdrawal that cannot be excluded from the contract. According to this right, consumers may cancel the sale for any reason. An exception only applies for specific auctions, which does not include platforms such 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.

49 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.



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Buying and selling

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

According to article 1376 of the Italian Civil Code (ICC), ownership of movable art, antiques or collectibles is transferred from the seller to the buyer when the parties enter into a sale agreement. There are no formalities required for finalising the sale agreement of a movable good.

It is customary in the Italian art market that art sale agreements are made with retention of title, which means that the title passes to the buyer when the seller has received full payment of the sale price in cash or cleared funds.

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

Article 1476, paragraph 1(2) of the 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 article 1483 of the ICC, the seller shall warrant the buyer against dispossession. If the buyer is dispossessed by a third party, he or she is entitled to rescind the contract if he or she had ignored in good faith that the seller did not own the purchased item when he or she entered into the contract. Furthermore, he or she is entitled to the reimbursement of the price paid, the expenses borne in relation to the purchased asset (including restoration expenses) and the damages suffered as a result of the dispossession (article 1479, ICC).

The parties may agree that the seller limits or excludes the 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 he or she fails to do so and an irrevocable judgment by a court orders him or her to release the purchased asset to the third party, he or she no longer has 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 commences from the date the dispossession is confirmed by an irrevocable judgment (Cassation Court, 10 January 1997, No. 184).

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 movable goods, including art, antiques and collectibles.

There is a public register of lost and stolen artworks managed by the art protection and enforcement unit of the carabinieri, which is accessible online.

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

Under Italian law, a good-faith acquirer is preferred to the victim of the theft. According to article 1153 of the ICC, if a person acquires a movable asset from a person who is not the owner, ownership passes to the acquirer, provided that: (i) the acquirer is in good faith and acquires the possession of the good; and (ii) the ownership is transferred pursuant

to a contract that provides for the transfer of title from one party to the other (eg, sale agreement, donation).

The good faith of the acquirer is presumed and the burden of proving his or her bad faith vests with the claimant.

If the acquirer is in good faith but the asset was not acquired pursuant to a contract that provides for the transfer of title from one party to the other (eg, a loan agreement), the ownership of the asset shall vest in the acquirer after 10 years of uninterrupted possession (article 1161, paragraph 1, ICC).

If the acquirer is in bad faith, he or she 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 the state's or other public entities' collections: no one can ever acquire the ownership of an asset that was 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).

In a case regarding two paintings illegally sold by a priest in charge of a church in Tuscany to a dealer, who then resold them to a lawyer, the Cassation Court held that the lawyer could not legitimately claim that he had acquired ownership of the paintings (Cassation Court, 7 April 1992, No. 4260).

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 certain period?

See question 4.

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

Pursuant to article 1161, paragraph 2 of the ICC, the bad-faith acquirer of a movable asset who has maintained its possession for an uninterrupted period of 20 years becomes the rightful owner of that asset. However, if the possession was acquired by means of duress or in a clandestine fashion, the period will start running from the date the duress or the secret possession has ceased (article 1163, ICC).

The above principle does not apply to goods that were either stolen or illegally removed from the state's or other public entities' collections (see question 4).

7 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.

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).

However, if the sale was agreed upon with retention of title and the asset was delivered to the buyer, the risk passes to him or her at the time of delivery, even if he or she has not yet become the owner of the asset (article 1523, ICC). In contrast, if the transfer of title is subject

to a condition precedent and the asset is lost when the condition precedent has not occurred, the risk remains with the seller (article 1465, last 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).

8 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 order to finalise in good faith (article 1337, ICC), the buyer does not have specific due diligence enquiry obligations.

However, it is customary for buyers (or their professional agents) to verify the following aspects before entering into a sale contract:

- provenance of the artwork, including checking the Carabinieri database on stolen artworks or the Art Loss Register;
- whether or not the asset was declared to be of cultural interest by the state;
- documents on authenticity or attribution; and
- physical condition of the asset.

9 Must the seller conduct due diligence enquiries?

In addition to the general obligation of the parties to negotiate the contract in order to finalise in good faith (article 1337, ICC), the seller does not have due diligence enquiry obligations.

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

Sellers must warrant that they are the owners or have been legitimately authorised by the owners to sell the asset (article 1476, paragraph 1(2), ICC).

In addition to the implied warranty of title (see question 2), a general rule on sale contracts provides that sellers must guarantee that the asset does not have defects that would make it inadequate for its designated use or may significantly reduce its value, and has the qualities promised in the contract or those that are necessary for its designated use (article 1490 et seq., ICC). False provenance or misattribution may be considered as a 'defect' under the general rule.

The above guarantees may be waived or limited, although any waiver or limitation of the warranty would not apply if the seller has intentionally or by gross negligence not disclosed defects or has not highlighted an 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 his or her discovery. The warranty claim is time-barred once one year has elapsed from the delivery date.

According to article 64 of Legislative Decree No. 42 of 22 January 2004 (the Cultural Heritage Code (CHC)) professional sellers must deliver to their clients a certificate of authenticity and provenance of the asset or, in the absence of this, a declaration (possibly printed on a photograph of the asset) on any available information on the authenticity or possible attribution and provenance of the asset.

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

The buyer has the following options for claims and remedies if he or she discovers that the art, antique or collectible that he or she bought is a forgery:

- Rescission of the contract based on alleged defects of the purchased asset (article 1490 et seq., ICC) (see question 10); 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.
- Rescission 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 delivery of the good to the buyer. The absence of required qualities must exceed the limits of tolerance that are established by general use.

- Termination of the contract based on a situation in which the asset sold is different to the asset promised in the contract (article 1453, ICC). The claim is time-barred once 10 years have elapsed from the date of the sale.
- Annulment of the contract based on mutual mistake or wilful misconduct (articles 1429 and 1439, ICC). The claim is subject to the statute of limitation of five years commencing from the date the mistake or the wilful misconduct is discovered by the claimant.

12 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?

A seller can request that the sale of an artwork of uncertain attribution subsequently proven to be an autograph work by a famous master be declared void by proving mistake. In 1998, the Cassation Court held that the seller of a fifteenth-century wooden statue attributed to an unknown master from Siena at the time of the sale to the state and later re-attributed to Jacopo della Quercia could be voided to the benefit of the seller (Cassation Court, 2 February 1998, No. 985).

Export and import controls

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

Pursuant to articles 10 and 65 of the CHC, the following categories of goods cannot be exported on a permanent basis from Italian territory:

- goods with an artistic, historical, archaeological and ethno-anthropological interest owned by the state (or other public entities) and non-profit private organisations made by deceased artists more than 70 years ago; and
- privately owned goods made by deceased artists more than 70 years ago, provided that they were classified as cultural goods by the Ministry of Cultural Heritage (the Ministry).

Privately owned goods of cultural interest that were made more than 70 years ago by a deceased artist and have a monetary value of more than €13,500 may be exported on a permanent basis from Italy if the competent export office of the Ministry grants an export permit.

Export control is carried out at a local level by the 18 export offices located in Italy.

The export permit is called a free circulation certificate (article 68, CHC) if the goods have to be sent to an EU member state. If the goods need to be exported outside the European Union, in addition to the free circulation certificate, the export office must issue an export licence (article 74, CHC).

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 issue an export permit or deny it, if it considers that the goods have particular cultural significance.

In granting export licences, the export offices must follow the criteria set forth by the Ministry on 6 December 2017. These criteria refer to the aesthetic quality of the goods, their rarity, their provenance from a relevant collection and their historic relevance, which gives wide discretion to the export offices.

The export office generally concludes the proceeding within 40 days of the date the goods are presented to it, but this time frame is not mandatory.

If the export permit is denied, the interested party is entitled to file a petition within 30 days of the date of service of the denial to the Ministry's General Director. Within 60 days of the date of service of the Director's decision, the interested party may file a complaint against the decision confirming the export denial before the competent administrative regional tribunal. The administrative tribunal will not assess whether the goods have particular cultural significance, but whether the public administration correctly applied the law and made appropriate use of its discretionary power (eg, by providing adequate motivation to the export denial, based on thorough art historical research).

If a person wants to export artwork made by a living artist, artwork of a non-living artist that is less than 70 years old or artwork that is more than 70 years old and worth less than €13,500, he or she does not need an export permit, but must file a unilateral declaration detailing the work, the author and the year of creation. The declaration must be

filed through the online system available on the website of the Ministry to the competent export office, which shall acknowledge receipt of the declaration by applying a stamp and delivering the original to the interested party.

However, if the export office deems that an artwork by a deceased artist that is between 50 and 70 years old, for which a unilateral declaration was filed, has exceptional cultural significance for the completeness and integrity of the cultural patrimony of Italy, it can request that the General Director of the Ministry classifies the artwork as cultural property and, consequently, the export of that artwork will be prohibited.

The violation of export control provisions results in the following sanctions: an administrative fine from €77,50 to €465 (article 165, CHC) and one to four years' imprisonment or a criminal fine from €258 to €5,165 (article 174, CHC).

The judge may also order the forfeiture of the artwork, unless it belongs to a person who is not involved in the crime (article 174, CHC).

14 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 tax.

Pursuant to article 36 et sequitur of Legislative Decree No. 41 of 23 February 1995, a rate of 10 per cent value added tax (VAT) applies to the import of artworks (the ordinary rate is 22 per cent).

The import of artworks that are wholly handmade by the artist and that have up to eight sculpture casts (made with supervision of the artist or his or her heirs) is subject to the reduced VAT rate of 10 per cent.

Pursuant to article 250 of EU Regulation No. 950 of 9 October 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 exhibitions, exhibitions and art fairs).

Direct and indirect taxation

15 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 a capital gains tax. If a sale is made by a professional dealer, he or she will be subject to income tax.

The inheritance and gift tax varies depending on the degree of kinship between the deceased and his or her heirs: for the spouse and lineal relatives, 4 per cent of the total value of the inherited goods in excess of the threshold of €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 €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.

Goods classified as cultural property are exempted from inheritance and gift taxation.

VAT only applies to sales involving a professional seller, for which the rate is 22 per cent. If the artist or his or her heirs are the sellers, the rate is reduced to 10 per cent.

16 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 of 29 July 2014 introduced a tax credit for three consecutive tax years on donations made by private individuals or companies by means of traceable payment instruments for maintenance, protection and restoration of cultural goods belonging to public entities, for support to cultural sites belonging to public entities.

Borrowing against art

17 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, ICC).

18 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 his or her 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 of 13 August 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) of Legislative Decree No. 385 of 1 September 1993).

19 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, Law No. 119 of 30 June 2016 introduced the possibility for professional dealers to create non-possessory liens to secure credits related to their business activity (which are not private loans). This lien must be registered in the online register managed by the Revenue Agency of the Ministry of Economy and Finance.

20 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, prior to 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. Article 2797 of the ICC provides that the parties to a collateral agreement may agree that the sale can be carried out by a private auction company.

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

According to article 2748 of the ICC, the lender with a valid and perfected first-priority security interest takes precedence over the other creditors.

Intellectual property rights

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

Copyright vests automatically in the creator without the need to register (article 6 of Law No. 633 of 22 April 1941 – the Italian Copyright Law (ICL)). In order to establish the date of creation in case of dispute on conflicting copyrights, it is advisable to deposit a photograph of the copyrighted work with the Italian Society of Authors and Publishers (SIAE) or a notary public.

23 What is the duration of copyright protection?

Copyright protection lasts for 70 years after the death of the author (article 25, ICL).

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

Artists have the right to publish their work and this right includes the right to exhibit their creation in a public venue (article 12, ICL).

It is questionable whether this right should prevail over the owner's right to exhibit his or her artwork. 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 the artist has sold his or her work to a collector, especially if this has occurred during a fair or an exhibition, his or her right to publish the work is exhausted. However, the artist could always try to enforce his or her moral right in case his or her artwork is exhibited in a manner or venue that he or she considers detrimental to his or her honour or reputation (see question 28). Furthermore, the copyright holder's consent is always required for reproductions of the artist's work in 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 prior to an exhibition, although it is customary and advisable to obtain to do so.

25 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.

An exception is provided in article 70 of the ICL for low-resolution reproductions, whose publication on the internet is permitted for non-profit, scientific and educational purposes, although the entry into force of the exception is subject to an implementing decree defining the meaning of scientific and educational purposes, which has not been enacted yet.

26 Are public artworks protected by copyright?

Public works are protected by copyright. In Italy there is no copyright exception allowing reproduction of public monuments (ie, freedom of panorama; see article 5, paragraph 3(h) of 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 specific offence consisting of damaging or spoiling a public space or private property (article 639, ICC).

27 Does the artist's resale right apply?

The artist's resale right (ARR) is provided by articles 144 et seq. of the ICL (implementing Directive 2001/84/EC) and is an inalienable right, which cannot be waived, even in advance, to receive a royalty based on the sale price obtained for any resale of the work, subsequent to the first transfer of the work by the author.

The ARR applies to all acts of resale involving sellers, buyers or intermediaries who are art market professionals, such as auction companies, art galleries and, in general, any dealers in works of art.

The ARR lasts for 70 years after the death of the artist, and its beneficiaries are the artists and their heirs. 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.

The 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.

The total amount of the royalty may not exceed €12,500. The ARR does not apply if the sale price is lower than €3,000.

According to article 144, paragraph 3 of the ICL, the ARR shall not apply to acts of resale where the seller has acquired the work directly from the author less than three years before the resale and where the resale price does not exceed €10,000.

Although article 152 of the ICL provides that the ARR should be charged to the seller, following the European Court of Justice judgment of 26 February 2015 (Case C-41/14, *Christie's France SNC v Syndicat national des antiquaires*), the prevailing interpretation of article 152 of

the ICL is that the parties to the sale contract may provide that the ARR vests in the buyer.

The Society of Authors and Publishers is the only entity entitled to collect the ARR and pay it to the right holder.

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

Pursuant to article 20 et seq. of the ICL moral rights are the rights to claim authorship of the work and object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, that would be prejudicial to the artist's honour or reputation.

Moral rights are perpetual and, after the death of the author, can be enforced by the spouse, the children or, in their absence, the parents or the lineal descendants or, in their absence, the siblings and their descendants.

Moral rights cannot be waived or assigned (article 22, ICL).

Agency

29 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 of the ICC, the agent is required to account to the principal for any commission or other compensation received by him or her while conducting the principal's business.

30 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 his or her 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.

31 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

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

In case of a voluntary liquidation, the consignor may request immediate restitution of the consigned work and obtain a restitution order pursuant to article 633 of the 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 of Royal Decree No. 773 of 18 June 1931) but that register is not available online.

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 of the Italian Bankruptcy Law).

Auctions

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

There are no specific regulations for auctions of art, antiques or collectibles in Italy.

34 May auctioneers in your jurisdiction sell art, antiques or collectibles privately; offer advances or loans against art, antiques or collectibles; and offer auction guarantees?

Auctioneers are allowed to sell art, antiques or collectibles privately.

Offering advances or granting loans or other credit facilities are activities reserved for financial institutions subject to the supervisory control of the Bank of Italy. Likewise, auction companies cannot guarantee the payment of a hammer price to a consigner for a fee.

Irrevocable bids from bidders who will be compensated in the event that their bid is not successful are permitted.

Spoliation during the Nazi era

35 In your jurisdiction, in what circumstances would the heirs of the party wrongly dispossessed typically prevail over the current possessor, if a court accepts jurisdiction and applied local 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.

General provisions regarding private ownership and acquisition of movable goods as a result of uninterrupted possession for a period corresponding to the statutory provisions (see questions 4, 5 and 6) would regulate these claims.

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

No.

Lending to museums

37 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, the Italy offers an indemnity covering the risks of loss and damage related to privately owned goods declared to be of cultural interest to be shown in exhibitions promoted by the Ministry of Cultural Heritage in Italy or with the support of other public entities.

38 Are artworks, antiques or collectibles loaned to a public museum in your jurisdiction immune from seizure?

There is no legislation on immunity from seizure.

Cultural patrimony

39 Is there a list of national treasures?

There is no list of national treasures accessible by the public. As the Italian heritage law (Law No. 364 of 20 June) dates back to 1909 and there is no central database listing all classified artworks, even the state itself does not have an accurate knowledge of the art, antiques and collectibles that have been declared to be of cultural interest.

The main consequences arising from an object that is declared to be of cultural interest are the following: (i) the work cannot be permanently exported from Italy; (ii) the state has a pre-emption right in any sale transaction regarding a work classified as cultural property; (iii) 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 home); and (iv) any restoration 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.

40 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 of the CHC 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 Cultural Heritage 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

Update and trends

Law No. 124 of 3 August 2017 introduced amendments to the CHC regarding the international circulation of artworks. The two main aspects of the reform are: (i) the extension of the age of an artwork by a deceased person from 50 to 70 years from the date of creation as the relevant age for heritage protection purposes; (ii) the possibility for the state to classify objects aged between 50 and 70 years as cultural property if they significantly contribute to the integrity of the national cultural heritage; and (iii) the introduction of a de minimis threshold (€13,500) for allowing the free circulation outside of Italy of works by deceased authors that over 70 years old.

The approval of the Ministry of Cultural Heritage's decrees implementing the reform are currently underway. New guidelines setting forth criteria for an export licence were approved on 7 December 2017.

Following the political elections of 4 March 2018, the new parliament is likely to approve a tax reform that will introduce a capital gains tax for private sellers.

must communicate whether it intends to buy the artwork at the same price as the sale.

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 the ARR), 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.

41 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.

If the owner is not able to prove that the archaeological object in his or her possession was found or purchased before 1909, the state's ownership of it is established.

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

Pursuant to article 77 of the CHC (implementing Directive 2014/60/EU), 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 that has jurisdiction over the place where the cultural property is located. The claim may not be brought (i) 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 (ii) 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 Cultural Heritage.

According to article 79 of the CHC, 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;
- 1972 UNESCO Convention concerning the Protection of World Cultural and Natural Heritage;
- 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).

Anti-money laundering

43 What are the anti-money laundering compliance obligations placed on the art trade?

The Fourth Anti-Money Laundering Directive (AMLD) has been transposed into Italian national law by Legislative Decree No. 90 of 25 May 2017, which amended Legislative Decree No. 231 of 21 November 2007 (AML).

Art galleries, antiquities dealers and auction houses are specifically listed among the 'other non-financial operators' that are subject to AML obligations (article 3, paragraph 5).

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 kept up to date (article 19, 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 (article 4, paragraph 3, AML).

Endangered species

44 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 of 7 February 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 to control the enforcement of the Convention and EU and Italian provisions on environmental protection.

45 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-1947 worked endangered species. The permit is normally issued 30 days after the filing date. In 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, see www.mise.gov.it/index.php/en/cites-convention-on-flora-and-fauna.

46 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 from the date 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.

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

There are no special rules for works of art made of elephant ivory, rhino horn or other specific endangered animal products.

Consumer protection

48 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 ICC if the sale was of a forgery (see question 11).

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 (article 52 of Legislative Decree No. 206 of 6 September 2005 (the 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.

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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 of the 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.

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

Art businesses selling to consumers must comply with article 1341 of the 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 seller 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. of the Consumer Code before the consumer is bound to the contract. The relevant information to be provided by professional sellers 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 of the CHC, art businesses must provide the buyer with a certificate of authenticity or attribution and provenance of the artwork.

