

ARGENTINA

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1. CULTURAL HERITAGE AND ART MARKET

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

There are several regulations of this type. Archaeological remains are considered public assets and cannot be bought nor sold. The same rule applies to pre-Columbian artefacts and works of art deemed "of national interest".

Law 27103 and its implementing regulations (Decree 2525/2015, enacted in 2015) amended earlier statutes dating back from 1940 which created the National Commission on Monuments, Places and Historical Assets. Although mainly involved with museums and monuments, the Commission also has authority to classify and list "movable property and documents belonging to private parties that may be considered of historical or artistic interest" and eventually propose their purchase by the state. Once listed, these assets cannot be sold, used as collateral or leave the Argentine territory without prior consent from the Commission. The Commission can also agree with private owners of listed assets any arrangements necessary to comply with the statute's "patriotic purposes". These arrangements can include restrictions on the owner's property rights.

In contrast, unlisted assets have no restrictions.

Violations of the statute carry severe fines and can also constitute criminal offences.

Law 24633 (1996), and Decree 1321/1997 regulate the international traffic of artworks by local or foreign artists. In all cases, exports require a prior permit. Exports and imports of artworks by living artists or artists who have been dead for less than 50 years enjoy several tax and customs benefits as well as a "fast track" permit procedure (except when declared of "national artistic interest" under Law 27103 above).

Whenever an export permit is denied, the owner can request expropriation of the relevant artwork within 180 working days after the denial.

Law 25743 (2003) (the Archaeological and Paleontological Heritage Protection Act) includes a broad description of "archaeological heritage", including "movable and immovable property or vestiges of any nature on the surface, underground or under water that may provide information of social and cultural groups living in Argentina from pre-Columbian times to recent historical times". The expression "recent historical times" has been defined as "the last hundred years counted from the date of the relevant events".

The statute places severe restrictions on the sale and transfer of pre-Columbian artefacts. All such artefacts held in private hands at the time of enactment of the statute had to be reported for registration on or before September 2003. Registered artefacts can only be transferred free of charge by will or donated to scientific or educational institutions. Sales are only possible if the artefacts are first offered to the federal or relevant provincial government. The government will set a price at which it will purchase the artefact. If this is not acceptable, the prospective seller must resort to the courts.

Non-registered pre-Columbian artefacts are presumed to have been illegally obtained and can be seized by the authorities without compensation.

The unauthorised search, transportation, deposit, sale and purchase of archaeological remains, and the attempt to export them out of, or to bring them into, Argentina constitute criminal offences.

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

Argentina has been a party to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property since 1973.

In 1978 Argentina ratified the 1972 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage.

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

Under Law 25257 (2000), Argentina ratified the 1995 UNIDROIT Convention.

The Organisation of American States approved the 1976 San Salvador Convention on the Protection of the Archaeological, Historical and Artistic Heritage of the American Nations, ratified by Argentina on 10 May 2002, through Law 25568.

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

Argentina is the second largest exporter of cultural goods in Latin America after Colombia. More than 90% of those exports go to other American countries. Around 20% of that amount goes to the United States. Figures from 2009 indicate that Argentine exports of cultural objects amounted to approximately US\$90 million. Between 2003 and 2009, the value of art exports grew 32 times. Between 2005 and 2008, the number of pieces exported increased by 65% (from 17,465 to 29,319 pieces).

There are approximately 25,000 active artists and more than 300 art galleries, most of them concentrated in the City of Buenos Aires.

According to the Argentine Association of Art Galleries, there were approximately 22,000 art transactions in Argentina in 2014, up 25% from the previous year.

There is an average of 60 art auctions in Buenos Aires every year, the majority of which are carried out by only five major firms.

The annual ArteBA fair (the largest art fair in Argentina and one of the largest in the world) has been held regularly in Buenos Aires since 1991. In 2015, 81 art galleries from Argentina and 25 foreign countries were represented and 450 artists participated. The fair attracts about 200,000 visitors every year.

A smaller fair, Expotrastiendas, (now called Eggoart) has also been held annually since 2006 in different cities, concentrating only on Argentine contemporary art.

2. PURCHASE AND EXPORT

2.1 What due diligence is required from a buyer?

The new Argentine Civil and Commercial Code entered into force in August 2015. It contains several principles on adequate due diligence, giving foremost importance to good faith. Generally, if the purchase price is significant, or the seller is not a professional capable of providing the necessary guarantees, the buyer must take all necessary precautions to make sure that the transaction will be to his satisfaction.

Under section 1053, the seller will not be liable for hidden defects if the buyer knew of them or should have known of them after a reasonable inspection, adequate to the nature of the property being purchased. If due to its complexity (such as the authenticity of a painting), the inspection required scientific or technical expertise, satisfaction of the duty of care will be governed by usage of trade.

If the buyer is not a professional dealer in art objects, he can enjoy the protection granted not only by the Civil and Commercial Code and the Consumer Protection Act but also by the Federal Constitution. In consumer litigation cases, liability waivers by the seller are not deemed to be valid.

Under the mandatory registration of works of art described in *Question 2.2*, a buyer should pay attention to whether the art object he is about to acquire is a registered object.

An interesting (and perhaps unique) rule of Argentine law considers intellectual property rights to be separate property (that is, not community property) belonging to the spouse who originated them. So, in case of death, while community property is to be divided in half between the surviving spouse and the other heirs, intellectual property rights, as separate property, are distributed in equal proportions among all the artist's heirs. This fact must be taken into account when buying property from an artist's estate.

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

Under the new Civil and Commercial Code, in force since August 2015, all sales transactions are governed by a single set of rules, regardless of the nature of the parties. Consumers enjoy specific protection and presumptions in their favour. However, it is still unclear whether constitutional and statutory protection granted to consumers applies to buyers of artworks. Resolution of the purchase agreement is possible if a substantial breach can be evidenced. The substantiality test depends on the nature of the transaction. Nullity can also be alleged if it can be evidenced that, as a consequence of a mistake, no "meeting of the minds" ever occurred.

Sellers must provide free, sufficient and easy to understand information about the essential features of the assets sold and the terms of the transaction.

Contractual promises by the seller to re-purchase artworks at the original purchaser's request after a specified term are legally binding. But it is illegal to grant the seller the right to re-acquire the artwork from the original purchaser.

It is valid to subject a sale to the purchaser's final approval. The sale will be considered a conditional transaction. If the purchaser refuses to accept the goods, the transaction will be deemed to have never existed. Approval or rejection by the purchaser must take place within a reasonable term.

If a sale is conditional on a generic specification or the quality of the goods and the condition is met, the purchaser cannot refuse payment.

No property rights accrue in favour of the purchaser until actual or constructive transfer of the artwork has taken place.

A seller must guarantee and indemnify a buyer if the latter's ownership rights over the property cannot be properly exercised or are disturbed by third party claims, except where the reason or origin of the disturbance was known at the time of acquisition. Therefore, both seller and buyer are strongly advised to perform a due diligence investigation about the piece's provenance to determine possible restrictions affecting its future and peaceful ownership by the buyer.

Most works of art are lent to the possible purchaser to determine whether an adequate setting is available. The transaction will close only when the purchaser indicates his approval. Otherwise, it will be considered as not having existed.

While a party vindicating lost or stolen movable property from a buyer in good faith is not required to reimburse the price that the buyer paid, this does not apply where the property was purchased at an auction or from a specialised dealer. Thus, purchases from art dealers make it possible for the purchaser to recover the price paid if a third party successfully claims prior ownership of the artwork.

On January 2015 (Res. Gen. AFIP 3730/2015), the Argentine tax authorities created a registry of art dealers and galleries. All individuals and entities engaged in the art trade must be registered, regardless of the type of transactions they carry out or in which they are involved, provided they carry out a minimum of three transactions for an aggregate minimum amount of ARP50,000.

Registered art dealers and galleries must report on a monthly basis all transactions (except auction sales) in excess of ARP10,000 each.

In addition, all individuals and estates (including collectors and non-collectors alike) who own works of art for an aggregate amount in excess of ARP10,000 must file an annual statement identifying:

- All works of art held as of 31 December of every year.
- The value assigned to each one.
- Its "purpose" (private use, investment, merchandise).

Failure to comply with this regulation may entail enhanced tax audits and fines.