Spain

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Buying and selling

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

In addition to the actual transfer of possession, the Spanish system envisages transfers that are performed as a symbolic delivery with the same effect as a physical delivery. In the case of artwork, the execution of the transfer in the form of a public deed is recommended. Other alternatives, such as the delivery of the keys to the place where the movable property is stored, are discouraged.

The parties may expressly agree the effective transfer of the property upon execution of the sale agreement or upon receipt of payment, even if the delivery of the property has not taken place (articles 609, 1095, 1462 and 1463 of the Spanish Civil Code).

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

Pursuant to articles 1461 and 1474 of the Civil Code, the seller shall be liable to the purchaser for the lawful and peaceable possession of the asset sold (ie, the purchaser will be entitled to compensation in the event of dispossession).

Eviction takes place when the purchaser is deprived, in whole or in part, of the asset purchased by virtue of a final judgment and of a prior right preceding the purchase. The seller shall be liable for the dispossession regardless of whether the parties have expressly agreed to it under the contract. The parties may, however, extend, reduce or cancel the seller's liability. Nevertheless, any agreement that does not hold the seller liable for dispossession will be void if it was done in bad faith.

Where the purchaser waives his or her right to be compensated in the event of dispossession, the seller must pay the purchaser the price of the asset sold at the time of dispossession, unless the purchaser had waived his or her rights with full knowledge of the dispossession risks and the potential consequences.

Where dispossession takes place and the compensation has been stipulated or the parties have failed to agree any provision to that effect, the purchaser is entitled to claim the following from the seller: the price of the object; the seller's income or gains made from the object; the costs of the suit; and other expenses and interest.

The statute of limitations of the purchaser's actions for dispossession against the seller is five years (article 1964 of the Civil Code).

Eviction provisions are applicable to 'civil transactions' (ie, transactions in which both parties are not companies or commercial agents). For other transactions, see question 5.

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 the ownership of art, antiques or collectibles or a public register or database for the record of stolen or lost artworks.

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

The law prefers the acquirer in good faith. According to the Criminal Code, the purchaser is entitled to initiate a criminal proceeding by filing a complaint against the seller for swindling. In order to succeed, the purchaser must prove the following elements exist in relation to the

seller: intention to make a profit; deceit; defective consent; and disposal of property in a manner that is prejudicial to the purchaser or others.

The absence of an express warranty of authenticity is not required to succeed in the criminal claim, but it could help to prove that the seller acted for his or her own benefit. Contrarily, according to precedents, the absence of a warranty of authenticity could also be an obstacle to prove that the purchaser had been led into error, particularly if he or she is an expert in art transactions.

Additionally, pursuant to the Criminal Code, the party that suffers from the perpetration of the crime is entitled to sue for civil liability, which includes restitution, damage repair, and compensation for material and moral damage.

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 certain period?

Pursuant to article 1955 of the Civil Code, ownership of movable property may be vested in the new acquirer after three years of uninterrupted possession in good faith. Similarly, ownership of movable property may also be vested in the new acquirer after six years of uninterrupted possession, without any other condition. With regard to the owner's right to claim title to the movable property that has been lost or of which he or she has been unlawfully deprived, the above provisions shall apply.

With regard to movable property acquired from registered markets or dealers engaged in the trade of similar items on a regular basis, the Code of Commerce (article 85) provides that the purchase of merchandise in stores or shops open to the public shall cause the rights of the owner to vest in the purchaser with regard to the merchandise acquired, except for the right, if applicable, of the owner to lodge the relevant civil or criminal complaint to which he or she may be entitled against whoever sells them unduly. This rule applies exclusively when both the seller and purchaser are dealers (ie, not if the purchaser is a consumer). See questions 48 and 49.

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

Yes, ownership in movable property vests in the acquirer after six years of uninterrupted possession without any other condition (ie, regardless of the fact that the acquirer acted in bad faith).

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

Pursuant to articles 1096, 1182 and 1452 of the Civil Code, damage or improvements to the item sold upon the execution of the contract shall be governed by the following rules:

- The purchaser is entitled to claim delivery of the property from the seller. If the seller falls into arrears or he or she has agreed the delivery of the property with two or more parties, he or she will be responsible for any event that occurs until the property is delivered to the purchaser.
- The obligation to deliver the property is removed where the property is lost or destroyed through no fault of the seller and before he or she has fallen into arrears.

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

The buyer is not obliged to conduct due diligence enquiries. Two different types of due diligence are usually performed: legal (regarding ownership and freedom of charges); and artistic (regarding authenticity, provenance, etc).

The agreement traditionally provides warranty and indemnity clauses.

9 Must the seller conduct due diligence enquiries?

The seller does not have to conduct due diligence enquiries, provided that he or she complies with the legal obligations and regulations with regard to anti-money laundering, consumer protection and other standards.

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

The seller is responsible for compensation in the event of hidden defects of the item sold, if the defects render it unsuitable for its intended use or if they compromise its intended use in such a way that, if the purchaser had known of them, he or she would not have acquired it or would have paid a lower price for it; however, the seller is not liable for patent defects or those that are in plain sight, or are latent, if the purchaser is an expert who, as a result of his or her trade or profession, ought to have become aware of them easily (article 1484 of the Civil Code).

The seller is liable to the purchaser for the warranty for hidden defects or flaws of the asset sold, even if it would not have been possible for him or her to know about them. This provision does not apply when it has been stipulated otherwise (article 1485 of the Civil Code).

The purchaser may opt to withdraw from the contract and be reimbursed for any expenses he or she has paid, or benefit from a proportional reduction in the price, as determined by an expert. If the seller should have been aware of the hidden defects or flaws of the asset sold and failed to disclose them to the purchaser, the latter will have the same option, and will further be compensated for any damages if he or she should opt to terminate the contract (article 1486 of the Civil Code).

The actions outlined in the above provisions will cease to apply within six months of the sold asset being delivered (article 1490 of the Civil Code).

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

Pursuant to article 1266 of the Civil Code, the purchaser of a forgery or of an artwork whose provenance or value, etc, has been falsely determined can contest or void the sale if he or she produces evidence of the following: first, that he or she has been falsely misled with regard to the authenticity or the features of the artwork; secondly, that his or her defective consent was crucial to the acquisition, because, if he or she had been aware of the forgery, he or she would not have entered into the contract; and, lastly, that his or her lack of awareness of the forgery is excusable, because even through diligent actions – for instance, requesting an expert opinion – the forgery could not have been identified. If this evidence can be produced, the contract may be rendered null and void if challenged within four years from its execution and the parties must reciprocally return to one another the assets that constituted the subject matter of the contract, including refunding the price to the purchaser (article 1303 of the Civil Code).

However, the courts usually adopt a strict approach to determine the satisfaction of the requirements for granting nullity, namely with regard to the excusable nature of the error. Therefore, although in theory civil laws protect the purchaser, judicial practice fails to grant such protection.

If the contract is governed by commercial laws – for instance, when it is entered into by dealers or art galleries – the solution is different. The agreement must be interpreted in accordance with the ‘custom of trade’, which focuses on the protection of the seller, to the detriment of the purchaser.

In view of the above, the purchaser of a forgery or of an artwork whose features have been erroneously determined can only

be effectively protected against such eventualities when it has been so agreed, which is usually the case for artworks acquired in auction where the auction house guarantees the authenticity of the work.

12 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 of uncertain attribution that is subsequently proved to be an autograph work by a famous master may contest or void the sale if they produce the evidence outlined in question 11. The provisions applicable to the buyer also apply to the seller.

If the contract is governed by commercial laws – for instance, when it is entered into by dealers or art galleries – the solution is different. The agreement must be interpreted in accordance with the ‘custom of trade’, which focuses on the protection of the seller, to the detriment of the purchaser. In this instance, the seller is effectively protected against such eventualities when it has been so agreed.

Export and import controls

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

European Union treaties allow member states to grant exceptions to the free movement of goods across the EU with regard to their artistic heritage (article 36 of the Treaty on the Functioning of the European Union). However, the Maastricht Treaty (1992) introduced the notion of common cultural heritage (of the EU) and the compatibility of national laws and EU law should be questioned in each particular case. Non-EU exports are governed by Council Regulation (EC) No. 116/2009 on the export of cultural goods illicitly exported from their country of origin.

According to Law No. 16/1985 of 25 June on Spanish Historical Heritage, buildings and movable objects of artistic, historical, palaeontological, archaeological, ethnographic, scientific or technical interest form part of the Spanish historical heritage, and as such are subject to export controls. Documentary and bibliographic heritage, archaeological sites and areas, and natural sites, gardens and parks of artistic, historical or anthropological value are also considered part of the historical heritage.

Similarly, intangible assets that are considered to be culturally significant also form part of the Spanish historical heritage, in accordance with the specific legislation relating to them.

The most significant assets of the Spanish historical heritage are inventoried or are declared to be of cultural interest, and they are non-exportable unless a temporary export licence is granted.

The export licence for cultural property that is more than 100 years old should be approved by the Ministry of Education, Culture and Sport. The Ministry has a preferential right to acquire the cultural property in the event that the export licence is not approved.

Current legislation states that the unauthorised export of a movable asset that forms part of the Spanish historical heritage will constitute a smuggling offence or infringement

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

Value added tax (VAT) is triggered at a rate of 10 per cent upon importing art.

Imports of collectors’ items or art of an educational, scientific or cultural nature, which are not intended for sale and that are imported by museums, galleries or other authorised establishments, are exempt. The exemption is based on the condition that the objects are imported for free or, if not, that they are delivered by people who are not professionals.

The authorisation for the export of any movable property that is part of the Spanish historical heritage will be subject to a progressive rate (from 5 per cent to 30 per cent depending on the value of the property), with the following exemptions: certain exports that take place during the 10 years following their importation; temporary exports; all goods that are under 50 years of age; and certain goods that are between 50 and 100 years old.

These provisions do not apply to imports and exports within the European Union.

Direct and indirect taxation

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

The main types of liability that arise from transfer are VAT, inheritance and donation tax, and property transfer tax.

Wealth tax arises from ownership.

The gain obtained from the transfer of art could also trigger corporate or personal income tax.

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

In addition to the exemption referred to in question 13, there is a special VAT scheme. The scheme is applicable to deliveries made by resellers of used goods, movable property that is considered as art, antiques and collectibles, provided that in the prior acquisition by the reseller certain requirements are met. In this scheme, the tax base will be determined according to the profit margin of each operation.

Borrowing against art

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

A non-possessory pledge is the usual type of security interest. Its regulation expressly contemplates its use for art, antiques and collectibles. It is a security that is granted over movable property, where the collateral continues to be in possession of the owner (debtor) as a deposit. It requires execution in a public deed and must be registered in the Chattel Registry.

18 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 debtor qualifies as a consumer, the loan will automatically qualify as a consumer loan, because this kind of financial instrument (a loan secured by a non-possessory pledge) is not included in the list of exceptions in Law No. 16/2011.

19 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?

Yes, the Chattel Registry. The registration of the public deed secured by a non-possessory pledge in the Registry establishes the date for the purposes of credit preference, constitutes evidence against third parties, prevents fraud invalidating the transmission of the asset to the detriment of the lender, and qualifies the credit as privileged and preferential in cases of insolvency of the borrower.

The security is registered against the art, but it is linked to the information pertaining to the borrower and his or her credit.

20 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?

Pledge regulations allow for an extrajudicial procedure before a public notary. However, if the debtor fails to collaborate in the delivery of the collateral, the lender will have no other recourse but to initiate judicial procedures.

With regard to the general enforcement of securities, the Civil Procedure Act sets forth the so-called 'executive procedure' to enforce securities that are considered as executive titles. Otherwise, enforcement of securities would follow the ordinary civil procedure. The two basic advantages of the executive procedure are its expediency and the fact that the debtor has limited causes of opposition. If the creditor is compelled to follow an ordinary civil procedure, it will be handled as an ordinary adversary proceeding (with the corresponding delay) and an executive procedure will not be initiated until a judgment is rendered (the executive procedure would then be that of enforcement of the said judgment).

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

Claims of secured creditors will qualify as privileged claims up to the value of the collateral on which they fall; any excess will qualify as an ordinary claim or, in the case of interest claims, as a subordinated claim. As a general rule, no third parties may benefit from the value of the secured assets insofar as the secured creditor has not been paid. In this regard, secured creditors will not be affected by the contents of the creditors' composition agreement unless they agree otherwise.

It is possible to challenge security created 'to the detriment of the insolvency estate' within the two-year period preceding the declaration of insolvency, even in the absence of fraudulent intent. In particular, there is a presumption of prejudice to the insolvency estate in the event (i) that the security was granted for pre-existing debts or for new debt incurred to cancel pre-existing and unsecured debt, or (ii) of any payments or other acts of early cancellation of secured payment obligations.

Intellectual property rights

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

Copyright vests in the author by virtue of its creation. Registration is not required.

Drafts or sketches of sculptures and paintings, drawings, engravings and lithographs, picture stories, cartoons or comics and other works of three-dimensional art are also protected (in any form, not just the final version of the work).

23 What is the duration of copyright protection?

Moral rights are recognised without any time limitation.

Regarding the author's exploitation rights, as a general rule protection shall run for the author's life plus 70 years from his or her actual or declared death. However, there are exceptions, including the following:

- in the case of works created by authors who died before 7 December 1987, copyright shall be protected for 80 years from his or her death, instead of 70 years;
- in the case of anonymous or pseudonymous works, the term of 70 years commences from the date on which the work is lawfully made available to the public; however, if the authorship becomes known, this period expires, and the term shall be 70 years from his or her death;
- in the case of works of joint authorship, copyright protection shall run for the lifetime of the co-authors and for 70 years from the death of the last surviving co-author;
- in the case of collective works, copyright shall be protected for 70 years from the date on which the work was lawfully made available to the public; and
- in the case of works made available to the public in parts, volumes, instalments or separate issues that are not independent, copyright protection shall run for 70 years after each separate component is lawfully made available to the public.

The terms of protection are calculated from the first day of the year following that of the author's death or that of the lawful communication of the work, as appropriate.

Exploitation rights vested in performers will expire 50 years after 1 January of the year following that of the performance or, if applicable, after the lawful publication of the recording of the performance.

Producers of phonograms and audiovisual recordings also enjoy copyright protection for 50 years after the completion of the recording or, where applicable, after the lawful publication of the recording.

The same 50-year copyright protection is applicable to broadcasting organisations (from the first broadcast or transmission) and database manufacturers (from the date on which the process of making the database is deemed completed or, if applicable, from the date on which the database was first made available to the public).

Copyright protection of ordinary photographs and publishers of unprotected works lasts for 25 years from the 1 January of the year following the creation of the photograph or the lawful communication of the work.

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

The owner of an original three-dimensional artwork or photograph is entitled to exhibit the work in public (even if it has not been made available to the public before) without the consent of the copyright owner, except where the author has expressly provided to the contrary in the sale agreement.

In any event, the author may object to the public exhibition if the work is displayed in a manner that is detrimental to his or her honour or professional reputation.

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

Where the museum is a non-profit institution or where the reproductions in printed and digital museum catalogues or in advertisements for exhibitions are made without the intention of generating a profit, artworks protected by copyright can be reproduced without the copyright owner's consent.

26 Are public artworks protected by copyright?

Public artworks are protected by copyright in the same way as other artworks except that they may be freely reproduced, distributed and communicated by painting, drawing, photography and audiovisual processes.

27 Does the artist's resale right apply?

The artist's resale right will apply whenever there is a transfer for consideration after a first sale (if the purchase price exceeds €1,200) and whenever 'art market professionals' participate in the resale. In other words, private sales are excluded (because they are difficult to control) and resales are also excluded by the art galleries that had, in turn, directly purchased from the author, provided that no more than three years have elapsed and the resale price does not exceed €10,000.

The duration of the artist's resale right is 70 years after the author's death.

The person liable to pay is the seller (art market professionals involved in the resale are jointly responsible) and the beneficiary of the artist's resale right is the author during his or her lifetime and, after his or her death, the person to whom the author has expressly entrusted it in his or her last will and testament. In the absence of such provision, the beneficiaries of the artist's resale right will be his or her heirs.

The artist's resale royalty depends on the purchase price. For €50,000, the royalty is 4 per cent; and for over €500,000, the royalty is 0.25 per cent. There are also three further ranges of 3 per cent, 1 per cent and 0.5 per cent. However, the artist's resale right will never exceed €12,500.

Beneficiaries can collect the artist's resale royalty directly or entrust a collective management company to collect it, for instance the Visual Management Entity of Plastic Artists.

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

Moral rights for visual artists are:

- the right to decide whether a work is to be made available to the public and, if so, in what form;
- the right to determine whether such the work should be released under the author's name, under a pseudonym, a sign or anonymously;
- the right to claim authorship of the work;
- the right to demand respect for the integrity of the work and to object to any distortion, modification or alteration of it or any act in relation to it that may be detrimental to the artist's legitimate interests or to his or her reputation;
- the right to alter the work subject to respect for the acquired rights of third parties and the protection requirements of goods of cultural interest;
- the right to withdraw the work from circulation owing to changes in his or her intellectual or ethical convictions, after paying damages to the holders of the exploitation rights;

- if the author later decides to resume exploitation of his or her work, he or she shall grant preference, when offering the relevant rights, to the previous holder thereof, and shall offer terms reasonably similar to the original terms; and
- the right of access to the sole or a rare copy of the work, when it is in another person's possession, with the intention to exercise his or her right of communication or any other applicable right. In addition, this right prevents the author from demanding that the work be moved, and access to it must be facilitated in a manner that causes the least possible inconvenience to the holder thereof, who shall be indemnified, where appropriate, for any damages caused to him or her.

These rights are recognised without any time limitation and cannot be waived or assigned.

Agency

29 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 payment of commission to a commercial agent is regulated under the Agency Act. Although the specific amounts are freely agreed upon by the parties, the payment of any remuneration is regulated by and is compulsory under the Agency Act. The commission for the agent's activity may be established as a percentage of sales, as a fixed amount or as a combination of both systems. Where the parties cannot agree on a commission amount, the agent will be remunerated according to the business customs habitually present in the place where the agent conducts his or her activities.

The Agency Act also regulates the instances in which the agent has the right to receive this commission. In essence, the agent can request commission when the transaction has been agreed with a client within the territory (in the case of exclusive territories) or with clients with whom the agent has an exclusive relationship.

30 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 must look after the interests of the principal on whose behalf he or she operates, conducting his or her professional activity loyally and in good faith. In particular, the agent is subject to a non-competition obligation, which entails not conducting an identical or similar professional activity involving the same assets and services that he or she is contracted to promote, either on his or her own behalf or on behalf of another business owner (ie, not competing with the principal business owner). This obligation may be waived if such a clause is agreed in the contract.

31 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?

No.

Consigning items

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

In the event that the dealer or auction house goes into liquidation, their contracts would be automatically resolved and the dealer would be obliged to restore the work of art to the consignor. Consequently, unless there has been an irregularity, the consignor does not need to take any specific measure to protect the artwork, and the dealer's creditors don't have any action against the consignor.

Once the dealer has been declared insolvent, the consignor can ask for the work of art to be returned at any time, and the dealer is obliged to do so.

There is no specific register where consignors can register interest in consigned artworks. However, there is a Registry of Intellectual Property in which the owners can register works of art.

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

No specific legislation covering art auction houses exists in Spain. However, article 58 of the Law on Regulation of the Retail Commerce Sector makes reference to auction houses handling valuable or artistic items, and establishes special rules (see question 49).