As a consequence of this regulation, theoretically all works of art must be registered, as well as all transactions involving them. This not only includes works of art within the category of "registered movable property" but also generates a separate art market for registered and non-registered art objects. The impact of the mandatory reporting requirement imposed on art galleries and dealers regarding all art sales should not be underestimated.

Please also see the last paragraph of *Question 2.1*.

2.3 Are there any consumer protection rules that apply?

Consumer protection rules have constitutional status; thus, even if in a particular case there are no specifically applicable statutory provisions, judges will apply generic protective principles. Although there are no exceptions in the statutory language, an argument could be made that art buyers do not constitute a class of consumers deserving protection or that artworks do not constitute consumer goods. However, there are no precedents in point.

The consumer protection rules override (but basically coincide with) Civil and Commercial Code provisions regarding breach of contract and the applicable remedies. These allow purchasers to:

- Request specific performance.
- Accept a substitute product.
- Rescind the purchase with devolution of monies paid.
- Without prejudice, in all cases, to ask for damages.

Under the specific protection rules contained in the Consumer Protection Act, sellers are required to provide precise, detailed and accurate information about the goods sold.

Transactions entered into by electronic means or outside the seller's premises can always be revoked at the purchaser's option within ten days after closing or delivery of the goods, whichever is earlier (see *Question 2.1*).

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

If there is an essential factual mistake on any substantial feature of the artwork that is the subject matter of a transaction (like its quality, nature or authenticity) the transaction can be nullified within two years from the date the buyer became aware of it. In order for the mistake to give grounds for the rescission, it should have been recognisable by the seller. Thus art dealers (who are assumed to be a professional) will be unable to raise a defence of this type and will be liable.

If there is evidence of fraud on the part of the seller, the sale of fakes, forgeries or counterfeits may constitute a criminal offence.

Buyer can argue that delivery of a piece not conforming to the contract (whether by reason of fake, forgery or counterfeit) constitutes a contractual breach and thus force the seller to remedy or indemnify the buyer.

2.5 Is there any VAT or sales tax?

Under VAT law all sales of movable property located in Argentina made by traders or dealers and all definitive import transactions are subject to VAT at a flat rate of 21% (calculated on the net price of the goods). However, in March 1997 the VAT rate on artwork transactions was reduced to 10.5% if the purchaser or the importer file a sworn statement with the Secretary of Culture identifying the art object in question and its price or value.

Once the Secretary of Culture confirms that the art object qualifies for the tax reduction, it will return the sworn statement to the buyer or importer confirming the tax reduction for delivery to the tax and customs authorities. Delivery of such confirmation must take place within 30 days from the decision of the Secretary of Culture that the art object in question qualifies for the tax reduction.

Single transactions of art objects involving art dealers as purchasers will be exempt from VAT provided the seller is not an art dealer. In the opposite case, VAT will apply.

The tax becomes due on delivery of the goods or at the time they are invoiced to the purchaser (whichever is earlier). In the case of imports, the tax is payable simultaneously with any applicable customs duties.

Export transactions are exempt from VAT.

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

There are no artists' resale rights in Argentina.

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

The National Commission on Monuments, Places and Historical Assets has authority to issue or refuse export permits for "any property deemed to be part of Argentina's historical and cultural heritage".

The Commission also lists "movable property and documents belonging to private individuals that may be considered of historical and artistic interest". If listed, such property cannot be exported without prior consent from the Commission.

Even if not listed, works of art in private hands considered to be "of public interest" by the Commission cannot legally be exported.

There are certain art objects the trading of which (including exports and imports) is strictly prohibited. Others require prior approval from the *Comité Argentino de Lucha contra el Tráfico Ilícito de Bienes Culturales*, created under Decree 1166 (2003).

Exports of archaeological artefacts protected by the Archaeological and Paleontological Heritage Protection Act must be authorised by the Secretary of Culture. Exports can only be made on a temporary basis and in favour of duly accredited foreign cultural institutions and pursuant to an approved programme. A temporary export certificate must be issued by the National Anthropology Institute. Permanent exports of archaeological artefacts can only be made for research and investigation purposes.