34 May auctioneers in your jurisdiction sell art, antiques or collectibles privately; offer advances or loans against art, antiques or collectibles; and offer auction guarantees?

The main auction houses offer a post-auction private sales service. Only some offer items for sale privately and independently of the auction house.

Auction houses in Spain do not currently offer advances, loans or guarantees on artworks.

Spoilation during the Nazi era
35 In your jurisdiction, in what circumstances would the heirs of the party wrongfully dispossessed typically prevail over the current possessor, if a court accepts jurisdiction and applied the local law to a claim to art lost during the Nazi era?

This type of claim has not arisen in the Spanish courts.

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

No.

Lending to museums
37 Who is responsible for insuring art, antiques or collectibles loaned to a public museum in your jurisdiction?

The state guarantee is a legal mechanism by which Spain commits to providing compensation in the event of destruction, loss, theft or damage to works of cultural interest that are temporarily loaned for public exhibitions in museums, libraries or state-owned archives under the exclusive jurisdiction of the Ministry of Education, Culture and Sport.

This must be combined with a private insurance policy, as the state guarantee does not cover the total amount.

38 Are artworks, antiques or collectibles loaned to a public museum in your jurisdiction immune from seizure?

No.

Cultural patrimony
39 Is there a list of national treasures?

No. Subject to the judgement of the Ministry of Education, Culture and Sport, any cultural property that is over 100 years old that has historical or artistic value may be listed in the General Register of Assets of Cultural Interest, and may qualify as cultural property and, consequently, may be subject to an export ban.

Autonomous communities are competent to determine what qualifies as cultural property.

Classified cultural property is subject to certain restriction and certain tax advantages.

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

The state's pre-emption rights are first refusal, withdrawal and irrevocable sale offer.

Regarding the right of first refusal, owners must notify the public administration of their intention to sell the artwork, specifying the price and conditions of the transaction. Within a maximum period of two months after the notification, the public administration must inform the seller about whether the right of pre-emption will be exercised.

In case of sale at auction, the auctioneers must notify, in four and to six weeks, to the competent administrations, the auctions in which they intend to sell any object belonging to the Spanish historical heritage, and send the data that will appear in the auction catalogues. The public administration may exercise the right of first refusal by the appearance

of a representative of the Ministry of Education, Culture and Sport in the auction.

The right of withdrawal can be exercised when the private sale of any object belonging to the Spanish historical heritage has not been correctly communicated to the state. This right must be exercised within six months from the date the sale is officially announced.

Finally, the submission of a request for temporary export with the possibility of a sale or definitive export is considered an irrevocable sale offer in favour of the public administration, at the same value indicated in the export request. The Administration will have a period of six months to expressly accept or reject the offer of irrevocable sale, and, if it accepts it, it has one year to pay for the object.

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

Assets of cultural interest established by the law include buildings housing state-owned archives, libraries and museums, as well as the movable assets stored within them. This category also covers caves, shelters and places that contain cave art, castles, insignia, boundary crosses and other similar items, and the ancient granaries.

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

Within the framework of the European Union, Spain applies Law No. 1/2017 of 18 April on the Restitution of Cultural Assets Illegally Removed from Spanish Territory or from Another European Union Member State, which incorporates Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 into Spanish law.

As the requesting party, the state may initiate restitution proceedings against the possessor, and, failing this, against the holder of the cultural asset that has illegally been removed from its territory, before the competent courts in the requested member state. The proceedings will make sole reference to the restitution of the cultural asset, and this may not extend to matters that may be contested by means of civil or penal claims, or any other type of claim, that may be relevant in the Spanish legal system.

Spain is also a party to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, signed in Paris on 17 November 1970, and has an instrument of accession to the UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, signed in Rome on 24 June 1995.

Anti-money laundering
43 What are the anti-money laundering compliance obligations placed on the art trade?

People who trade professionally in objects of art or antiques have certain obligations as to the prevention of money laundering. Among other things, they must approve in writing and implement appropriate policies and procedures in matters of due diligence, information, preservation of documents, internal control, risk assessment and management, guarantee of compliance with the relevant provisions and communication, to prevent money laundering-related operations.

Law No. 10/2010 of 28 April is entirely devoted to the prevention of money laundering and terrorist financing, and the obligations of the obliged subjects are very extensive and change depending on the situation.

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

Spain became a party to the CITES Convention on 16 May 1986. The Directorate-General of Commercial Policy and Competitiveness has been designated as the principal management authority, within the remit of the European Union, for the purposes of article 13(1)(a) of Council Regulation (EC) No. 338/97 of 9 December 1996.

The duties of the management authority are designated by the Secretary of State Secretariat of Commerce of the Ministry of Economy, Industry and Competitiveness.

Controls and checks over CITES goods are entrusted to 12 units within the network of SOIVRE Export Inspection Service managed by the district and provincial chambers of commerce.

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

Worked specimens of elephant ivory and of other endangered species are included in Annex A of Regulation (EC) No. 338/97, which prohibits, in article 8, their purchase, offer to purchase, acquisition for commercial purposes, display to the public for commercial purposes, use for commercial gain and sale, keeping for sale, offering for sale or transporting for sale.

With regard to antiques, there is an exemption from the above prohibition that applies to worked specimens that were acquired more than 50 years before the entry into force of the Regulation (ie, before 1 June 1947).

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

See question 45.

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

As mentioned in question 45, elephant ivory and rhino horn are listed in Annex A of Regulation (EC) No. 338/97. Therefore, their import requires an import permit issued by the management authority of the destination state, and their export or re-export will require the issuance of an export permit or re-export certificate by the management authority.

An export permit may be issued only if the specimens have been obtained in accordance with the legislation in force, if the trade will not have a harmful effect on the conservation status of the species, and if an import permit had been previously issued.

A re-export certificate may be issued only if the specimens were imported in accordance with the provisions of the Regulation and, in the case of live specimens of animals or plants, if an import permit had been previously issued.

Consumer protection

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

The right of withdrawal from the contract is the consumer's right to terminate a contract by informing the other party within the specified withdrawal period, without giving any reason to justify their decision, without incurring any costs and without any penalty whatsoever. Any contractual provisions imposing a penalty on the consumer in the event that the right of withdrawal is exercised shall be null and void. The withdrawal right applies in retail contracts, in distance and off-premises contracts and in instalment sales of movable goods.

The right of withdrawal in retail contracts is subject to the general rules through the express reference made by the Retail Trade Act (article 10) to the Consumer Defence Act and to other supplemental statutes (articles 68–79 and 102–108). The consumer shall have a period of at least 14 calendar days counted from the date of delivery of the goods to withdraw from the contract. This is applicable to any kind of retail contracts provided that the buyer is a consumer.

In distance and off-premises contracts, with the exception of contracts concluded at a public auction, there is a special regulation: the consumer will have the right to withdraw from the contract within a period of 14 calendar days without giving any reason and without incurring any costs other than as specified below. The withdrawal period shall expire after 14 calendar days from the date on which the consumer, or a third party other than the carrier and indicated by the consumer, acquires physical possession of the goods.

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

Public auctions are regulated in articles 56 to 61 of the Retail Trade Act, setting out the obligations of the auctioneer or auction house, the obligations of the owner of the goods being auctioned, the formal obligations, the relationship between the auction house and the bidders, the non-recoverability of any movable goods acquired in the public auction, and the joint and several liability of the auctioneer and the owner of the goods in the event of breach of the applicable disclosure obligations and in the event of defects in the goods (either as (i) misrepresentation of the auctioneer; (ii) error in the description of the features and characteristics of the good; and (iii) error in not noticing the defects).

There are special rules applicable to public auctions in venues specialised in precious objects or works of art (article 58 of the Retail Trade Act). The offer for sale in public auction must include an accurate description of the relevant goods, including a reference to whether the specified features are certain or merely estimated or assessed by an expert. In particular, where the object for sale in a public auction is an imitation, or an object that appears to be a precious object but in reality is not, the fact must be expressly disclosed in any notices and advertising published, as well as in any invitations to make bids. This obligation will also apply to the sale of precious objects or works of art that are offered to the public otherwise than in public auction.

A special statute, Law No. 43/2007 of 13 December 2007, will apply to the legal relations between the consumers and the businesses or professionals engaging in the sale of stamps, works of art, antiques, jewels and other goods, with the offer to return at a later stage, in one or several instalments, all or part of the purchase price settled by the consumer or an equivalent sum, with or without a provision for the appreciation of the amounts involved.

Lastly, distance and off-premises sales, where the purchaser is a consumer, are regulated by the applicable provisions of the Consumer Defence Act (articles 92–113). Contracts concluded by electronic means are governed by the rules on distance contracts and by Law No. 34/2002, on information society services and electronic commerce (article 23).



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Buying and selling

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

The moment of transfer of title depends on whether an object has been bought at an auction, if the buyer is a consumer or the sale is made business to business or between private persons. For auction sales and consumer sales, the transfer of title – as well as protection for the buyer against a seller's creditors – occurs as per the agreement. For sales made business to business or between private persons, however, a transfer of the object from the seller to the buyer is necessary to receive protection from third-party claims.

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

The term 'warranty of title' is not used in Swedish law. However, the Sale of Goods Act and the Consumer Sales Act provide sanctions if a third party owns the object (legal fault). A person is obligated to give notice of complaint within reasonable time from the time the legal fault was or should have been discovered, normally immediately. The two-year limitation period provided for other types of faults is not applicable on legal faults.

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 for this, but there are private initiatives such as the non-profit anti-theft organisation SSF Stöldskyddsföreningen, which offers registration for a limited period of time against a fee.

A lost or stolen object can be reported to the Swedish police, which keeps a national database where all lost property is registered.

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

The victim of theft is preferred, but there are provisions that offer protection to a buyer acting in good faith.

The Good Faith Acquisition of Personal Property Act may be applicable if a work of art is bought from someone who was not the rightful owner.

The main rule is that the buyer is protected from restitution claims from the original owner if the buyer is in possession of the object and has acted in good faith at the time of the purchase.

Likewise, where a person has held personal property in good faith for 10 years after acquiring the object, he or she acquires title to the object by way of prescriptive title – regardless of the object being stolen. However, the ownership will not be transferred if he or she, at the time of the purchase or thereafter, should have suspected that the transferor was not entitled to dispose of the object.

An original owner who has lost the ownership of an object because of somebody else's good-faith acquisition or because of a prescriptive title is, however, still entitled to recover the object against payment. The payment shall encompass what the new acquirer has paid, including costs for improvements of the object. Such a demand for restitution must be made within six months of the day on which he or she became aware, or must be assumed to have become aware, of the whereabouts of the property (three months for acquisition prior to 1 July 2003). The

acquirer has the burden of proving that the restitution claim was made too late.

If the buyer has acquired stolen or unlawfully taken goods, he or she can lose title to it and be forced to return the goods without being entitled to compensation, even if the purchase has been made in good faith. In such a case, the original owner of the stolen goods must make the claim within six months of the day on which he or she became, or must be assumed to have become, aware of the whereabouts of the lost property. A buyer losing title this way may, in theory, turn to the seller of the object, revoke the purchase and reclaim what was paid for it, or even claim damages from the seller.

The buyer's good faith is assessed considering the nature of the object, the conditions under which it was offered and whether the other circumstances of the case were such that he or she was not given reason to suspect that the transferor was not entitled to dispose of the object.

Normally, a higher degree of care should be exercised when purchasing a valuable object, such as a work of art, particularly if the seller is a private person. In this case, a buyer is expected to ask a seller to identify himself or herself and share the details of the provenance of the object as well as his or her title to it. Extra caution should be exercised when a seller presents himself or herself as being an authorised person, agent or director of a company. In such case, a buyer is recommended to ask for a letter of authorisation, power of attorney or other documents that proves the transferor's authority. If a private person is making a purchase at a public auction or at a fair organised by an auction house or a similar type of business, no duty of diligence normally applies, unless the circumstances indicate that extra care is called for. However, more recent statements concerning cultural objects indicate that when assessing good faith, it is worth considering whether the buyer did any research in the various international public registers over stolen cultural objects, such as Interpol's database of stolen works of art.

A court will require a higher degree of care by a professional trader than by a private person with no special knowledge of the art trade.

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 certain period?

See question 4.

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

No.

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

The main rule is that the seller vests the risk until the object has been physically delivered to the buyer.

If the object is to be collected it should be made available for delivery at the business location. The risk passes to the buyer when the buyer physically takes possession of the goods. However, if there is a delay in the collection of the goods, it is the party that causes the delay that stands the risk.

If the parties agree that the object shall be transported to the buyer, the risk can pass in two ways. If delivery is carried out within a determined location or within an area where the seller in general undertakes

the transport (on-site purchases), the risk passes from the seller to the buyer when the object is handed over. If the parties have otherwise agreed on transportation of the object and this transportation is performed by an independent carrier (distance purchases), the risk passes to the buyer when the object is handed over to the carrier.

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

No laws in Sweden specifically govern the liability of a buyer of art and antiques to investigate the legal characteristics of an object. Freedom of contract is thus the starting point. A buyer and a seller may agree upon due diligence standards, guarantees and other conditions relevant to the purchase of an object.

If no specific agreement has been made between the parties, business-to-business sales and sales between private persons are regulated by the Sale of Goods Act. These fallback rules do not require a buyer to examine an item before the purchase, but a buyer who has actually done so, or who has refrained from doing so, may not later complain about 'defects' that he or she should have noted.

An object may be considered to have defects if it does not comply with a standard that the parties have agreed upon, if it cannot be used the way the buyer intended to use it or if it deviates from the buyer's reasonable expectations.

Moreover, an object shall be considered to have defects if it does not conform to information relating to the characteristics of it or its use that the seller (or a person other than the seller on behalf of the seller) has provided in the context of marketing the goods, or otherwise prior to the sale.

Objects sold at auction are considered to be sold in 'as is' condition, which means that special rules on defects apply. Even so, goods shall be considered to have defects if they do not conform to information on their characteristics or use given by the seller. Information not given by the seller can also make the rules on defects apply, if it concerns important characteristics or use of an object that the seller presumably knew about and the buyer could reasonably have expected to be informed of.

A professional seller who can be presumed to have relevant knowledge of export restrictions or other relevant rules applicable to the products sold is therefore advised to inform a foreign buyer that this may be the case.

If no specific agreement has been made and the buyer and seller are business operators that have their places of business in different countries, the United Nations Convention on Contracts for the International Sale of Goods (CISG) may be applicable. The CISG requires that the buyer examines the goods as soon as possible. The legal consequence for a buyer who does not examine the goods as soon as possible after the purchase is that he or she loses the right to complain about defects that the buyer should have noticed. The CISG is not applicable to auction sales.

9 Must the seller conduct due diligence enquiries?

Depending on the circumstances, information given (or not given) by the seller that has, or can be presumed to have, influenced the buyer to make the purchase may constitute a defect that gives the buyer an opportunity to revoke the purchase.

In consumer sales, a seller has a more extensive obligation towards the buyer to inform him or her of a matter relating to the characteristics or use of an object that the seller was aware of, or should have been aware of, and about which the buyer could reasonably expect to be informed.

In general, professional traders often have more extensive knowledge of the goods sold than a private person and, as such, they generally have increased responsibility.

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

As stated in question 2, implied warranty is not a term that is used in Swedish law. However, the notion of implied warranties, meaning that goods must reasonably conform to the buyers' expectations, is part of Swedish contractual law. This also follows from the Sale of Goods Act and the CISG.

Consequently, one of the implied warranties in Swedish law is, if the parties have not agreed otherwise, an implied warranty of fitness for a buyer's particular purpose.

The quality of the product can, however, be limited contractually or through expressed disclaimers made by the seller before the sale – for instance by selling the product 'as is' or by similar wording. See questions 8 and 9.

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

The remedies provided in the event of a purchased object being defective are not very well adapted to works of art. The only reasonable sanction if a purchased object proves to be forged, fake or counterfeit is revoking the contract in connection with a claim for damages. Other statutory remedies available are correction, delivery of a new object and price reductions. To our knowledge, the application of remedial actions to fake or counterfeit works of art has rarely been used in Swedish courts.

12 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 law of contracts is governed mainly by the Contracts Act and the principle of *pacta sunt servanda*.

A contract can be considered void if, for example, the buyer acted in a fraudulent manner or took advantage of a seller's distress, lack of judgement or dependence on him or her.

Further, the Contracts Act provides two legal bases to void a contract. The minor general clause is applicable if the circumstances at the time of the deal were such that it would be considered against good faith and fair dealing to enforce the contract. A precondition is that the contracting party trying to enforce the contract knew, or ought to have known, about the circumstances in question. It is not, therefore, bad faith regarding the legal transaction that may void the contract, but the circumstance that would make it contrary to good faith and fair dealing to enforce the agreement.

The main general clause can void a contract wholly or partly if it is concluded that it would be unfair – with regard to the conditions of the contract, the circumstances at the time of the deal, events that occurred subsequently or the circumstances in general – to enforce it. Special concern should be given to the need to protect consumers or the weaker party in the contractual relationship.

Export and import controls

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

Most contemporary cultural objects do not require any special permission (except a general export declaration), but all goods must be classified by the correct commodity code, selected from the common nomenclature used in the European Union. Since some contemporary art may be difficult to classify, it is recommended to ask customs for assistance.

Some cultural objects require an export permit or licence. There is no general definition of cultural property in Swedish legislation, but for the purposes of export there is one definition applicable to objects intended for export outside of the European Union (requiring a licence) and another applicable to objects intended for export into another member state (requiring a permit).

Annex I of Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods defines certain types of objects as cultural goods, depending on the age and value of the item.

For export within the European Union, it is sufficient to apply the Swedish national definition of a cultural object, as given in the Historic Environment Act and the Historic Environment Regulation. Only cultural objects assumed to have been in Sweden for at least 75 years and considered to be of major importance for the protection of national cultural heritage may be refused an export permit or licence. However, there are also a number of special conditions under which a permit must be given even if the object is considered to be of major importance to national cultural heritage, such as if the cultural property has been acquired by an institution abroad.

An application is made by filling in a form on the National Heritage Board's website. A decision is often reached within two weeks. A permit or licence is valid for a year from the date of the decision. A refusal

of the application may be appealed to a Swedish general administrative court.

Intentional illegal export of cultural property, including attempted export, is punishable as a smuggling offence. The sanction is either a fine or a maximum of six years' imprisonment. The object is forfeited if this is not considered undue. Negligent failure to seek permission for an export and negligent illegal export also constitutes an offence, and intentional packing, transporting, storing, concealing, processing, buying and selling cultural property may be sanctioned by a fine or imprisonment for unlawful dealing in smuggled goods.

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

A liability to pay customs duty and value added tax (VAT) arises upon import of some cultural property to Sweden, but many traditional types of art and antiques are exempt from customs duty. Temporary import (eg, for the purpose of an exhibition) does not give rise to customs duty and VAT but requires the importer to provide security for the potential taxes that will arise if the work of art is sold.

Export does not give rise to any liability to pay customs duty.

Direct and indirect taxation

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

Private persons reselling art (created by someone else) pay 30 per cent tax on the profit of the sale. However, since basic deductions can be made for sales worth up to 50,000 Swedish kronor, there is seldom any taxation for this type of sale.

If the total value of artworks sold by an artist in one year is less than 336,000 Swedish kronor, the sales will be exempt from VAT. If sales exceed 336,000 Swedish kronor, the artist must add 12 per cent VAT on all sales during the year.

VAT of 25 per cent applies to art dealers and galleries, and artists selling their own artwork through a partnership or a limited company wholly owned by the artist.

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

If artwork is purchased by someone who does not have the right to deduct input VAT when purchasing the goods (ie, a non-taxable person; a taxable person who himself or herself has used profit margin taxation in Sweden or in another EU country; or a non-taxable person who is not liable for VAT on sales), VAT can be calculated from the difference between the selling price and the purchase price, instead of the sales price (profit margin taxation). VAT is then 25 per cent on the profit margin. If VAT has been charged by the seller, however, the buyer cannot use profit margin taxation when he or she resells the goods.

Borrowing against art

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

There is no specific regulation on how to provide security. Ordinary rules on pledge apply, meaning the lender must take the pledged item in his or her possession in order to obtain a valid security. Since banks rarely agree to store movable property, pawnbrokers are generally used to borrow against art.

18 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?

Normally, if the borrower qualifies as a consumer the loan will automatically qualify as a consumer loan and the Consumers Credit Act will be applicable. However, the Consumers Credit Act is not applicable when borrowing from a pawnbroker. Instead, the lender has to act in accordance with mandatory rules in the Pawnbrokers Act regarding the terms of the loan.

19 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, but pawnbrokers are obligated to preserve certain information about a pledge according to the Pawnbrokers Act. A right of pledge in movable property requires possession of the object, hence a register would not serve any purpose.

20 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 general, the parties agree on how to regulate the lender's authority to sell the collateral. In such a case, the contract will be decisive. If the lender is a pawnbroker, there are mandatory regulations. The Pawnbrokers Act stipulates that the collateral may not be sold until two months have passed after the day of maturity, unless the borrower approves. The collateral must be sold at a public auction and the lender has to account for the surplus. Permission from the court is not required in either case.

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

In case of bankruptcy or execution, the lender has specific rights of priority according to the Rights of Priority Act. According to this Act, the pledgee has paramount rights, meaning he or she will take precedence over all other creditors.

Intellectual property rights

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

Copyright vests automatically in the creator in accordance with the Act on Copyright in Literary and Artistic Works.

23 What is the duration of copyright protection?

Seventy years after the death of the creator.

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

Yes, as long as the creator's non-economic rights are respected (eg, the right to acknowledgement).

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

Yes, but only if the purpose is to advertise the exhibition and only to the extent needed for the promotion. It is only permitted to depict an artwork without the consent of the creator if it is part of a collection in a catalogue in hard copy – it cannot be in digital format.

26 Are public artworks protected by copyright?

Yes, public artworks are protected by copyright. In a decision from 2016, the Supreme Court held that it is not permitted to publish pictures of public sculptures on websites.

27 Does the artist's resale right apply?

Yes, if a sold artwork is resold within the 70-year limit of the copyright, the creator or his or her successor is entitled to remuneration. The requirements are that the object sold must be an original work and at least one party involved must be a professional trader (ie, the buyer, seller or intermediate, or all three).

The amount to be paid is a percentage scale based on the sale price, excluding VAT, which ranges from 5 per cent if the sale price is less than €50,000, up to 0.25 per cent if the sale price is more than €500,000. The amount paid cannot exceed €12,500. If the sale price is below 2,275 Swedish kronor the sale is exempted from the resale right.

Further exemptions are a work of art that is a building or if a private person sells the object to a non-profit museum open to the public and without a professional trader as intermediate.

The professional party makes the payment. If more than one professional party has participated, the seller is responsible for the payment. Collective management is compulsory. As of 1 July 2018, professional traders active on the art market as seller, buyer or intermediary will be obligated to report remunerating sales to the collecting organisation.

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

Moral rights of the artist encompass the right to acknowledgement as creator (ie, to have the artist's name presented when his or her work of art is exhibited) and the right of respect for the work (ie, the work of art may not be used or altered in a way that offends the artist).

The possibility to waive moral rights is very limited and this kind of agreement could lack legal effect in respect of the creator. There is no limit for moral rights.

Agency

29 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 specific act governing agents in the art industry. An artist and an art gallery or other art dealer that have a working relationship are free to negotiate the terms of their cooperation agreement in accordance with the principle of freedom of contracts. In the absence of an explicit contract, different statutes may apply to the relationship depending on the characteristics of it. The Commission Agents Act (2009:865) is applicable to an art gallery acting in its own name on behalf of an artist. The gallery shall then account for what it has received from sales and what part of this constitutes its commission.

If the sale is independently conducted by the agent but in the name of the artist, which to our knowledge is very uncommon, the Commercial Agents Act (1991:351) will apply. The agent is not authorised to receive payment for the sold artwork unless this has been specifically agreed upon.

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

The principal is responsible for the payment of a commission to the agent within a certain time. Normally the agent is not entitled to keep any money before the commission has been determined.

31 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 the Commercial Agents Act is applicable and a third party has paid an unauthorised agent, the principal (when he or she becomes aware of the sale) is obliged to inform the third party without unreasonable delay if he or she does not want to approve the sale. If the Commission Agents Act is applicable, the principal has the right to refuse the agreement if the agent has acted in an economically negligent way.

Consigning items

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

The Commission Agents Act protects the consignor if the dealer goes into liquidation, as he or she remains the owner of the artworks until the ownership passes to a third party. The consignor thus has the right to separate the artworks from the dealer's creditors. If the ownership has passed to a third party but payment is outstanding, the claim is reserved for the consignor prior to the dealer's creditors.

Auctions

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

Yes. An auctioneer must adhere to the provisions of the Sale of Used Goods Act (1999:271) and the Sale of Used Goods Regulation (1999:272). The latter Regulation provides for a list of objects, which includes paintings, drawings and sculptures.

Update and trends

The Department of Culture is currently investigating if and how foreign cultural property will be immune from seizure.

The National Heritage Board has recently started a project together with the Swedish museums and the Sami Parliament to develop guidelines for meeting demands of restitution and repatriation in accordance with international agreements. The explicit goal for the project is to set a good example internationally.

Anyone aspiring to commercially sell objects within the scope of the Regulation (eg, an auctioneer) has to register with the police prior to starting the trade. In addition, the trader must take notes on the goods bought and sold and, upon request, turn these over to the police. The trader of used goods is further prohibited from acquiring goods from anyone unable to, in a reliable way, prove his or her identity or that he or she is otherwise known to the trader, or a person under 18 years old.

The Enforcement Code (1981:774) also provides special provisions for execution sales. For other forms of auction, general contract law applies to the buyer and seller, most notably the Sale of Goods Act and the Consumer Sales Act (see questions 1-12).

For online auctions, see questions 48 and 49.

34 May auctioneers in your jurisdiction sell art, antiques or collectibles privately; offer advances or loans against art, antiques or collectibles; and offer auction guarantees?

Yes, auctioneer offices may sell items privately and some offer private sales. They may also offer their customers advances in the ordinary scope of business, but are not allowed to offer loans against art as security as a side business (ie, as pawnbrokers).

Auction guarantees are not prohibited by law but are not the regular practice of larger auctioneers' offices.

Spoliation during the Nazi era

35 If a court in your jurisdiction agrees to hear a claim to art lost during the Nazi era, applying the local law, in what circumstances would the heirs of the party wrongly dispossessed typically prevail over the current possessor?

The determination of a restitution case and the chances of success depend, to begin with, on whether the current possessor acquired the stolen art before or after 2003. As explained in question 4, Swedish law prefers the victim of theft. Prior to 2003, however, it was possible to make good-faith acquisitions regardless of the history of an object. Hence, a current possessor having bought a work of art before 2003 from somebody who had made an acquisition in good faith is protected from restitution claims and must only release the property against compensation.

Accordingly, the chances of success are much higher if the current possessor acquired the object after 2003, since the buyer in this case does not have any protection against title claims from the original owner (see question 4).

The burden of proof is on the claimant to prove the origins and the original title to the object.

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

No. Sweden took part in the Washington Conference on Holocaust-Era Assets and has signed the Terezin Declaration, but has not adopted any specific laws or national dispute procedures for Nazi-looted art.

Lending to museums

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

The National Heritage Board is responsible for issuing the government's exhibition guarantee, a state indemnity for objects on loan to exhibitions in Sweden. A guarantee may be applied for by non-profit organisations, such as public museums, and is granted provided that the security arrangements of the exhibition are sufficient. An application should be filed (by the arranger) at least three months prior to the exhibition's opening. An application fee of between 6,000 Swedish kronor and 120,000 Swedish kronor is charged.

38 Are artworks, antiques or collectibles loaned to a public museum in your jurisdiction immune from seizure?

No. Sweden has signed the United Nations Convention on Jurisdictional Immunities of States and their Property, but no national legislation is yet in force.

Cultural patrimony**39 Is there a list of national treasures?**

No.

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

No.

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

Ownership of ancient artefacts (ie, objects without an owner and found on or near an archaeological site) automatically vests in the state. Ancient artefacts found in other circumstances must be offered for sale to the state, which has a right of pre-emption if the object can be presumed to date from before 1850 and certain other criteria are met. Ownership of ancient artefacts found in the ocean in a foreign jurisdiction, collected by a Swedish ship or brought to Sweden, also vests in the state.

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

Sweden is a party to the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, which means that a cultural object illegally exported to Sweden after 2011, from another contracting party, shall be returned to that state upon request. The reclaiming state must bring an action in public court against the possessor of the object within three years from gaining knowledge of where the object is located and who the possessor is, before 50 years have passed from the illegal export. To succeed with a claim, the export must still be illegal when the case is initiated.

Similar rules exist for restitution claims concerning illegally exported cultural property from another EU member state. As Directive 2014/60/EU of 15 May 2014 targets restitution claims between the member states, a private or legal person seeking restitution this way must ask for assistance from the relevant authority in his or her own country. A claim must be brought before three years have passed from the date when the relevant authority of the requesting state gained knowledge of the whereabouts of the object.

If the court rules in favour of a reclaiming UNIDROIT or EU state, the possessor of the object is entitled to fair compensation for returning the object, provided that due care and attention in acquiring the object was exercised. Hence, the burden of proof is on the possessor.

Restitution claims that fall outside the scope of Directive 2014/60/EU and the UNIDROIT Convention seem to be handled on a case-by-case basis diplomatically.

Sweden is also a party to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

Anti-money laundering**43 What are the anti-money laundering compliance obligations placed on the art trade?**

All professional buyers and sellers of art must comply with the Money Laundering and Terrorist Financing (Prevention) Act if the operations of the business involve sales of art amounting to €5,000 or more in cash.

First, a general risk assessment in accordance with the Act should be performed and documented by the art trader. Secondly, customer due diligence must be performed to assess the customer's risk profile, which should include the following information: his or her identity; the beneficial owner's identity (if applicable); whether he or she is a politically exposed person; and if he or she is established in a high-risk country (as identified by the European Commission) outside the European Union. In addition, information of the purpose and nature of the transaction should be obtained.

Endangered species**44 Is your jurisdiction a party to the CITES Convention?**

Yes, Sweden adopted the CITES Convention in 1975. As with all EU member states, CITES is enforced through special regulations applicable in each state. The responsible national authority is the Swedish Board of Agriculture, which consults with the Swedish Environmental Protection Agency. The former can issue permits and certificates.

45 Is the sale, import or export of pre-1947 worked endangered species subject to a licence?

An antique exemption is applied for sales of items processed prior to 3 March 1947, which means that the owner does not have to apply for a CITES certificate for the items. However, the owner must have evidence of the age of the object, which is also required if he or she were to apply for either a CITES certificate or a CITES import or export permit. The evidence must be available prior to the use of the item in a commercial activity. The requirement for evidence is particularly important regarding high-risk objects, such as objects made of elephant ivory and rhino horn (see question 47). For these species, an expert certificate from an independent expert is required. A permit for export is also required.

Lack of evidence of the item's age may result in prosecution for violation of protection of species.

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46 Is the sale, import or export of post-1947 worked endangered species authorised? On what conditions?

With regard to species listed in Appendix A to Council Regulation (EC) No. 338/97, commercial activities are prohibited unless the Swedish Board of Agriculture grants exemption by issuing a CITES certificate.

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

The use of unprocessed ivory, for example a polished elephant tusk, is prohibited in commercial activities, regardless of the age of the object. This means that no CITES certificates or permit for export can be issued. For ivory processed after 3 March 1947, a CITES certificate can be applied for, if the owner is able to provide documentation that the object was obtained lawfully.

Regarding rhino horn, an export permit may be granted only in limited cases, for example if the competent authority is convinced that the object is a work of art and that its value ensures that the object will not be used for other purposes.

More details can be found on the Swedish Board of Agriculture's website: www.jordbruksverket.se/swedishboardofagriculture.

Consumer protection**48 In what circumstances may consumers cancel the sale of art, antiques or collectibles?**

If the buyer is a consumer, contractual terms that are disadvantageous to the buyer in comparison with the consumer protection rules are unenforceable against the buyer.

Further, a consumer is always entitled to withdraw from the contract within 14 days of the date on which the consumer takes physical possession of the object, if he or she has purchased an object on the internet or otherwise off the premises of the seller. This also applies to auction sales of art and antiques, if the auction is only available through the internet (hence not if the consumer can choose to participate in the auction at the auctioneer's place of business). The obligation for the seller to inform the customer of the right to cancel a purchase has also been established in Swedish case law.

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

In general, the same rules apply for all types of sales, regardless of whether the sale is made face to face, by telephone or through other platforms on the internet (see questions 1–12). Determining which set of rules applies to a specific case depends on whether goods or services are sold.

In the case of online sales, the Distance and Off-Premises Contracts Act (2005:59) and the E-Trade and other Services in the Information Society Act (2002:562) apply. The former contains specific regulations concerning the information duty of the seller when providing goods or services on online platforms, and the latter gives consumers the right of regret (see question 48) as well as further requirements on what kind of information a seller needs to give the consumer prior to a sale over the internet.

A seller must provide certain information to the buyer prior to a sale made outside the seller's place of business, including his or her name, corporate identity number, telephone and fax number, and address and email address. If the seller is an agent or acting on somebody else's behalf, the seller needs to provide the buyer with the same information regarding the principal. In general, the seller must provide the necessary information for the consumer to reach the him or her.

Switzerland

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Buying and selling

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, Civil Code; article 184, Code of Obligations). 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 free port (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).

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 Cultural Property Transfer Act (CPTA) 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 (i) 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 (ii) be meaningful property from a religious or secular point of view for archaeology, pre-history, 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 (see question 4), 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.

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 free ports 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 (see question 1), but this rarely occurs in practice.

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 his or her 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. Prior to 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 (see questions 8 and 9).

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.

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 certain period?

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 he or she knew about the current

possessor's identity and location of the object, and 30 years after the loss (see question 4).

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

No, ownership never passes to a purchaser in bad faith (article 936, Civil Code).

7 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.

8 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 (see question 4). It will typically involve consulting available stolen art registers.

9 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 persons 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 he or she 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; see question 42). 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 him or her of his or her 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 for the International Transfer of Cultural Property at the Federal Office of Culture (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 (see question 43), and import and export laws (see question 13).

10 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.

11 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 either rescind the sale agreement on the grounds of a fundamental mistake or under the seller's liability against defects. 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 his or her 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.

12 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 he or she known about the true situation, he or she 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.

Export and import controls

13 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 (see question 39), requires specific authorisation to be exported. A specific export licence also applies to objects containing endangered species according to the CITES Convention (see question 44). 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., 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.

14 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 value added tax (VAT) is, in principle, levied on import of art, antiques and collectibles (at a rate of 7.7 per cent

as of 1 January 2018) 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 antiques, 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

15 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 0.11 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 the 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 his or her 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, 24 per cent in Geneva).

A person is subject to VAT (article 10, VAT Act) if he or she operates a business and provides assets and services in Swiss territory through that business or has his or her registered office, domicile or permanent establishment in Swiss territory (this individual is, however, exempt from tax liability if within one year he or she generates turnover, in Swiss territory and abroad, from supplies of less than 100,000 Swiss francs that are not exempt from tax; see questions 14 and 16).

16 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 0.11 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. On the other hand, collections simply stored in safes or free ports 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 free ports may lead to avoiding tax and duties or postponing tax liability. Moreover, if an artist brings artwork he or she created into Switzerland, this may be done duty-free.

As of 1 January 2018, 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 he or she has 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, VAT Act).

In some cantons, works of art may be used to pay a taxpayer's gift or estate tax.

Borrowing against art

17 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).

18 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 Federal Credit Consumer Act provides that a consumer concludes a loan for a purpose outside his or her 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 his or her expense.

19 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.

20 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 Federal Act on Debt Enforcement and Bankruptcy, 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, he or she must file a claim with the courts. The parties may not anticipate and forego this procedure by inserting a clause in the loan agreement.

21 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

22 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 (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.

No copyright registration system exists under Swiss law.

23 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. All other types of work are protected for 70 years following the death of the author.

24 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) of the Federal Act on Copyright and Neighbouring Rights (FACN)). Once they have made use of this right and published their artwork, it may be exhibited in public without their consent.

25 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 catalogues.

26 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.

27 Does the artist's resale right apply?

There is no artist's resale right under Swiss law.

28 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 his or her work from the current possessor if the access is essential for him or her to exercise copyright (article 14(1), FACN). The artist may also request the possessor to provide him or her 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

29 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 his or her 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, he or she breaches his or her fiduciary duty.

30 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, he or she is not allowed to act for both parties at the same time. Consequently, he or she loses his or her entitlement to a commission (article 415, Code of Obligations).

31 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

32 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 free port, it is listed in an inventory together with the identity of its owner.

Auctions

33 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 229–236 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 publication 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.

34 May auctioneers in your jurisdiction 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.

Spoilation during the Nazi era

35 In your jurisdiction, in what circumstances would the heirs of the party wrongly dispossessed typically prevail over the current possessor, if a court accepts jurisdiction and applied the local 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

Update and trends

The Swiss Federal Office of Justice has drafted a revised version of the Federal Act on Copyright and Related Rights, which is still subject to legislative debate. The amendments are intended to make the Act more suitable for the digital age.

that the current possessor acquired the art in bad faith, and that all previous owners did so too.

36 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.

Lending to museums

37 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 prior to 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, earthquakes or volcanic eruptions are permitted.

38 Are artworks, antiques or collectibles loaned to a public museum in your jurisdiction immune from seizure?

The 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 10–13, 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 prior to 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 from 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

39 Is there a list of national treasures?

The 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. So far, these inventories have not taken shape. However, cantons have established inventories of monuments that may not be exported out of the canton without a licence or without notifying the authorities. Further, no process exists under Swiss law whereby private property can be considered as national treasure and therefore blocked from being exported.

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

No.

41 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.

42 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 eight 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 and Mexico. All of the agreements, except for the most recent agreement concluded with Mexico, have entered into force. 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, he or she has 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 prior to the repatriation.

Anti-money laundering

43 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, Criminal Code).

Since 1 January 2016, the Anti-Money Laundering Act 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 verification of the customer's identity and transaction; establishing the identity of the beneficial

owner; and a duty to keep 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 Customs Ordinance stipulates various rules for free ports, 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

44 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.

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

Yes, except for their sale. 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, CITES Ordinance).

46 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, CITES Control Ordinance). 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 8-10 of the Ordinance on the transfer of animals and plants of protected species. 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).