Under Law 24633 and its implementing Decree 1321/1997 export of works of art always require a permit. In the case of living artists or artists who have been dead for less than 50 years, the export permit is not only necessary for the export itself, but also to enjoy the exemptions from export and customs duties, port fees, consular charges and freight taxes granted by law 24633, unless the relevant work of art is declared part of the national patrimony.

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

A special statute allows the federal government to reach agreements with the provinces to establish "free ports" (*zonas francas*) where all types of goods (including art objects) can be deposited for further export from or import into Argentina. Export or import duties (if applicable) will be payable on the exit or entry of the goods to or from the free port. Given the nature of artworks, it is uncommon to use free ports to deposit them.

3. PEACEFUL ENJOYMENT

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

The definitive or temporary importation of works of art by living artists or artists who have been dead for less than 50 years is exempt from all customs or other charges, including storage and consular charges and taxes on freight (but not VAT).

In those cases, import duties will be identical to those in force for products imported from countries outside Mercosur. In 1997, import duties for artworks were reduced to 0%.

3.2 Does a buyer have protection against title claims in general? Does the acquirer have protection against claims made in good faith?

Under the Civil and Commercial Code rules, "possession" means that an asset is under the power of a person with the intention of subjecting it to some ownership right.

Possession in good faith of movable property creates the presumption that the possessor is its legal owner, with the power to repeal any pretence from third parties, unless the movable property had been stolen or lost. A possessor in good faith is immune from the results of any action for rescission, nullity or resolution addressed against a prior possessor.

The presumption cannot be invoked by anyone who, by reason of a contract or as a consequence of an illicit act, is required to turn the object over to a third party.

As a consequence, ownership of a work of art by a collector who acquired it in good faith (and was not stolen or lost by a prior owner) cannot be disputed. Evidence of good faith may be required, that is, that representations and warranties were requested to and obtained from the seller or that some due diligence investigation was performed.

Under the Code, the seller must indemnify the buyer if he is deprived of the property over the object by reason of an in rem claim from a third party.

The fact that, under the mandatory registration of works of art mentioned in *Question 2.2*, most art objects must be registered. Acquisition of a registered piece from the owner of record gives additional protection to the buyer.

3.3 Does a buyer have protection against Holocaust-based claims?

Although no specific rules for Holocaust-based claims exist, if it can be evidenced that a restitution claim is related to a crime against humanity, there is no time limit for the claim. Otherwise, the right to sue for restitution will lapse after a year from the date the object was illegally taken.

If the buyer is in a position to claim good faith and prove that the artwork was acquired for adequate consideration and from a reputable seller, the claim is unlikely to succeed.

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

Argentina ratified the 1995 UNIDROIT Rome Convention on Stolen or Illegally Exported Cultural Objects. Thus, restitution of stolen cultural objects and the return of cultural objects removed from one country against its protective legislation is mandatory for the Argentine government.

The enforcement authority is the Argentine Committee to Fight Illicit Trade of Cultural Property (*Comité Argentino de Lucha contra el Tráfico Ilícito de Bienes Culturales*) comprising representatives from the National Board of Museums and Cultural Property, the Federal, Airport, Naval and Boundaries Police Divisions, the Federal Tax Authority and the Attorney General's Office. Members of the National Fine Arts and History Academies and the Argentine Committee of the International Council of Museums act on an advisory basis.

Argentina recently seized and returned over 1,000 pre-Columbian artefacts to Peru and Ecuador which had been illegally imported into the country. The fact that the artworks qualified as pre-Columbian made the solution easier, but there have been several disputes with local collectors with claims from certain countries (such as Peru) which have long-arm reaching statutes with broad definitions of what constitutes "Peruvian cultural property".

Buyers' remedies are covered in *Question 3.3* above.

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

There have been no cases reported, but Argentina would, in general terms, resort to a large number of bi-lateral treaties signed with neighbouring countries to ensure the repatriation of its own cultural property.

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

Not unless there is a written agreement between lender and borrower that provides sufficient evidence that the objects lent to local institutions belong to the lender.

The contract under which a collector or art dealer gratuitously lends an art object for exhibition purposes is called *comodato*. Under *comodato* (unlike under a deposit) the party receiving the art object can use it (that is, exhibit it). At the end of a specified time period, the same property received must be returned to the lender.

Under *comodato*, the lender remains the owner of the property. The borrower is required to use all possible diligence to keep it in good condition and is liable in case of damage. The borrower cannot use the property for any other purpose than that mentioned in the agreement. If not, the lender can immediately recover the property under *comodato*.

The borrower will not be liable under *force majeure*.

If lost or stolen property is lent to a borrower who is aware of that fact but fails to report it to the actual owner, he will be liable for the damages the owner may suffer as a consequence of the property having been returned to the lender. The owner of lost or stolen property cannot claim it from the borrower without the lender's consent, or without a court order to that effect.

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

Under section 54 of the Intellectual Property Act the sale of an artwork does not imply the right of the purchaser to reproduce it, unless otherwise provided by the parties. Notwithstanding this provision, under a reasonable construction of the statute, based on the argument that reproduction is not equivalent to exhibition, it is held that the owner can freely exhibit the work of art, as this is normally considered its ordinary purpose.

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

As a general rule, no duplication, copying, publication, performance, exhibition, adaptation or reproduction of an artwork is permitted without the author's express permission.

Protection is obtained through registration with the National Intellectual Property Registry. While normally paintings, drawings and sculptures having purely artistic motivations are not registered (although registration is highly advisable), all other works of art in non-traditional formats (videos, installations, performances) should be registered.

Registration creates a legal presumption that the registrant is the author and that the work so registered is original. Authorship is not a consequence of registration, so it is not lost if registration does not take place.

Intellectual property rights last 70 years from 1 January of the year following the year of the author's death. In the case of photographs, the property right lasts for 25 years after the date of its first publication. When a photograph is sold, the photographer retains the right to make additional copies. Thus, the purchaser of a print is not authorised to reproduce it.

4. SALE

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

As mentioned earlier, there are no specific regulations imposing a particular duty of diligence to determine the provenance of a work of art. However, the Civil and Commercial Code imposes on the seller the obligation to guarantee the non-existence of third party claims and cure any possible defects affecting title.

As indicated in the answer to *Question 2.2*, the mandatory registration of works of art adds a significant protection to both purchasers and sellers when dealing with registered artworks.

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

Due diligence standards should be enhanced whenever any transaction is entered into with a party that would normally not deal with the particular type of property being sold, or when the price clearly deviates from market standards, or whenever other features of the transaction do not conform with normal use of trade. These standards extend to all participants in the art market.

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

The Money Laundering and Financing of Terrorism Prevention Act (Law 25246) included new crimes and felonies related to money laundering and financing of terrorist activities into the Criminal Code. It also created the Financial Information Unit (*Unidad de Información Financiera*) (UIF) to analyse, process and control information related to drug trafficking, terrorism and money laundering activities. UIF has wide authority to examine activities and transactions that may involve money laundering or finance terrorism.

Section 20 of Law 25246 includes art and antique dealers among the individuals, institutions and corporations required to know and identify their clients, obtain from them information about any transaction they wish to carry out and, under UIF Regulation 28/2011, report it if exceeds ARP50,000. All other transactions which, under normal use of trade are unusual, unjustified or of unusual complexity, must also be reported. When the transaction exceeds ARP200,000, the art dealer must obtain a sworn statement from the customer indicating the origin of the funds. If it exceeds ARP500,000 the client must provide evidence of the origins of the funds.

Transactions must be reported within 150 days in case of possible money laundering and within 48 hours in case of possible terrorism financing.

If art dealers carry out their business activities through corporate vehicles, a compliance officer must be appointed by the corporation to enforce UIF regulations.

Inclusion of art dealers among those required to submit information to the UIF implies an obligation to adopt money laundering and financing of terrorism prevention policies. This means that they must prepare a handbook describing their internal mechanisms and procedures, organise periodic audits, train their personnel, keep written records of all transactions reported to UIF as "suspicious" and use adequate technological resources to put in place control mechanisms to detect possible suspicious transactions.

In the *Galería Castagnino* (2011) case, after a year-long investigation (during which the owner of the art gallery involved was required to provide evidence of all exhibits and transactions that took place between 1 January 2009 and 31 August 2010), UIF imposed a fine on the owner for having failed to comply with the anti-money laundering statute. The art dealer had alleged absolute ignorance about the existence of the relevant regulations.