47 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 (see questions 45 and 46).

Consumer protection

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

In contrast to European 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; see question 49). 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.

49 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).



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Buying and selling

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

The contract for the sale of goods obliges the seller to deliver them to the buyer and the buyer to pay the agreed price. Principally, ownership of movable goods can only be transferred when the goods are delivered to the buyer. However, according to article 279 of the Turkish Code of Obligations (TCO), the title of a movable asset is transferred to the bidder as soon as he or she places a successful bid. The parties may agree on the retention of title for movable goods. By doing this, they may postpone the transfer of title past the possession date even if the buyer receives possession of the movable asset. However, this contract must be executed before a notary and recorded in a specific registry for ownership to be legally enforceable.

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

According to the TCO, the seller gives warranty to deliver assets free from any encumbrances. However, the buyer may agree to take the assets subject to encumbrances. In this case, the seller's liability terminates. The parties may also execute an agreement to limit or exclude the implied warranty. However if the seller acts in bad faith, the agreement will be void. The buyer is obliged to give the seller notice of litigation, and the seller may then assist or represent the buyer in the litigation. If the notice of litigation is given in due time, a judgment against the buyer also applies for the seller unless he or she proves that the unfavourable judgment was the result of malicious intent or the gross negligence of the buyer. However, if the notice of litigation is not given in due time, the seller may be released from his or her warranty by proving that a more favourable judgment could have been achieved if notice had been given in due time. According to article 216 of the TCO, under certain circumstances the buyer's obligation to warrant title also exists in the absence of a court decision. Turkish law is silent on the limitation period and its starting date with regard to the implied warranty of title. Therefore, the general provisions of the TCO and Supreme Court decisions must be considered. Accordingly, the statute of limitations is 10 years from the dispossession.

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 or established register for the ownership of art, antiques or collectibles. However, if the aforementioned is cultural property, the collectors have an obligation to notify the Ministry of Culture and Tourism for its registration. Stolen or lost works may also be recorded in a public register. The Ministry of Cultural Affairs publishes these works on its website (www.kulturvarliklari.gov.tr/TR,195650/bakanligimiza-bagli-muzeler--birimlerden-calinan--kaybo-.html) and regularly sends a list of them to the auction houses. There are also databases including Interpol, the ICOM Red List, the Art Loss Register and Art Recovery International.

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

It is a general principle of Turkish law to protect the acquirer in good faith, whose title is considered superior to the victim of theft. Therefore, all buyers of movable property, regardless of whether it is stolen, are presumed to act in good faith. The acquirer in good faith cannot have known or should not have been expected to know about the absence of ownership at the time of the purchase. It is worth emphasising that the concept of a good-faith acquirer may change depending on the position of the acquirer. A person cannot acquire a good-faith title from a thief. Thus, the original owner (victim of theft) is entitled to claim the return of the stolen artwork from the acquirer within five years of the date the artwork was lost. In this case, the claimant must prove that the buyer acted in bad faith and that possession was lost unwillingly, and the original owner bears the burden of establishing otherwise. However, if the stolen art has been bought from a market, an auction or a dealer of objects of the same nature by the good-faith buyer, the claimant must reimburse the price paid by the good-faith buyer in order to start a legal proceeding. The good-faith buyer also reserves the right to request an indemnification for the expenses arising from the stolen art.

The concept of acquisitions in good faith does not apply to cultural property.

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 certain period?

It must be determined whether the new acquirer is the bona fide possessor. In principle, the statute of limitation starts from the date of possession. However, if the new acquirer is in good faith, he or she may also add the period of time that the artwork was possessed by his or her predecessor. However, if the predecessor did not act in good faith, this is not allowed.

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

No. The victim of theft is always entitled to claim against the acquirer in bad faith and recover the artwork.

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

If the contract is silent on risk of loss or damage, according to the TCO, the risk passes to the buyer when possession of movable goods is transferred on movables and when the sale of immovable goods is registered. The United Nations Convention on Contracts for the International Sale of Goods (CISG) includes detailed provisions with respect to the passing of risk on movable goods. The rule adopted in the TCO is embodied in article 69 of the CISG, which stipulates that risk passes to the buyer when he or she becomes the owner of the goods or, if he or she does not do so in due time, from the time when the goods are placed at his or her disposal and he or she commits a breach of contract by failing to take delivery. Article 67 of the CISG regulates two different risk-transfer mechanisms for contracts of sale involving the transit of the assets. Accordingly, if the seller is not bound to hand over the assets at a particular place, the risk passes to the buyer when the

assets are handed over to the first carrier to be transported to him or her. If the seller is bound to hand over the assets to a carrier at a particular place, the risk passes to the buyer when this is carried out.

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

Under Turkish law, there are no regulations that specifically govern the liability of the buyer or the seller to investigate the provenance or originality of art and antiques. A buyer has a general duty of diligence and must act in good faith. In practice, the buyer generally seeks a general condition report or specific expert report. However, the buyer must be particularly diligent when he or she wishes to purchase cultural property. The degree of due diligence should be determined on a case-by-case basis.

9 Must the seller conduct due diligence enquiries?

The seller is not legally obligated to conduct due diligence enquiries other than the general duty of information in accordance with the rules of good faith and prudence. According to the UNESCO International Code of Ethics for Dealers in Cultural Property, to which Turkey is a party, the sellers must be satisfied that the object has not been stolen or taken against the will of its owner, does not come from a clandestine excavation or has not been imported in breach of the export regulations of a foreign country. Moreover, like the buyer, the seller is under a general duty of diligence to prevent money laundering. However, according to the Law on Prevention of Laundering Proceeds of Crime and its regulations, which gave effect to the Financial Action Task Force recommendations to prevent money laundering in Turkey, if the seller qualifies as a dealer or auctioneer, it must provide a higher standard of diligence. Under the above-mentioned Law and its regulations, dealers and auction houses should be required to undertake customer due diligence as follows.

If the asset is sold for 20,000 Turkish lira or more (or 2,000 Turkish lira for electronic sales), or the transaction appears suspicious, the customer must be identified and his or her identity verified using reliable, independent source documents, data or information. If this occurs, the dealer or auction house must notify the Financial Crimes Investigation Board. Moreover, auction houses and dealers are obliged to keep a written record (register) of each customer's identity and details of the provenance and description of the artwork and the price paid. Breach of a dealer's or auction house's special duty of diligence may result in criminal prosecution.

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

According to article 219 of the TCO, similar to the implied warranty principle in English law, the seller will be liable if the assets sold contain deficiencies that affect their value or adequacy with respect to their prescribed and intended use, even if the seller is not aware of this particular use. However, the seller is not liable if the purchaser knew that the sold asset was defective (the seller must accept the defect). Therefore, the seller is only liable for defects that can be discovered by the buyer by adequately inspecting the sold asset if he or she has assured the buyer that they do not exist. Under the TCO, the buyer must examine the assets once they are delivered in accordance with usual customs and must notify the seller immediately once the assets have been delivered or if defects are found to exist. However, if there is evidence of gross negligence or fault on the part of the seller, he or she cannot claim that the buyer did not examine the sold asset. If the defect could not have been discovered upon inspection, the purchaser has to notify the seller immediately after discovery of the defect in order not to forfeit his or her right to a remedy. In the light of all the facts mentioned above, the conditions for the seller's warranty liability for defects are as follows: the defect must be significant; the purchaser must not have knowledge of the defect; the defect must be present at the time of delivery; the seller's warranty must not be excluded or limited by contract; the supplier's fault is not a condition; and the buyer's liability of examination (obvious defects) and notification.

It is possible for the parties to contractually waive or limit the seller's warranty if there is no evidence of gross negligence or fault. The statute of limitations is two years from the delivery date of the asset. However, this period does not apply if gross negligence is found on the

part of the seller. (If the transaction is carried out between traders, special provisions exist under the Turkish Commercial Code.)

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

In the presence of all conditions required for the seller's warranty liability, the buyer will be entitled to choose from the following rights, set forth in article 227 of the TCO: rescind the contract; reduce the price or seek reparation; or replace the asset with something similar. In addition to these optional rights, the buyer is entitled to claim compensation according to the general provisions (breach of contract) unless the seller proves that he or she is not at fault. Moreover, the buyer has a 10-year limitation period from the date of the notification that the artwork is a forgery. Where a defect leads to rescission of the sale, the buyer is entitled to recover the contract price with interest, and to claim for payment of damages for all losses that have been the direct result of the defective goods. In addition, the seller is liable for any indirect loss caused by the defective goods (eg, lost profit), unless the seller is able to prove that he or she did not commit any fault. The Supreme Court has held that the buyer of defective goods may also base his or her claim on the presence of an error for rescission of the sale. However, this is not applicable if he or she has already made a claim based on warranty. Furthermore, if there is evidence that the seller has acted in bad faith, the buyer may also base his or her claim on fraud. In this case, the limitation period will be one year from the date of the discovery.

12 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 may base his or her claim on an error. According to article 30 of the TCO, a party entering into a contract under a material error (mistake) will not be bound by the contract. There are two types of mistake: mistake in the declaration of intention; and mistake in motive. As a rule, a mistake in motive is not considered to be a material mistake; rather it is a discrepancy between a party's knowledge when entering into a contract and the actual circumstances relevant to the contract (TCO, article 32). However, the TCO can be broadly applied on this point, which means that, in certain cases, a mistake in motive is deemed to be material and can affect the validity of the contract. Conditions for a mistake in motive deemed to be material are as follows: (i) the erring party must have considered the error as a necessary basis for concluding the contract (the subjective element); (ii) the error must have been a necessary basis for concluding the contract under rules of good faith in the course of business (the objective element); and (iii) the erring party's motive must have been known or able to have been known by the other party (the recognisability element). According to article 39 of the TCO, the party at fault may void the sale provided that it makes a claim within one year of the date the error was discovered. The erring party that is terminating the sale on the legal ground of error is liable for any damages if the misunderstanding was the result of its own negligence in examining and understanding the situation.

Export and import controls

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

According to the Law on Conservation of Cultural and Natural Property (Law No. 2863), movable cultural property must be protected within the borders of Turkey. However, there are some exceptions, such as temporary exhibitions and the right of embassies and consulates to take back, on their departure, any cultural property that they brought into Turkey. Moreover, any property that is not listed in the Regulation on Movable Cultural Property of Ethnographic Quality may be removed from the country subject to museums' authorisation. Failing to comply with export control rules may result in five to 12 years' imprisonment and a pecuniary penalty of up to 5,000 days (the fine per day generally ranges from 20 Turkish lira to 100 Turkish lira depending on the circumstances; the final amount is decided by the judge). Turkey has strict customs examinations and is a member of the World Customs Organization.

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

All goods within the customs tariff schedule imported in order to be exhibited in private or public museums must be exempted from customs duties, fees and funds. However, if the art, antiques or collectibles are not imported for exhibition purposes, import VAT and other customs duties will be applied. The Customs Law, customs regulations, the Convention relating to temporary admission and the ATA Carnet regulate the temporary import regime in Turkey. Accordingly, artworks can be temporarily imported for sale purposes without value added tax (VAT) and customs duties. However, if a person decides to proceed with ATA carnet as a temporary import regime, only goods that will be used in exhibitions, fairs, meetings, etc, can be accepted. VAT may be charged on sales for export but the VAT can be reclaimed from the seller once the goods have been exported.

Direct and indirect taxation

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

VAT is levied at a standard rate of 18 per cent on the sale price of art by dealers, auction houses and artists, if they qualify to register for VAT. The taxpayer should be the deliverer of the property, not the owner of the property that is being sold. However, delivery signifies assignment of the right of disposition to the purchaser or seller. If there is a commission invoice with regard to selling of art, antiques or collectibles, this commission should be also subject to VAT.

In addition, traders of art, antiques or collectibles may be taxpayers subject to personal and corporate income tax in the context of the direct taxation system. Personal income tax is levied on the income of individuals (ie, natural persons). For the purposes of income tax, partnerships are not deemed to be separate entities and each partner is taxed individually on his or her share of the profit. Artists have an exemption on personal income tax through tax cuts. Corporate tax is levied on the profits of a company following the addition of disallowable expenses and the deduction of tax-exempt income. If a corporation buys a work of art for 5,000 Turkish lira and sells it through an auction house for 5,500 Turkish lira, based on the margin scheme, it should pay corporate income tax on the difference (ie, 500 Turkish lira).

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

The Income Tax Law provides tax exemptions for cultural activities that are authorised and supported by the public authorities. These tax exemptions apply to the following:

- national or international cultural and artistic organisations that are non-commercial;
- protection of manuscripts and rare cultural objects, and their delivery to the collections of the Ministry of Culture and Tourism;
- restoration, care, survey and transfer of cultural property;
- delivery of cultural property (as defined by law) and other contemporary or traditional artworks to the collections of the Ministry of Culture and Tourism, and provision of their security; and
- production and activities concerning intangible cultural heritage, fine arts, cinema, contemporary and traditional handcraft objects, and research and film productions.

Additional tax exemptions apply for private museums founded by stock corporations. If this type of museum is sponsored or approved by the Ministry of Culture and Tourism, its expenses can be wholly exempt from corporate income tax, provided that they are declared. The Turkish Inheritance Law also lists some exceptions: certain cultural property, such as personal belongings of deceased persons and family heirlooms such as paintings, swords and medals, are not taxable. (See also questions 13–15.)

Borrowing against art

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

A pledge (possessory or non-possessory) may be taken over stock, or movable property. According to article 939 of the TCO, the main form of collateral for movable property is the pledge. A pledge transfers the

lender only a limited right in rem over the collateral. As a rule, a pledge may only be validly affected through delivery of the pledged assets to the lender, or to a third party trustee by an agreement, established between the lender and the borrower. However, there was a change in Turkish legislation regarding lending markets in the form of the Law on the Pledge of Movable Properties in Commercial Transactions (No. 6750) and its secondary legislation, which were introduced on 1 January 2017, to create an alternative method, particularly for commercial enterprises, to use movable pledges as security for financing purposes. Accordingly, this Law allows the borrower to keep possession of the movable property, which has a limited impact on art assets.

18 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?

Despite the fact that a limited number of private banks accept art as collateral because of legal, art-related and risk complexities, under Turkish legislation, if the borrower is acting for non-commercial reasons, he or she will qualify as a consumer and the loan will be accepted as a consumer loan.

19 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. Transfer of the physical possession of movable property to the pledgee or a reliable third party is the only requirement for a successful pledge under the TCO, with certain exceptions. However, the newly adopted Law on the Pledge of Movable Properties in Commercial Transactions does not require a physical delivery but instead provides for specific procedural requirements. The pledge agreement must be prepared either in written form and signed before an official of the Pledged Movable Property Registry, or certified before the notary public; or in electronic form, and signed using a secured electronic signature. The pledge agreement shall be registered to the Pledged Movable Property Registry, which was established for the perfection, monitoring and public disclosure of the pledged assets, determining priority among the pledgees and registering disposals on the pledged movable assets.

20 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?

Under general principles of Turkish law, any agreement stating that the pledged property (movable or immovable) would become the absolute property of the pledgee in the event of a default by the pledgor will be null and void. The Enforcement and Bankruptcy Law provides for two separate proceedings for the enforcement of security interests, which are the following:

- Execution proceeding without judgment. The lender can apply to the execution office along with the documents proving the existence of its receivables.
- Execution proceeding with judgment. The lender can apply to the execution office with a decision given by the competent court, or a document with similar legal effect.

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

Yes. The lender with a valid and perfected first-priority security interest over the art collateral takes precedence over all creditors. However, debts arising from the expenses of the bankrupt estate administration or taxes arising from the assets of the bankrupt company have priority over all foregoing debts during the liquidation of the bankrupt estate. According to the Enforcement and Bankruptcy Law, the proceeds of sale of the debtor's assets are distributed among creditors in the following order:

- debts incurred during the administration of the bankrupt estate;
- taxes, duties, fees and other governmental charges;
- secured obligations;

- employees' wages for the past year, severance payments and unemployment insurance funds;
- certain debts of the bankrupt estate under domestic family law;
- privileged receivables of the bankrupt estate under specific laws (eg, attorneys' fees, utilities debts); and
- unsecured receivables.

Intellectual property rights

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

It is not mandatory to register copyright in order to establish certain rights, and registration is not a prerequisite for the enforcement of copyright. Copyright protection starts from the creation of the work (from the first communication of the work to the public) without the necessity for notification or registration. However, cinematographic and musical works must be registered to exploit rights and facilitate proof of ownership (not for creation of the rights). It is optional to register copyright for artworks. However, registration creates a presumption with respect to the date of creation.

23 What is the duration of copyright protection?

Copyright protection starts when the work becomes public and subsists for the life of the author, plus 70 years following the death of the author. The 70-year period starts from 1 January of the year following the author's death. If there is collective ownership of a work, the 70-year period begins from the date when the last surviving author dies.

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

The consent of the author or copyright owner is not required for the act of displaying a work in public if ownership of the artwork was transferred.

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

No. This should be considered as copying and issuing copies of the work to the public. Therefore, it should be accepted as a copyright infringement unless permission from the copyright owner is obtained.

26 Are public artworks protected by copyright?

Yes. Copyright has the characteristics of absolute rights. Accordingly, only the financial rights of the author may be assigned, wholly or partially, although he or she may license the right to use the moral rights. Usually, the artist will hold copyright in the work and the government only has a licence to use the work. There are also some exemptions, such as fair use in the common law, which includes public interest, public order and private (personal) use. According to article 40 of the Copyright Law, 'works of fine art permanently placed on public streets, avenues or squares may be reproduced by drawings, graphics, photographs and the like, distributed, shown by projection in public premises or broadcast by radio or similar means. For architectural works, this freedom is only valid for the exterior form.'

27 Does the artist's resale right apply?

Yes. Under article 45 of the Copyright Law, artists are entitled to royalties each time one of their works is resold through an auction house or by a professional art dealer. Accordingly, if the price of the first sale is lower than the second sale, the author of the artwork (or his or her heir) may request compensation from the reseller after each sale. However, compensation can only be requested within the protection period of 70 years starting from the first date of sale. The resale right cannot be claimed for all artworks – those that are subject to the resale right should be originals bearing the signature of the author. The artist's resale right does not apply to architectural works.

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

The moral rights for visual artists include the right to publish; the right of attribution; and right of integrity. Unlike the financial rights of the author, moral rights cannot be waived or assigned. However,

the copyright holder may license the right to use the moral rights. Any agreement to the contrary is considered void. The duration of protection is the lifetime of the author plus 70 years following his or her death. Copyright covers the author's moral rights, such as the right to publicise the work and to designate the author's name, prohibition of modification of the work and rights against owner or possessor of the work.

Agency

29 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?

Under article 532 of the TCO, a commission agent refers to a person who buys or sells movable property or securities in his or her own name on behalf of the principal in return for a commission. Accordingly, this compensation will be payable where it is agreed or customary.

30 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 has a number of statutory obligations, including loyalty and duty of care towards the principal. Moreover, according to article 533 of the TCO, the agent has an obligation to keep the principal informed of the performance of the commission contract (duty to account) and compliance with the principle's instructions. Thus, the agent has a duty to disclose any commission to the principal, who has to authorise it. It is generally recommended to define in the contract when the agent is entitled to commission, the amount of commission and when payment of the commission is due.

31 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?