As a consequence of the mandatory registration of artworks, the sale or purchase of a work of art previously registered adds additional protection to any transaction.

4.4 Is there a regime of temporary import for sale?

The temporary import of works of art by living artists or artists who have been dead for less than 50 years is exempt from all customs or other charges, including storage and consular charges and taxes on freight.

In 1997, import duties for artworks were reduced to 0%.

If artworks imported under Law 24633 are re-exported within 15 years of their entry into Argentina, the re-export will also be exempt from customs and other charges.

Temporary imports are exempt from VAT. However, VAT will become due when a temporary import becomes permanent. It will be payable simultaneously with any applicable custom duties.

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

In the case of default by the buyer (lack of payment) due to his negligence, the seller has the following alternatives:

- Request the rescission of the agreement plus applicable damages.
- Request specific performance within 15 days plus damages, failing which, the agreement will be terminated and the seller will be entitled to recover damages from the purchaser.

These rules also apply in case of sales at an auction if the auctioneer granted credit to a defaulting buyer.

If default happens without negligence on the part of the vendor (due to unforeseeable circumstances, for example) the transaction will be deemed terminated with no further obligations on the parties.

5. ART PHILANTHROPY

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

Donations require specific acceptance from the Government. In the past, most donations were made subject to the mandatory obligation to exhibit the work. Public institutions no longer accept donations subject to such conditions. Public institutions do not receive art objects in deposit.

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

Foundations are not-for-profit legal entities, created pursuant to an economic contribution from one or more benefactors. They must obtain prior authorisation, the approval of their bye-laws and of a three-year operational programme from the Superintendence of Corporations in the city of Buenos Aires (or similar agencies in the provinces).

Foundations are governed by a board of trustees (*consejo de administración*). Trustees can be appointed for life or a specified term. Trustees can be co-opted or appointed by other non-for-profit institutions.

Most of the foundations' income must be devoted to complying with their corporate purpose. Major expenses that may considerably reduce a foundation's wealth and contracts between the foundation and its founders or their heirs granting any benefit to them require government approval.

Dissolution of a foundation or the transfer of its assets due to a change of circumstances do not entitle any donor to request the revocation of any donation made to the foundation (unless the donation was subject to a condition that subsequently became impossible).

Private foundations must expressly apply for tax-exempt status.

6. TAX

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

Under the Personal Assets Tax Law all individuals residing in Argentina (except diplomatic personnel) must pay an annual tax on the value (calculated at 31 December every year) of their personal assets located in Argentina or elsewhere. Foreign residents must also pay the annual tax on the value of their personal assets located in Argentina.

For the purposes of the tax, all marital property is allocated to the husband (except for property bought by the wife as a result of her personal work or profession).

If the value of the assets at 31 December does not exceed ARP305,000, no tax is due. The tax applies on a sliding scale from 0.50% to 1.25% of the value of the assets. The highest rate (1.25%) applies when the total value of the property exceeds ARP5 million.

The value of art objects and collectibles used to determine the tax rate is that at which the property was acquired or the value it had at the time it entered the taxpayer's ownership.

The mandatory reporting of most art transactions imposed by the regulations mentioned in *Question 2.2* will greatly impact on the wealth tax collection.

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

Taxation on capital gains is subject to the rules contained in the Income Tax Law.

Capital gains are subject to income tax if they accrue on a periodic basis. Therefore, a capital gain made by a collector generated by an isolated sale of a work of art will be exempt from the tax.

Income generated by art dealers or auctioneers (whether organised as corporations or sole entrepreneurs) will be subject to income tax. In this case, the difference between the acquisition and sale value will constitute taxable income.

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

Donations and bequests are exempt from income tax for the recipient, except where the beneficiary is a corporate entity or if the recipient is an individual where donations are received periodically.

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

Taxpayers can deduct from their taxable income donations or bequests made to state-owned institutions, religious institutions and institutions or foundations devoted to scientific research, to the extent that their programmes have been validated by the Secretary of Science and Technology. Deductions are valid to the extent that the recipient institution is tax exempt. Deductible donations cannot exceed 5% of the taxpayer's taxable income for the relevant fiscal year.