No. Turkish law recognises privity of contracts, therefore, only parties to a contract can be bound by the provisions of the contract. For example, if a sales contract exists between an agent and a third party, the principal will not be able to claim any right, as he or she is not a party to the contract.

Consigning items

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

Under article 509 of the TCO, 'the agent acting on the principal's behalf acquires claims in his own name against third parties, such claims pass to the principal provided that he has fulfilled all his obligations towards the agent under the agency relationship.' The transfer of acquired rights to the principal has no other condition than payment of the agent including his or her fees and reimbursement of all his or her costs and expenses. Article 509 also provides for when the agent is bankrupt. Similarly, liquidation of the agent will not prevent this legal assignment of claims in favour of the principal. Accordingly, the principal can claim for movable goods that the agent took possession of in his or her own name but on the principal's behalf, subject to the agent's own rights of lien.

Auctions

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

There are limited provisions under the TCO that specifically regulate the sale and purchase of art, antiques or collectibles at voluntary live auctions. However, these provisions do not cover all aspects of the transaction, which means that the general provisions of the TCO and the Turkish Commercial Code must also be applied.

34 May auctioneers in your jurisdiction sell art, antiques or collectibles privately; offer advances or loans against art, antiques or collectibles; and offer auction guarantees?

Yes, auctioneers may sell art, antiques or collectibles privately. In very rare cases auctioneers may also offer advances or loans against art and offer auction guarantees.

Spoliation during the Nazi era
35 In your jurisdiction, in what circumstances would the heirs of the party wrongfully dispossessed typically prevail over the current possessor, if a court accepts jurisdiction and applied the local law to a claim to art lost during the Nazi era?

There are no regulations that are specifically related to the Holocaust in Turkey. Claims may be governed by the general rules against transactions in stolen property, including in particular those pertaining to the protection of the acquirer in good faith (see question 4).

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

No.

Lending to museums
37 Who is responsible for insuring art, antiques or collectibles loaned to a public museum in your jurisdiction?

If a public museum has been loaned art, antiques or collectibles for an exhibition, even if it is cultural property, the artwork will usually be covered by commercial insurance as Turkey does not have a particular system in place, such as the Government Indemnity Scheme in the United Kingdom. There is no regulation of loans to public museums in Turkey. The parties may freely decide on the responsible party for insurance, which must be *tailor-made* fine art insurance.

38 Are artworks, antiques or collectibles loaned to a public museum in your jurisdiction immune from seizure?

Yes. Public museums provide anti-seizure guarantees to the lender, 'approved' museums and galleries. The Ministry for Culture and Tourism is the competent authority to issue the necessary authorisations.

Cultural patrimony
39 Is there a list of national treasures?

The term 'national treasure' is not included in Turkish legislation. According to Law No. 2863, cultural property encompasses all public or privately owned immovable or movable property that is related to science, culture, religion or fine arts and that belongs to prehistoric and historic periods, or that are artefacts of prehistoric and historic periods that have scientific or cultural value, and that may be above ground, underground or underwater. National treasures may be considered movable cultural property that belongs to public collections and collections of national museums, and all immovable cultural property. There are different valuation elements in order to list an artwork as cultural property, such as rarity and public interest. If an artwork is listed as cultural property, which is subject to public ownership, the former owner is entitled to compensation.

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

Yes. According to article 30 of Law No. 286, 'Public institutions and organisations, foundations, real and legal persons shall be obliged to, first of all, inform and show state museums movable cultural and natural property and collections that are commodities and estates for sale or objects for sale at an auction.' Therefore, collectors may exchange or sell the items in their collections to each other unless they notified the public authority 15 days prior to the exchange and the museum registers it. However, priority of purchase is retained by the state. A commission established by the Ministry of Culture and Tourism designates the purchase price.

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

According to article 5 of Law No. 2863, all cultural property (whether belonging to the state, public institutions or private institutions or individuals) is under state control and considered to be state property. In other words, the state has *de jure* and absolute right of ownership at all times even before the discovery. Therefore, there is an obligation to notify the government authority for classification and registration of the cultural property. Accordingly, if the cultural property is not deemed

necessary to be acquired by public museums, it will be returned back to its owner with a document. By doing this, the private owner will have a limited ownership right on the cultural property.

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

Turkey ratified the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property in 1979 and implemented it without any reservations.

Turkey is also a signatory to the following international conventions relating to cultural property:

- the Convention for the Protection of the Architectural Heritage of Europe (the Granada Convention, 1985), which was ratified in 1989 and entered into force in 1990;
- the Convention for the Protection of the Archaeological Heritage of Europe (the Valetta Convention, 1992), which was ratified in 1999 and entered into force in 2000;
- the Convention Concerning the Protection of the World Cultural and Natural Heritage (Paris, 14 November 1957), which was ratified in 1982 and entered into force in 1983;
- the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954), which was ratified and entered into force in 1965; and
- the Convention on the safeguarding of the intangible Cultural Heritage (Paris, 17 October 2003), which was ratified and entered into force in 2006.

Turkey is also a member of UNIDROIT, but it has not ratified the 1995 Convention on Stolen or Illegally Exported Cultural Objects.

In addition to asking for restitution under Turkish law, the requesting state (if a member) can claim restitution in compliance with the UNESCO Convention. According to article 7 of this Convention, a requesting state may take appropriate steps to recover and return any cultural property imported after the entry into force of the Convention provided that the requesting state pays the appropriate compensation to an innocent purchaser or to a person who has valid title to the property.

Anti-money laundering
43 What are the anti-money laundering compliance obligations placed on the art trade?

See question 9.

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

Although the CITES Convention entered into force in Turkey in 1996, the regulations implementing the convention took effect five years later in December 2001. However, these regulations are not sufficient as they have limited sanctions. In addition, Turkish criminal law does not contain any special provisions on wildlife trade (only general provisions are being implemented). Fines have been anticipated in the Customs Law in this regard.

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

If a pre-CITES certificate issued by the CITES management authorities verifies that the specimen was acquired before Turkey became a party to the CITES Convention or prior to the date the species was listed under CITES, it may be exempt from sale, import or export controls.

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

The Ministry of Forest and Water Management has the authority to issue CITES certificates for the sale, import, export and re-export of each species listed in Turkey's CITES regulations. Exporters must attach the certificate, which is valid for six months, to their customs declaration form. Certificates for import are valid for 12 months.

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

No.

Consumer protection

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

Any natural person or legal entity buying art, antiques or collectibles for non-commercial purposes will be considered a consumer under article 2(k) of the Turkish Civil Procedure Law (TCPL). The consumer may cancel (or withdraw) from a sale contract without giving a reason if that type of contract is identified in the TCPL. The concept of off-premises sales and distance sales contracts, which provide the right to cancel without a reason and without incurring any penalties, are available under the TCPL. Where the right to cancel applies, the TCPL places the responsibility of informing the consumer of this right directly on the trader and the consumer has to exercise it within the statutory

period. In particular, for distance and off-premises contracts the seller must notify the consumer that he or she has the right to cancel the contract within 14 days of receiving the items bought. If the trader fails to inform the consumer of their right to cancel, TCPL and relevant regulations extend the cancellation period by one year from the end of the initial 14-day period. However, the circumstances in which a contract is made on- or off-premises are not always clear. In instalment sales contracts, the consumer's cancellation right should be exercised in seven days, unless the dealer has not informed the consumer of their right to cancel.

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

The TCPL provides obligations for sellers that apply to all consumer agreements, including the following: fair provisions in a contract; liabilities owing to defects (second-hand goods sold at auction where the buyer had the opportunity to be personally present at the time of sale are deemed to be sold in 'as is' condition); adequate information; and transparency. (See question 48.)



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Buying and selling

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

Title typically passes from seller to buyer upon payment of the purchase price in full. The parties can agree, in the contract, on a different triggering event, such as acceptance following inspection, receipt upon delivery post-shipment or other transfer.

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

Under the Uniform Commercial Code (UCC), which governs sales of goods, a seller gives a buyer both express warranties and implied warranties. Article 2 of the UCC, adopted in 49 states, including California, provides the express warranty of authenticity and of title, and the implied warranties of merchantability and fitness for a particular purpose. The seller warrants that a work is by a particular artist or from a particular country of origin, period or culture. Express warranties of authenticity arise from a seller's affirmation of facts, promises or statements about authenticity, provenance, etc. Unless specifically excluded or modified, every contract for the sale of art includes a warranty stating that the seller is transferring good title, the seller has the right to transfer title, and the works are transferred free of security interests, liens or other encumbrances of which the buyer has no knowledge. Implied warranties arise from the circumstances or conduct of the sale and not from express statements of the seller. The statute of limitations under section 2 of the UCC is four years from breach, regardless of knowledge of the breach (unless fraud can be shown).

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 registration system for works of art in California. Decisions by judges in US cases involving stolen art or fraudulent transactions often note that a comprehensive national registration system would simplify transactions and avoid foul play. There are certain non-compulsory, non-comprehensive databases that exist for researching works of art. For example, a UCC-1 financing statement allows a creditor to file a statement identifying the creditor, the work, and perfecting a security interest by public notice. Databases such as the Art Loss Register, the Federal Bureau of Investigation's National Stolen Art File (NSAF), the International Foundation for Art Research's Stolen Art Alert and Interpol are all sources of information, but there is no central registry in the United States.

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

Statutes of limitations, determining the commencement of a claim, vary from state to state, with some favouring a rightful owner and others favouring a subsequent purchaser. California utilises the discovery rule, which provides that actions must be brought within three years of the time the plaintiff discovers the facts giving rise to a cause of action, or, with exercise of reasonable due diligence, should have discovered the facts.

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 certain period?

Under US law, a thief cannot pass good title, allowing the victim to recover a stolen work irrespective of the good faith of the subsequent purchaser, but subject to the defence of the statutes of limitations. There are certain circumstances that permit a subsequent purchaser who acquired a work in good faith (ie, a bona fide purchaser for value) to acquire good title from a seller with voidable title, but only if the voidable title arose from fraud, non-payment, etc, and not by theft. In situations involving stolen art, only void title results. However, the recovery right may be barred by the statute of limitations or by laches (an equitable remedy that precludes recovery where a party unreasonably delayed in asserting a claim, causing prejudice to the good-faith purchaser).

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

A person that acquires a work in bad faith, for example with knowledge of theft or other infirmity, cannot acquire good title, irrespective of the passage of time.

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

Risk of loss typically passes on transfer of title, and transfer occurs upon payment unless the parties agree otherwise. The parties can agree by contract that risk of loss will transfer at a different point, for example upon delivery following shipping or once the work clears customs. However, the parties should agree in writing as it is critical to know at all times whether the buyer or seller is responsible for the risk of loss and for insuring the work.

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

The due diligence obligations of a buyer will depend on whether a buyer is an ordinary purchaser or a merchant who deals in works of that kind. For an ordinary purchaser, there is no duty of due diligence imposed by law, but a reasonable buyer will enquire into title, provenance, the identity of the seller, the condition and attribution of the work, etc. Dealers and other merchants are held to a higher due diligence standard of reasonable enquiry in the trade.

9 Must the seller conduct due diligence enquiries?

A seller has certain due diligence obligations. A seller must satisfy the express and implied warranty obligations of the UCC, as outlined in question 2. This means a seller must be satisfied that he or she can warrant free and clear title, authenticity, etc. The seller is often contractually required to disclose any and all information in his or her possession, disclose restoration and warrant that no export or import laws were broken. A seller would be prudent to enquire into the financial stability and reputation of the buyer to avoid dishonoured cheques, money laundering, and so on.

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

As noted in question 2, a seller gives a buyer express and implied warranties of authenticity and of title. These can be limited contractually, for example, with express disclaimers such as the work is sold 'as is', but such disclaimers may well reduce the purchase price. Where a merchant states, among other things, the artist, date and country of origin, in a bill of sale, the dealer cannot disclaim authenticity or title by contract. These warranties run for a period of four years from date of purchase.

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

In cases of forgeries, the UCC express warranty of authenticity provides a cause of action. In addition to express warranties, authenticity issues can also fall within the ambit of implied warranties, as more fully described in question 2. Moreover, tort law may provide recourse in forgery cases to add additional claims to the breach of warranty under contract law. The aggrieved buyer may claim that the seller committed the tort of fraud, which occurs when the seller has made an intentional or knowing misrepresentation of a material existing fact about the artwork with the intention that the misrepresentation be relied upon, which the buyer does to his or her detriment. Another tort remedy is negligent misrepresentation, which means that the seller makes certain false representations as to authenticity, value, etc, without reasonable grounds or basis for such belief. Negligent misrepresentation does not require bad faith or the seller's intent or knowledge of the misrepresentation.

12 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?

Under certain circumstances, a seller may seek to void a sale claiming mistake or error, upon learning, subsequent to the sale, that the work is different from and far more valuable than the work the seller thought it to be at the time of the sale. The seller seeks rescission on the ground of a mutual mistake. Courts do not look favourably on such claims as the law seeks settled commercial transactions. But where it can be shown that there was, in fact, an honest mistake on the part of both seller and buyer, rather than failure to investigate, conscious ignorance, assumption of the risk, etc, a 'mutual mistake' case can be brought. Whether a seller can succeed will depend on the parties' expertise, knowledge and ability to discover or determine the facts upon which the mistake was based. Most courts find that the parties comprehended the risk and entered into the written contract with full knowledge thereof, and should therefore be required to live with the results. Seller's remorse is not often a successful legal claim.

Export and import controls**13 Are there any export controls for cultural property in your jurisdiction? What are the consequences of failing to comply with export controls?**

Unlike many countries, the United States does not have export controls for cultural property. Certain exceptions do apply, though, to protect goods in commerce. The Native American Graves Protection and Repatriation Act (NAGPRA) protects Native American human remains, burial sites and grave goods, and imposes criminal penalties for trafficking in Native American remains and certain objects. Another federal law that has had a significant impact on the art and antiquities market is the Endangered Species Act of 1973 (ESA), which affects works of art that incorporate certain animal parts, and especially the regulations governing the commerce and export of African elephant ivory under the ESA, resulting in a near total ban on the commercial trade in African elephant ivory in the United States, as more fully discussed in question 46.

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

There is no value added tax in the United States, and imported works of art are not subject to customs duties. However, state sales taxes and use taxes may be imposed, depending on the state and the circumstances. California has a statewide sales tax, and local taxes can raise the rate above the statewide tax rate.

Direct and indirect taxation**15 Outline the main types of tax liability arising from ownership and transfer of art, antiques and collectibles.**

As art escalates in value, collectors increasingly treat their art collections as investments. An art collection as investment property presents unique and challenging issues from various tax perspectives. The principal areas are income tax treatment of art, valuation issues in tax and estate planning with art. There is no wealth tax in the United States.

There will be different income tax rates depending on whether the owner of an artwork is a dealer, an investor or a collector. Dealers are taxed on the gain from the sale of art held as inventory at ordinary tax rates, and may take income tax deductions for ordinary and necessary expenses incurred in the business. In contrast, an investor holds art for the primary objective of making a profit from the appreciation in value of the art over a period of time (unlike a collector, whose primary objective is personal use and enjoyment). Investors are taxed on the gain from the sale of art held for more than one year at the more favourable long-term capital gains rate for collectibles, and art held for one year or less is taxed the ordinary income rate. Collectors, like investors, are taxed on the gain from the sale of art held for more than one year at the federal long-term capital gains rate for collectibles. Both investors and collectors are limited to their ability to deduct collection-related expenses.

State and local tax authorities are becoming increasingly vigilant when it comes to enforcing tax. Given the escalating values of art transactions, the Franchise Tax Board (FTB), California's tax authority, aggressively pursues sales or use taxes due and owing on art transactions. This FTB scrutiny can take the form of reviewing shipping manifests, examining auction records, auditing gallery sales and cross-checking museum donations, among others. Both New York and California tax authorities are watching art transactions closely and are interpreting and enforcing tax laws in an aggressive manner.

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

At the state level in California, there is no state tax on inheritance or gifts for California residents, making estates subject to federal estate tax only. Income tax for heirs is not applicable either, because inherited property is not treated as ordinary income.

It is expected that the new tax law, passed at the end of 2017, will change the tax treatment for art, though the scope and magnitude of these changes are not yet known. One certainty is that section 1031 of the Internal Revenue Code on like-kind exchanges will be eliminated. For art owners who qualify as investors for income tax purposes, like-kind exchanges under section 1031 provide a capital gains tax deferral opportunity, allowing owners of investment properties to defer payment of capital gains by reinvesting proceeds from sale of a currently owned property into the purchase of a new 'like-kind' property that will also be held for investment purposes.

Another area targeted for significant change is the deduction for a charitable donation of artwork. Museums and other cultural organisations have come to rely on the favourable capital gains tax treatment afforded to donors and are bracing for the as yet unknown shift in both estate tax treatment and income tax treatment.

Borrowing against art**17 In your jurisdiction what is the usual type of security interest taken against art, antiques and collectibles?**

The typical security interest in art is the UCC-1 financing statement and an accompanying security agreement.

18 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?

Not applicable.

19 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?

See questions 3, 17 and 32.

20 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 a borrower default are determined by contract between the parties.

21 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 perfected security interest pursuant to the UCC-1 financing statement is a priority creditor.

Intellectual property rights

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

The United States is a signatory to the Berne Convention and copyright law is under federal, rather than state, jurisdiction. Under US copyright law, copyright subsists at the moment of creation and the creator of the work owns the copyright without the need to register the work with the US Copyright Office. Copyright registration does provide certain protections, though, as registration is a prerequisite to instituting litigation, it puts others on notice of ownership and it allows the claimant to seek attorneys' fees.

23 What is the duration of copyright protection?

For works created on or after 1 January 1978, the duration of copyright under US law is currently the life of the artist plus 70 years. For works created prior to 1 January 1978, the duration rules are complicated because it depends on when and where the work was created, therefore it is advisable to seek competent counsel to assist with an analysis of duration pre-1978.

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

Exhibiting an artwork in public without the copyright owner's consent implicates two distinct, and potentially colliding, rights under the Copyright Act. The copyright owner enjoys, inter alia, the right of display and the right to exhibit the work to the public. But this exclusive right is superseded by the first-sale doctrine, which provides that the purchaser of the copyrighted work (or a copy sold in multiples such as books, prints, etc) receives the right to sell, display or otherwise dispose of the physical work, notwithstanding the interests of the copyright owner.

25 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 typically request permission for image reproduction in museum catalogues and exhibition-related marketing. This permission is relatively simple to secure through US licensing entities such as Artists Rights Society and Visual Arts and Galleries Association (or international counterparts for travelling exhibitions). Museums tend not to rely on fair use for multiple-image catalogue projects because fair use is a fact-intensive analysis on a case-by-case basis.

26 Are public artworks protected by copyright?

As noted in question 22, copyright attaches to a creative work at the moment of creation. Under US law, the fact that a work is available to the public does not strip it of copyright protection or otherwise affect its copyright status. A creator can be anonymous, as is often the case with street art, but the work is protected and the artist can reveal his or her identity at any time. In the case of commissioned public art sculptures, such as those commissioned by federal, state or local agencies, the copyright is routinely retained by the artist and is not transferred to the commissioning entity.

27 Does the artist's resale right apply?

California is the only state in the US that provides a resale right to the artist. The California Artist Resale Royalties Act of 1976 (CARRA) provides that a California seller of an original painting, drawing, sculpture or glass art in the secondary market must pay the US artist or artist's estate a royalty in the amount of five per cent of the resale price. The right extends during the artist's lifetime or within 20 years of the artist's death, and applies to works where the sale exceeds US\$1,000 or the sales price is more than the seller paid for the work. The CARRA was challenged in federal court when it was initially implemented, and more recently it has been subject to a series of constitutional challenges. The law has been struck down twice in recent years by federal trial courts – a 2016 appeal limited the law's applicability rather than invalidating it entirely – and there is a current appeal of a decision holding the entire Act to be invalid on the grounds that the US Copyright Act pre-empts it. The decision in the 2016 appeal is expected soon.

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

The US extended limited moral rights to visual artists through the passing of the Visual Artists Rights Act of 1990 (VARA), which provides rights of attribution and integrity. The attribution right allows an artist to have his or her name attached to a work he or she created and to disavow works he or she did not create. The integrity right prevents the intentional distortion, modification or mutilation of a work of recognised stature. The rights last for the artist's lifetime and can be waived in writing.

Predating VARA, California enacted the California Art Preservation Act in 1979 (CAPA). The CAPA is pre-empted to the extent that it overlaps with the VARA, but it provides the following: additional rights of attribution and integrity; civil penalties and injunctive relief for violations of such rights; specifies procedures for removal of works of public art to avoid destruction; and a right to public or private not-for-profit organisations to remove a work of fine art in order to preserve it from destruction. The law also permits attorneys' fees and is therefore a potent remedy for aggrieved artists in California.

Agency

29 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?

Agency principles arise in consignments of fine art where an artist consigns works to a gallery for sale. The California Civil Code provides the following: that, on consignment of fine art, the dealer shall be the agent of the artist for the purposes of the sale; the work of fine art shall constitute property held in trust for the benefit of the consignor; it shall not be subject to any claim by a creditor of the dealer; the dealer shall be responsible for any loss or damage; and proceeds from the sale of the work shall constitute funds held in trust for benefit of the consignor. The statute specifically provides that these provisions cannot be waived and any agreement to do so is void. A consignment by a collector on the secondary market, whether through an auction house or gallery, will also be subject to agency obligations; in this case, general agency duties of good faith and fair dealing arise, but there is no specific law in California governing agent commissions in art transactions.

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

Transparency in art transactions is favoured, but occurs infrequently. Complex transactions, with multiple intermediaries in the chain, can give rise to lawsuits, especially where undisclosed commissions are involved. California has not issued legislation in the area of agent commissions for art transactions, and case law has not provided guidance.

31 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?

Auction houses regularly pay an introductory commission to third parties or agents in the chain of the transaction. This arrangement is typically disclosed in the consignment agreement. If the commission

is undisclosed, the principal can claim the commission from the third party or agent.

Consigning items

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

It is often an unwelcome surprise for a non-artist consignor to learn of the treatment of property consigned to galleries where liquidation or bankruptcy proceedings are initiated post-consignment. As noted in question 29, California law provides that works of artists consigned on the primary market shall not be subject to claim by a creditor of the consignee (section 1738.6(b), California Civil Code). But, where the work is consigned by a collector on the secondary market, this property is available to satisfy claims of creditors. A consignor can protect his or her interest by filing a UCC-1 financing statement (see questions 3 and 17), which provides the consignor with a perfected security interest and status as a priority creditor.

Auctions

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

The auction trade is highly regulated. New York, the US centre for auctions, has well-developed laws governing the auction industry. Though California has far less auction activity, there are a number of auction houses doing business in the state and the large auction houses have recently resumed holding sales within California. The California Civil Code governs auction houses and auctioneers generally, and provides the following: that the auctioneer must disclose any liens or encumbrances on the auction item; that a bill of sale or invoice must reference the catalogue or other written materials; deposits, blank cheques or deposits exceeding purchase prices must be returned within specified periods; and auctioneers misrepresenting the nature of an auction item are subject to civil fines and required to refund the purchase price. Auction houses are also governed by the UCC, which contains numerous auction-specific provisions in section 2.

34 May auctioneers in your jurisdiction sell art, antiques or collectibles privately; offer advances or loans against art, antiques or collectibles; and offer auction guarantees?

Auction houses may sell works privately as well as at public auctions. The private sales department of an auction house is an increasingly important and active area of the market, and is viewed as favourable by consignors and buyers both for privacy and for the timing of a sale. Auction houses are free to offer guarantees, to advance funds on a guarantee, to take a financial interest in a work and to make loans against a work. All such interests and activities must be disclosed in the auction catalogue.

Spoliation during the Nazi era

35 In your jurisdiction, in what circumstances would the heirs of the party wrongly dispossessed typically prevail over the current possessor, if a court accepts jurisdiction and applied local law to a claim to art lost during the Nazi era?

Holocaust-era art has been the subject of numerous lawsuits in the United States. The US has not adopted legislation specifically addressing claims for recovery of Nazi-era looted art. As indicated above, however, a possessor of looted art remains subject to potential suits by Holocaust victims or their heirs because good title to stolen or converted property cannot be transferred, even to a good-faith purchaser.

In California, the legislature addressed the burden of Holocaust-era litigation by adjusting the state statute of limitations for bringing suit. The first statute, enacted in 2002, eliminated entirely the statute of limitations for bringing suit as long as the action was brought on or before the end of 2010. That statute was deemed unconstitutional by the courts and a subsequent statute, section 338(c) of the California Code of Civil Procedure, was enacted to extend the statute of limitations from three to six years for claims for recovery of fine art from a dealer, gallery, auction house or museum, commencing upon the discovery of both the identity of the possessor and the location of the work. The statute expressly provided that such actions must be commenced on or before the end of

Update and trends

Online art auctions are increasing in frequency and dollar volume in order to compete for the attention of a younger generation of potential collectors that is media savvy, appreciates efficient and convenient user experiences, and may prefer the anonymity of an internet transaction in some cases. Strengthening of consumer or tax regulations in this area can therefore be expected.

2017 and thus, unless revived, the benefits of law have expired and the standard jurisdictional limitations apply under the discovery rule.

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

There is no body or tribunal in the US set up to hear Holocaust-era claims. These claims are brought by litigation in the appropriate court with jurisdiction to hear the claim.

Lending to museums

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

Typically, the museum will insure the work and provide a certificate of insurance to the lender. On occasion, lenders may decide for their own business reasons to keep their insurance in place and will subsequently note that responsibility in the loan agreement.

In addition, the National Endowment for the Arts (NEA) administers the US Arts and Artifacts Indemnity Program, which provides coverage for loss or damage to eligible works on loan to US museums and organisations holding exhibitions. The indemnity covers both works from outside the US while on exhibition in the US, and eligible US works while on exhibitions outside the US.

38 Are artworks, antiques or collectibles loaned to a public museum in your jurisdiction immune from seizure?

The United States has a federal programme in place that provides immunity from seizure. The US Department of State administers the Immunity from Judicial Seizure Act, which protects from seizure certain foreign works of cultural significance that are brought into the US for temporary display or exhibition as loans to US museums.

On the domestic side, the NEA also administers a programme of domestic indemnity for works owned by public and private collections in the US while on exhibition in US museums and not-for-profit organisations. There are specific eligibility requirements and dollar limits for all indemnity programmes.

Cultural patrimony

39 Is there a list of national treasures?

The US does not have a list of national treasures. The National Gallery of Art and the Smithsonian Institution are the only US national museums, all other US museums are public or private not-for-profit organisations.

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

California does not have a right of pre-emption for the purchase of works for public collections. Similarly, there is no such federal right under US law.

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

Ownership of cultural property does not automatically vest in the state unless such property is found on federal or state land. The NAGPRA (see question 13) vests in the affiliated tribe the title to certain Native American objects.

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

Foreign states can, and do, seek to reclaim cultural property illegally exported from its territory into the United States. These actions can take the form of litigation instituted by the foreign government in the appropriate federal court under the National Stolen Property Act or can

be in the form of a judicial seizure action pursuant to a valid treaty. In addition, the Archaeological Reserve Protection Act prohibits exchange in interstate or foreign commerce of any archaeological resource taken in violation of the law, and section 497 of the California Penal Code prohibits receiving stolen property in a foreign country and bringing it into California in the knowledge that it was stolen.

Anti-money laundering

43 What are the anti-money laundering compliance obligations placed on the art trade?

Anti-money laundering compliance is voluntary in the United States in art transactions, but any prudent buyer or seller, regardless of whether they are an art merchant, will make efforts to comply with 'know your customer' due diligence enquiries, and will ensure that funds used to purchase art will not be subject to future forfeiture or disgorgement. Anti-money laundering provisions are increasingly being written into purchase agreements.

Endangered species

44 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 the CITES Convention. The ESA (see question 13), which implements CITES in the US, prohibits the taking, possessing, selling or offering for sale in interstate or foreign commerce, importing, exporting, delivering, carrying, transporting or shipping in the course of a commercial activity, any ESA species listed as endangered, or any part thereof. In addition, the ESA has the authority to issue protective regulations for ESA species identified as threatened.

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

The ESA allows for an 'antiquities exception' for articles containing endangered species or parts thereof that are at least 100 years old; are composed in whole or in part of any endangered species or threatened species; have not been repaired or modified on or after 28 December 1973; and entered at a port designated for the import of ESA antiques.

A permit is required from the US Fish and Wildlife Service, a federal agency within the Department of the Interior, to import or export endangered or threatened species under the ESA. See www.fws.gov.

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

See question 45.

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

As noted in question 13, the United States issued regulations increasing the protection for African elephants. Such regulations do not exist for rhino horn. These regulations are complicated, and address import, export, commercial, non-commercial and personal use.

For commercial purposes, the import of African elephant ivory is prohibited. For non-commercial purposes, the import of worked elephant ivory is allowed if it was legally acquired, removed from the wild prior to 26 February 1976, and is either part of a household move or inheritance, part of a musical instrument or part of a travelling exhibition.

For commercial purposes, only the export of items meeting the ESA antiquities exception is allowed. For non-commercial purposes, only the following exports are allowed: (i) items meeting the ESA antiquities exception (see question 45); (ii) items legally acquired, removed from the wild prior to 28 February 1976, and are either part of a household move or inheritance, part of a musical instrument or part of a travelling exhibition; (iii) certain worked ivory that qualifies as pre-ESA; and (iv) law enforcement and bona fide scientific specimens.

Interstate and foreign commerce in African elephant ivory is prohibited except for items that qualify as ESA antiquities, and certain manufactured or handcrafted items that contain a de minimus amount of ivory and meet certain criteria. Intrastate commerce (ie, selling within a state) is permitted for worked ivory lawfully imported prior to 18 January 1990, the date the African elephant was listed on Appendix 1 of CITES, or ivory imported under a CITES pre-convention certificate. In both cases, the seller must demonstrate the facts to support the exception.

Non-commercial movement within the US (within and across states) of legally acquired ivory is allowed. The personal possession and non-commercial use of legally acquired ivory is also allowed.

Consumer protection

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

California courts permit a claimant to cancel a sale where fraud can be proved, and where a seller breaches the express and implied warranties of authenticity, title or merchantability. Additionally, the California legislature has enacted a consumer protection statute, the California Fine Prints Act (the Farr Act), for fine art multiples. The Farr Act provides that dealers must issue a certificate of authenticity with any sale of a fine art print, and specifies the requirements thereof, including the artist's name, whether the work is signed, the medium or process, the year and the size of the edition. It also provides that the dealer must post in a conspicuous place a sign that notifies consumers that California law requires disclosure of certain information concerning prints or photographs, and that a person can request such information prior to purchase. Failure to observe such requirements can result in penalties or cancellation of the sale (or both).

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In addition, in 2016, the legislature passed a strict consumer protection statute governing autographed collectibles. In light of California's unique status as the centre of the entertainment industry, regulation of memorabilia was deemed an important state interest.

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

There are general obligations under California law for art businesses selling to consumers. For example, compliance with business registration and filing requirements, and website requirements such as terms of use and privacy policies. As noted in question 29, art dealers have certain obligations to their artists, but the Farr Act is the only art-specific consumer protection legislation in California.

United States – New York

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Buying and selling

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

The passage of title to art, antiques and collectibles is generally governed by section 2-401 of the New York Uniform Commercial Code (NY UCC), which applies to sales of goods. Under that statute, title to goods passes from the seller to the buyer in any manner and on any condition explicitly agreed to by the parties (eg, until full payment); however, any reservation by the seller of title in goods shipped or delivered to the buyer is limited to a reservation of a security interest. The statute contains default rules that set the time that title will pass in the absence of an explicit agreement in various scenarios, including when the seller is required to physically deliver the goods, and when delivery is to be made without moving the goods.

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

Yes, under section 2-312 of the NY UCC, the seller of a good such as an artwork warrants good title, and the work shall be delivered free from any security interests or other liens or encumbrances unknown to the buyer. This warranty can be excluded or modified only by specific language or circumstances that give the buyer reason to know that the seller does not claim title himself or herself or that he or she is purporting to sell only the portion that he or she, or a third person, may have. According to section 2-725 of the NY UCC, an action for breach of warranty must be commenced within four years after the cause of action accrues (the parties can, by agreement, reduce the limitations period to not less than one year, but cannot extend it). A claim for breach of warranty generally accrues upon tender of delivery, regardless of whether the buyer lacks knowledge of the breach.

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 registry in New York to record the ownership of art, antiques or collectibles. Apart from the well-known international art loss registers that are typically used by the trade, the Federal Bureau of Investigation maintains the National Stolen Art File (NSAF), a database of stolen art and cultural property. Law enforcement agencies in the United States and abroad report stolen objects to the NSAF, and when objects are recovered they are removed from the database.

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

New York has long protected the right of the true owner whose property has been stolen to recover the property, even if it is in the possession of a subsequent buyer who is unaware that the property was previously stolen. According to New York law, placing the burden of investigation on the potential purchaser rather than foreclosing the rights of the true owner who failed to locate his or her stolen artwork is the better rule as it does not enable illegal trafficking in stolen art.

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 certain period?

Where the work is in the possession of a good-faith purchaser, the true owner may bring a cause of action for replevin, and the statute of limitations for such claim is three years. Under New York's 'demand and refusal' rule, a claim for replevin accrues when the true owner makes a demand for return of the artwork and the possessor refuses to return it. (Until such time, possession of the stolen property by the good-faith possessor is not considered wrongful.) To counterbalance this seemingly generous limitations period, New York law gives defendants a laches defence (an equitable doctrine that bars claims based on the claimant's inexcusable delay, which unfairly prejudices the defendant).

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

Under New York law, a thief cannot pass good title. This means that a stolen work still belongs to the original owner, even if there were several subsequent buyers and even if those buyers were unaware that they were purchasing stolen goods. See *Bakalar v Vavra*, 619 F.3d 136, 140-41 (2d Cir 2010). However, the equitable doctrine of laches (discussed in question 5) can bar a true owner's claim based on inexcusable and prejudicial delay.

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

The moment that risk of loss passes from the seller to the buyer in the absence of breach is governed by section 2-509 of the NY UCC, and depends upon the particular arrangement reached between the parties as to how the artwork is to be shipped or delivered to the buyer. That statute sets forth default rules that specify when risk of loss shifts where the agreement authorises or requires the seller to ship the goods by carrier, as well as rules that apply when the goods are to be held by a bailee to be delivered without being moved. In all other cases, the risk of loss passes to the buyer on his or her receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery. The rules set forth in the statute are subject to contrary agreement of the parties.

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

There is no compulsory due diligence that the buyer must conduct, but particularly where the buyer is an art merchant, the failure to conduct appropriate due diligence may limit the claims and remedies available to the buyer. The level of investigation conducted by a purchaser varies, but prior to making any significant purchase of artwork, a purchaser should consider conducting due diligence regarding authentication, valuation, title, provenance, physical condition and compliance with any legal restrictions such as cultural heritage and animal protection laws.

9 Must the seller conduct due diligence enquiries?

While the seller is not legally compelled to conduct due diligence, he or she should do so in order to satisfy himself or herself that he or she can meet his or her express and implied warranty obligations under the NY UCC regarding warranting free and clear title, authenticity, etc.

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

Under section 2-313 of the NY UCC, any affirmation of fact or promise made to the buyer that relates to the work and forms part of the basis of the bargain creates an express warranty that the work conforms to such affirmation or promise, and any description of the goods that is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description. The seller does not need to intend to make a warranty or use any particular words such as ‘guarantee’ or ‘warrant’ in order for an express warranty to be made. However, a statement of the value of the work or a mere opinion about the work generally will not create a warranty. Warranties of authenticity are further addressed in response to question 11.

With respect to implied warranties, under section 2-314 of the NY UCC, where the seller is an art merchant, the artwork is sold with an implied warranty of merchantability, unless excluded or modified. Additionally, under section 2-315 of the NY UCC, an implied warranty of fitness for a particular purpose can arise where the seller has reason to know any particular purpose for which the goods are required and the buyer is relying on the seller’s skill or judgement to select or furnish suitable goods, unless excluded or modified. Other implied warranties may also arise from the course of dealing or usage of trade, unless excluded or modified. Under section 2-725 of the NY UCC, claims for breach of warranty must be brought within four years of the breach, and are generally deemed to accrue at the time of delivery of the work.

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

New York has enacted legislation that regulates warranty claims brought by laypersons after purchasing fine art from art merchants. Under section 13.01 of the New York Arts and Cultural Affairs Law (NYACAL), whenever an art merchant furnishes to a non-art merchant purchaser a certificate of authenticity or any similar written instrument, it creates an express warranty for the material facts stated. Thus, where the written instrument states that the work is by a named author without any limiting words, the seller expressly warrants that the work unequivocally has such authorship. By contrast, under the NY UCC, whether the seller’s statement of authorship constitutes an express warranty and therefore a basis of the bargain, or merely an expression of opinion, which would not give rise to a warranty, is a fact-based enquiry, but a dealer’s attribution of a work on an invoice is generally deemed to be a warranty that the work is by that artist, even if given to another art merchant. In a breach of warranty of authenticity claim, the purchaser bears the burden to establish that the seller lacked a reasonable basis in fact at the time the representation was made, as measured by expert opinion testimony.

An art purchaser may also seek to rescind a sale on the ground that the parties were mistaken as to the authenticity of the work at the time of the transaction. However, at least one court in New York has rejected such a claim by an art merchant purchaser, holding that the buyer’s failure to investigate the work’s authenticity prior to purchase constituted negligence sufficient to bar the application of the mutual mistake doctrine. See *ACA Galleries, Inc v Kinney*, 928 F. Supp. 2d 699, 702 (SDNY 2013).

Purchasers of artwork later proven to be forged have brought fraud claims, but such claims require the purchaser to prove that the defendant made a material misrepresentation of fact or omission of fact for the purpose of inducing the plaintiff’s reliance, and justifiable reliance on the part of the purchaser. Claims for negligent misrepresentation have also been brought by injured purchasers, but such claims require that a ‘special relationship’ exist between the parties such that a duty of care is imposed on the defendant to accurately convey information; no ‘special relationship’ will be found where the transaction was negotiated at arm’s length, even where the defendant has superior knowledge. See, for example, *Arthur Properties, SA v ABA Gallery, Inc*, No. 11-Civ. 4409(LAK), 2011 WL 5910192 (SDNY 28 November 2011).

12 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?