In the case of donations of works of art, the deductible amount must be equal to the acquisition value of the property donated. In the city of Buenos Aires, gross turnover taxpayers may apply up to 100% of the tax due to the financing of cultural or heritage projects (or only 50% if the project is associated with the promotion of a particular brand or trade mark linked to the taxpayer). Projects must be authorised by the City's Cultural Promotion Council.

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

The income of private foundations and institutions devoted to the arts is exempt from income tax to the extent that their income and assets are devoted to accomplishing the purposes of the foundation and are not distributed among its members.

The exemption does not apply where foundations carry out industrial or commercial activities.

Activities of private foundations and institutions devoted to the arts are exempt from VAT if those activities relate directly to their specific scope.

However, the exemption is not generic and in order to apply to all activities of private foundations and institutions, they must be not-for-profit institutions, be duly registered as such and have educational, social welfare or health purposes.

If all those conditions are not met, private foundations and institutions will only enjoy a VAT exemption in connection with merchandising sales and the provision of services directly related to their corporate purposes.

7. USEFUL PRACTICAL INFORMATION/REFERENCES

7.1 Principal laws and regulations

There is no single body of law compiling all regulations related to art and the art trade. References are found in many separate statutes and regulations, for example:

- Civil and Commercial Code (where references to the contracts such as purchases and comodato are regulated).
- Intellectual Property Act (Law 11723).
- Statutes on heritage and cultural property (Laws 12665 and 25473 and their implementing regulations).
- Statute facilitating the international circulation of artworks (Law 24633).
- International treaties executed by Argentina.

7.2 Selected law enforcement authorities

All regulations related to export permits and restrictions based on heritage protection are enforced by the Visual Arts Secretary of the Ministry of Culture. Its offices are located at Alsina 1169, Buenos Aires, and are open from 12.00 to 16.00 every weekday. The telephone number is +541143816656 and the e-mail address is *artesvisuales@correocultura.gov.ar*.

Customs and tax matters are enforced by the *Administración Federal de Ingresos Públicos*.

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7.3 Selected collector and trade associations

There are no relevant collector associations in Buenos Aires. Most art galleries are members of the *Asociación Argentina de Galerías de Arte* (AAGA), found at www.galeriasargentinas.org.ar. AAGA provides authenticity certificates upon request. Contemporary art galleries are associated with GALAAC (www.galaac.com.ar).

Information about artists can be found from the *Sociedad de Artistas Visuales Argentinos* at www.sava.org.ar.

Descriptions and catalogues from art auctions in Argentina are available from www.estimarte.com.

Most antique dealers are members of the *Asociación de Anticuarios Argentinos* (www.anticuariosargentinos.com). Members of this institution issue authenticity certificates for the pieces sold by them.

7.4 Selected publications

Art law is not specifically covered by any single book in Argentina. *Derecho del Arte: Anuario Iberoamericano 2015* published by Fundación Profesor Uría, Madrid (Thomson Reuters/Civitas, 2015) contains a few chapters entirely devoted to art law in Argentina.

Other books contain general references in the wider context of copyright law, such as *El Derecho de Autor en la Argentina*, by Carlos Villalba and Delia Lipszyc; La Ley, Buenos Aires, 2001; *Manual de los Derechos de Autor*, by Horacio Fernández Delpech; Heliasta, Buenos Aires, 2011; and *Derecho de autor y sociedad de la información*, by Mable Goldstein, Ediciones La Rocca, Buenos Aires, 2005.

AUSTRALIA

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1. CULTURAL PROPERTY AND ART MARKET

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

Australia protects its cultural heritage through the Protection of Movable Cultural Heritage Act 1986 (Cth) (the PMCH Act). The PMCH Act controls the import and export of significant pieces of Australia's "moveable cultural heritage". The PMCH Act covers very limited works in specific categories (full details in *Question 2.7* below). Legitimate trade in other cultural property is not affected by the PMCH Act. The PMCH Act also enables the export of cultural property whose loss would not prove detrimental to Australian cultural heritage.