Although New York case law does not include a case exactly on this point, looking to mutual mistake cases involving other types of property, courts have denied rescission to a seller where, prior to the sale, the seller could have discovered the quality of the property that made it more valuable than initially believed. See, for example, *PK Dev, Inc v Elvem Dev Corp*, 226 A.D.2d 200, 201 (1st Dep’t 1996) (barring rescission of a real property sale where the seller could have discovered that the apartment was vacant, and therefore more valuable); and *ACA Galleries, Inc*, 928 F. Supp. 2d 699, 701-02 (barring a mutual mistake claim of a merchant buyer where the buyer proceeded with a sale without submitting work for authentication). Thus, it seems unlikely that a court would allow a claim based on mistake or error where the seller could have, but did not, discover that the work was by a famous master prior to sale.

Export and import controls**13 Are there any export controls for cultural property in your jurisdiction? What are the consequences of failing to comply with export controls?**

While the United States has adopted regulations restricting the import of cultural property of other nations, its laws generally do not regulate the export of cultural property, with the exception of restrictions on archaeological resources removed from federal or Native American lands.

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

Regarding customs duties, art, antiques and certain other collectibles are covered under Chapter 97 of the Harmonized Tariff Schedule, available at www.usitc.gov/tata/hts/archive/8900/890c97.pdf. Generally, original paintings, drawings and pastels executed entirely by hand are exempt from any customs duty, as are original engravings, prints and lithographs, and original sculptures as well as a limited number of castings, replicas and reproductions. Duty does apply where the work is a mass-produced reproduction or a work of conventional craftsmanship of a commercial character.

Direct and indirect taxation**15 Outline the main types of tax liability arising from ownership and transfer of art, antiques and collectibles.**

At the time of the sale, there is an obligation on the part of the New York seller to collect sales tax for the sale of a collectible (including artworks and antiques) to a New York purchaser unless an exemption applies (eg, resale by a dealer). If a New Yorker purchases a collectible out of state, he or she may be required to pay use tax when the work is brought into New York. There are no tax consequences to mere ownership of collectibles in New York, but upon the sale of a collectible, the seller will be liable to pay tax on the gain he or she recognises on the sale of the item, either as ordinary income (for dealer inventory) or capital gains. Collectibles that are gifted inter vivos may be subject to federal gift tax, and may be subject to federal and state estate tax if included in the decedent’s estate.

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

A special rate of tax applies to capital gains for collectibles. Additionally, donations of artwork to tax-exempt organisations can afford the donor the opportunity to receive a charitable income, gift or estate tax deduction. The availability and allowable amount of the charitable deduction depends upon the circumstances, including the type of charity that the donee is, the type of property donated and whether the use of the artwork is related to the charity’s purposes.

Borrowing against art**17 In your jurisdiction what is the usual type of security interest taken against art, antiques and collectibles?**

A lender commonly perfects a security interest in artwork that the borrower pledges as collateral by filing a UCC-1 financing statement with the applicable governmental authority, which in New York is the New York Department of State's Division of Corporations.

18 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?

Not applicable.

19 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?

Yes, see question 17. Perfection by filing allows the borrower to retain possession of the work while the loan is outstanding. Financing statements are registered listing the secured party, the debtor (the borrower that pledges the collateral) and the collateral. The New York Department of State's Division of Corporations maintains a database of financing statements that may be searched by the name of the debtor, the name of the secured party or the filing number.

20 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 terms of the loan agreement typically set forth the rights and remedies that the lender has in the event of default and should be considered in the first instance. However, under section 9-610 of the NY UCC, after default, a secured party such as a lender may sell the collateral under commercially reasonable circumstances so long as the sale or disposition is in compliance with the notice provisions codified in section 9-611 of the NY UCC.

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

A security interest can be subordinate to the rights of a person who became a lien creditor before the security interest was perfected. Under the NY UCC, the general rule is that the first to perfect a security interest has priority over other security interests. Certain exceptions exist; for example, a purchase money security interest can take priority over a conflicting perfected security interest on the ground that the person who provided the credit that makes the purchase of the good possible ought to have the first claim to that good. The rights of a secured lender under the NY UCC are complicated and a comprehensive statement regarding priority of creditors is beyond the scope of this survey; an attorney should be consulted regarding any questions about a particular lender-creditor scenario.

Intellectual property rights**22 Does copyright vest automatically in the creator, or must the creator register copyright to benefit from protection?**

For works created on or after 1 January 1978, copyright vests in the author once the work is fixed in a tangible form. Works in existence but not published or copyrighted before 1 January 1978 are also given automatic copyright protection. (Prior to 1 January 1978, copyright protection was contingent upon registration or publication with notice, and renewal registrations.)

Although copyright registration is not mandatory under current US copyright law, registration is required for US owners in order to commence litigation for copyright infringement. Further, where an author registers a work prior to infringement or within three months after publication of the work, the copyright owner may be eligible for an award of statutory damages or attorneys' fees. Additionally, a registration made within five years after first publication of the work constitutes prima facie evidence of the validity of the copyright and of the facts stated in the certificate.

23 What is the duration of copyright protection?

For works created on or after 1 January 1978, in general, the term of the copyright is the life of the author plus 70 years. For joint works, the copyright term is the life of the last surviving author plus 70 years. For works made for hire or anonymous or pseudonymous works, the copyright term lasts for the shorter of: 95 years from publication; or 120 years from creation. For works created before 1 January 1978 that were neither published nor registered as of that date, the term of copyright protection is generally the same as work created on or after 1 January 1978, except that the term would not be deemed to have expired before 31 December 2002, and if the work was published on or before that date, the term shall not expire before 1 December 2047.

For works created and either published or registered before 1 January 1978, the initial term of copyright protection was 28 years from the date of registration or publication with notice, and at the end of the initial term, according to a 1998 amendment to the US Copyright Act, the copyright could be renewed for an additional 67 years (for a total of 95 years of copyright protection). Before the 1998 amendment, the total protection possible was 75 years, so that any pre-1923 work fell into the public domain. Whether a work is protected by copyright is complicated (eg, foreign owners, termination of transfers), and an attorney should be consulted with any questions about a specific work.

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

The first-sale doctrine (codified in section 109 of the US Copyright Act) provides a limited exception to the copyright owner's exclusive right of public display. Under section 109(c), the owner of the artwork or anyone authorised by such owner may display the work publicly to viewers present at the place where the work is located.

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

Generally speaking, no. Included among the copyright owner's exclusive rights is the right to authorise the reproduction of copies of the copyrighted work, and to distribute copies of the work to the public by sale or other transfer of ownership. Therefore, absent a fair use, an artist's consent should be (and typically is) sought by museums for reproductions of artworks in connection with the promotion of an exhibition.

26 Are public artworks protected by copyright?

Yes, public artwork can be protected by copyright, as long as it is not a work of the US government (ie, a work prepared by an officer or employee of the federal government as part of that person's official duties), for which copyright protection is unavailable. Although some commentators have suggested that illegal street art may not be protectable, the Copyright Act does not contain any exclusion for protection on the basis of illegality of fixation.

27 Does the artist's resale right apply?

New York does not have a law affording artists royalties on the resale of a work. Additionally, although federal legislation has been introduced at various points over the years regarding a federal resale royalty, no such legislation has been passed into law.

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

Under section 106A of the Copyright Act, an author of a 'work of visual art' (as that term is defined) has certain rights of attribution and integrity. Under that statute, the artist has the right to claim authorship of his or her work, and to prevent the use of his or her name as the author of any artwork that he or she did not create. The artist also has the right to prevent the use of his or her name as the author of an artwork 'in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to [his or her] honour or reputation'. Additionally, the artist shall have the right to prevent any such intentional distortion, mutilation or other modification of his or her work that would be prejudicial to his or her honour or reputation, and to prevent any destruction of a work of 'recognised stature'. For works created on or after the effective date of the statute (1 June 1991), these moral rights endure through the end of the calendar year in which the

artist dies, and for works created before 1 June 1991, but to which title had not by that time been transferred from the artist, the rights endure through the calendar year of the work's copyright term. In the case of a joint work, moral rights endure through the end of the calendar year of the death of the last surviving author. These rights can be waived by written instrument signed by the artist, but may not be transferred.

Agency

29 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?

Under New York law, an agent owes fiduciary duties of honesty, loyalty and disclosure of all material facts relating to the subject of the agency to his or her principal. An agent may not obtain any advantage from transactions made on behalf of his or her principal without the knowledge and consent of the principal. Absent an agreement by the principal to allow the agent to retain any such undisclosed commission or other compensation, the agent is vulnerable to a claim for breach of fiduciary duty. In the art advisory context, courts in New York will look at the particular circumstances of the relationship at hand to determine whether a fiduciary relationship exists between an art adviser and a collector, or whether the relationship is at arm's length, and no fiduciary duties are owed. See, for example, *Saul v Cahan*, 153 A.D.3d 947, 949 (2d Dep't 2017), which found that no fiduciary duty was owed by the purported art adviser to the collector concerning acquisition of artwork; and *Mueller v Michael Janssen Gallery Pte Ltd*, 225 F Supp 3d 201, 205 (SDNY 2016), which found that the independent art adviser owed no fiduciary duty to the collector.

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

New York courts have made clear that parties can modify their obligations to each other by contract, such that an art merchant can limit fiduciary obligations it might otherwise have to its principal. See, for example, *Sveaas v Christie's Inc*, 452 Fed Appx 63, 66–67 (SDNY 2011). However, it is hornbook law that agents may retain benefits received during the course of performing duties on behalf of their principal only with the 'full knowledge and consent of the principal'. See *Am Assur Underwriters Group, Inc v MetLife Gen Ins Agency, Inc*, 154 A.D.2d 206, 208 (1st Dep't 1990); NY Jur 2d Agency section 230. Disclosure sufficient to give the principal adequate information to be able to provide informed consent will allow an agent to retain a commission from a third party. The level of disclosure necessary would be determined under all the facts and circumstances of the case, but a precautionary agent should consider disclosing the amount of the commission or a range of acceptable commission in addition to the fact that a commission will be paid.

31 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?

Provided that the third party owes no duties to the principal, the principal's claim would ordinarily lie against the agent to recoup the unauthorised commission. But, where the facts of the particular case would support it, the principal could conceivably have a claim for fraud, or aiding and abetting fraud, if the third party was engaged in a pattern of conduct on the part of the agent to deceive the principal.

Consigning items

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

Section 12.01 of the NYACAL provides special protection for artists and their successors who consign a work of fine art, craft or print for exhibition or commission to art merchants. Under that statute, the work and any sales proceeds derived from the sale thereof constitute trust property and trust funds, and may never become the property of the consignee or be subject or subordinate to any claims, liens or security interests of the consignee's creditors. For consignments that do not fall within this statutory protection, such as consignments by collectors, consignors should provide notice to potential creditors of their interest

Update and trends

The Holocaust Expropriated Art Recovery (HEAR) Act of 2016 established a uniform, federal statute of limitations for claims seeking the recovery of artwork and certain other objects that were confiscated by the Nazis. These claims may be brought within six years of the claimant's actual discovery of facts giving rise to the claim. Before the HEAR Act, the timeliness of such claims was governed by state laws that were generally more restrictive and varied from state to state, which led to costly choice-of-law battles, unpredictability and rulings barring meritorious claims. The new statute, which is a sea change in the law applying to Holocaust recovery claims, is expected to alleviate these concerns in ongoing and future disputes. Cases involving the application of the HEAR Act are only now winding their way through the courts, and time will tell how the courts will interpret the statute and its meaning to the rights of litigants, including the affect of the statute on the ability to assert a laches defence.

in the consigned property by filing a UCC-1 financing statement (discussed in question 17).

Auctions

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

Yes, any business that engages in auctioneering must have an auction house licence, and if a person plans to sell merchandise by public auction, he or she must also obtain an auctioneer licence. The New York City Department of Consumer Affairs has promulgated regulations that govern the business practices of auctioneers. These rules regulate the conduct of an auction and also require, among other things, that the auctioneer has a written agreement with the consignor of personal property that contains certain disclosures to the consignor regarding commissions and charges, and certain warranties and indemnities regarding the goods by the consignor, and certain disclosure to prospective bidders. The regulations can be found at www1.nyc.gov/assets/dca/downloads/pdf/about/auctioneer_law_rules.pdf.

34 May auctioneers in your jurisdiction sell art, antiques or collectibles privately; offer advances or loans against art, antiques or collectibles; and offer auction guarantees?

Yes to all of the above.

Spoliation during the Nazi era

35 In your jurisdiction, in what circumstances would the heirs of the party wrongfully dispossessed typically prevail over the current possessor, if a court accepts jurisdiction and applied local law to a claim to art lost during the Nazi era?

Under New York law, in a title action, the good-faith purchaser of an artwork bears the burden of proving that the work was not stolen. See *Bakalar v Vavra*, 500 Fed Appx 6, 7 (2d Cir 2012). Despite the burden of proof resting with the possessor, state laws governing the timeliness of Holocaust recovery claims (discussed in question 5) presented a significant obstacle in the way of the claimants' ability to vindicate their claims. In December 2016, a new federal law was enacted that established a uniform, federal statute of limitations for claims seeking the recovery of artwork and certain other objects that were confiscated by the Nazis. Now, such claims may be brought within six years of the claimant's discovery of facts giving rise to the claim (including the whereabouts of the object).

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

No, the United States has no such body.

Lending to museums

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

Under the Arts and Artifacts Indemnity Program, the federal government makes indemnity agreements with US not-for-profit, tax-exempt

organisations and government entities for coverage of eligible objects (artwork and other cultural objects) for both domestic and international exhibitions. More information about the Arts and Artifacts Indemnity Program, including eligibility and application requirements can be found at www.arts.gov/artistic-fields/museums/arts-and-artifacts-indemnity-program-international-indemnity; and at www.arts.gov/artistic-fields/museums/arts-and-artifacts-indemnity-program-domestic-indemnity. For loans that do not qualify for this programme, the responsibility for insuring artwork is determined by agreement between the lender and the borrowing institution, but it is common for the borrowing institution to supply fine art insurance coverage for the work while on loan.

38 Are artworks, antiques or collectibles loaned to a public museum in your jurisdiction immune from seizure?

The federal Immunity from Seizure Act protects the custody of artwork loaned from a foreign owner to a not-for-profit US museum. To take advantage of the statute, a US institution applies to the US Department of State for a determination that the work is of cultural significance and its exhibition is in the national interest. If the Department of State grants the application, the work is immune from seizure while on loan. In 2016, the government amended the Foreign Sovereign Immunities Act to grant foreign states and carriers that transport the loaned work immunity from suit in the US for any activity associated with certain art loans (no such immunity exists in the case of Nazi-era claims or claims based on other systemic campaigns of coercive confiscation that occurred after 1900).

Additionally, New York has an exemption from seizure statute prohibiting any kind of seizure of a work of fine art by any non-resident exhibitor at New York institutions including museums, universities and not-for-profit art galleries. (See section 12.03 of the NYACAL.)

Cultural patrimony

39 Is there a list of national treasures?

The United States does not have a list of artworks it considers as national treasures that are prohibited from leaving its borders in the way that other countries do. However, federal law protects historical and archaeological sites and their treasures. More information about these laws can be found at www.nps.gov/archeology/tools/laws/index.htm.

40 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 New York law for buying an artwork for public collections. There is also no federal right under US law.

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

Ownership of cultural property does not automatically vest in the government unless the property is found on federal or state land, with the exception of ownership of Native American cultural items excavated or

discovered on federal or tribal lands, which is governed by the Native American Graves Protection and Repatriation Act.

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

The United States ratified the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property in 1972, and in 1983 it enacted the Cultural Property Implementation Act (CPIA), implementing the following portions of the UNESCO Convention: article 7(b)(1), which requires parties to undertake to prohibit the import of documented cultural property stolen from a museum or other institution located in another state party; and article 9, which allows state parties whose cultural patrimony is in jeopardy from pillage to request assistance to implement measures, such as the control of exports, imports and international commerce. Notably, the CPIA does not implement the portion of the UNESCO Convention that obliges parties to take necessary measures to prevent museums and other institutions from acquiring cultural property that has been illegally exported. Any material imported into the United States in violation of the CPIA is subject to seizure and forfeiture, and section 2609 of the CPIA sets forth the procedures whereby works may be seized and forfeited, and offered to be returned to the state party, and whether just compensation must be paid to a claimant with title to the object. The United States has bilateral agreements regarding import restrictions with Belize, Bolivia, Bulgaria, Cambodia, China, Colombia, Cyprus, Egypt, El Salvador, Greece, Guatemala, Honduras, Italy, Mali, Nicaragua and Peru, and it additionally imposes import restrictions on cultural property from Iraq and Syria.

Anti-money laundering

43 What are the anti-money laundering compliance obligations placed on the art trade?

Art vendors, like other businesses in the United States, must report to the Internal Revenue Service any transaction (or two or more related transactions) in which they receive more than US\$10,000 in cash (see 26 USC section 6050I). Additionally, regarding the art trade, dealers in precious metals, precious stones or jewels are required to develop and implement anti-money laundering programmes (see 31 CFR section 1027.210).

Endangered species

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

Yes, CITES is codified in the federal Endangered Species Act (ESA). The US Fish and Wildlife Service implements the provisions of the ESA, and serves as the management and scientific authorities as required by CITES. As such, the Fish and Wildlife Service monitors trade through a standardised permit system and facilitates the collection of species-specific trade data.

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

See question 46.

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

Under the ‘antiques exemption’ to the ESA, the sale of items that are at least 100 years old, are comprised in whole or in part of any ESA-listed species, have not been repaired or modified with an ESA-listed species since 27 December 1973, and are imported through a designated port are exempt from ESA prohibitions. If the item was imported prior to 22 September 1982 or was created in the United States and never imported, the item is exempt from the importation port requirement. Additional restrictions exist with regard to certain animal products, as specified in question 47.

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

In 2016, a near total ban on commercial trade in African elephant ivory went into effect in the United States. More information about these restrictions can be found at www.federalregister.gov/documents/2016/06/06/2016-13173/endangered-and-threatened-wildlife-and-plants-revision-of-the-section-4d-rule-for-the-african?utm_campaign=subscription+mailing+list&utm_medium=email&utm_source=federalregister.gov. In 2014, New York enacted legislation prohibiting trade and other distribution of antiques containing ivory

and rhino horn, except under very limited circumstances. Unless an exception applies, the law prohibits any person from trading or distributing any ‘ivory article’ (defined as any item containing worked or raw ivory from any species of elephant or mammoth) or rhino horn. (See section 11-0535-a of the New York Environmental Conservation Law.) Additionally, there are laws that regulate trade in the skin or bodies of wild and exotic animals, and the possession and trade of bald eagles or golden eagles, but a comprehensive review of those laws is beyond the scope of this chapter.

Consumer protection**48 In what circumstances may consumers cancel the sale of art, antiques or collectibles?**

Under New York’s Door-to-Door Sales Protection Act, the buyer has up to three business days to cancel a door-to-door sale, as the term is defined in the act. In this kind of sale, the seller must provide the buyer with a receipt or contract disclosing to the purchaser his or her right to cancel the transaction and provide a notice of cancellation form and explanation of the right.

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

In addition to the regulation of door-to-door sales (see question 48), the New York City Department of Consumer Affairs has issued citations to galleries under truth-in-pricing law for failing to conspicuously display price listings for artworks for sale.

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
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Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
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Fund Management
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Government Investigations
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Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
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Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
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