Indigenous artworks and artefacts of cultural significance to Australia's Aboriginal and Torres Strait Islander peoples are further protected by the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth). This Act enables the Australian government to respond to requests from indigenous or Torres Strait Islander persons to protect areas and objects of cultural importance in the form of a declaration.

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

Australia is a party to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The PMCH Act is the national implementing legislation of Australia's obligations under the Convention.

The unique feature of this implementing legislation is its focus on indigenous artworks and cultural artefacts.

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

Australia is not a party to the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. Australia has been a party to the United Nations 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions since 18 September 2009. This Convention is an international treaty that outlines protective measures for cultural goods, services and activities and the importance of access to a rich diversity of cultural expressions from around the world.

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

Recent market statistics for art and cultural property sales indicate that there is an upturn in the commercial market. Sale results at auctions in 2015 realised around A\$110 million.

The beginning of the 21st century saw a growth in the sale of Aboriginal art. In 2015, the sale of indigenous art was approximately A\$12.8 million.

2. PURCHASE AND EXPORT

2.1 What due diligence is required from a buyer?

Inspection

A buyer should undertake careful examination of the work, ensuring that it matches the description provided by the seller. Sellers' conditions of sale often incorporate terms which state that the buyer accepts that the work matches the description. A buyer will not ordinarily be entitled to a remedy if he had an opportunity to examine the artwork before purchase and did not find noticeable defects.

However, a buyer may be entitled to a remedy for defects that could not be detected on close inspection subject to the provisions of the relevant state or territory Sale of Goods Act or the Australian Consumer Law at a federal level. These laws, generally speaking, imply conditions and warranties into the contract relating to title, authenticity, provenance, merchantable quality, fitness for purpose and compliance with description.

The competition regulator in Australia, the Australian Competition and Consumer Commission (ACCC) has published a fact sheet on consumer rights for buyers of indigenous artworks. It contains a practical checklist of questions that should be asked of sellers. In particular, it encourages consumers to probe sellers on the names of artists, language groups, homelands, titles of works, provenance, the details of any story an artwork tells and other cultural information.

Estimated selling range

A buyer should not rely on an estimated selling range provided by a seller. It is advisable that a buyer form an independent view as to an estimated selling range as it may not be possible to subsequently make a claim for false or misleading representations where the estimated selling range provided by a seller is inaccurate.

Terms and conditions

A buyer should carefully consider all the terms and conditions of sale. For example, auction houses' typical conditions of sale include provisions specifying that the legal risk transfers to the buyer from the fall of the auctioneer's hammer, whether or not payment has been made at that point in time.

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

The Personal Property Securities Act 2009 (Cth) (the PPSA), which commenced on 30 January 2012, requires a buyer's attention. The PPSA allows persons to register their security interests (which may include interests over artwork) on the Personal Property Securities Register (the PPSR). A buyer should use the PPSR to their advantage by conducting a search in order to ensure that the relevant work is not encumbered (see further comments under *Question 3.2* below).

2.3 Are there any consumer protection rules that apply?

The Australian Consumer Law (contained in a schedule to Australia's Competition and Consumer Act 2010 (Cth)) prohibits conduct that may be misleading or deceptive, or making false or misleading representations.

Under the Australian Consumer Law, art consumers have a general unconditional right to a refund if goods are faulty, unfit for their purpose, do not match the description or sample, have defects that were not obvious or not brought to the consumer's attention at the time of purchase or if the relevant goods were bought on the basis of misleading information. Art consumers who consider that they may have been misled are encouraged to contact the ACCC.

In recent years, the ACCC has become more robust in pursuing litigation and penalties against dealers of indigenous art who have acted unconscionably. The costs have ruled that art dealers should not describe artwork as "Aboriginal" or "Aboriginal Art" unless the work was actually created by a person of Aboriginal descent.

Additionally, an Indigenous Art Code was introduced in 2011 to guide ethical commerce following the recommendation of a 2007 senate inquiry into Australia's indigenous visual arts industry. The code establishes standards for art dealings to ensure fair and ethical trade, transparency in the promotion and sale of artwork, and efficiency and fairness in disputes arising under the code. The code applies only to dealers who are voluntary signatories. Such dealers display the code logo and apply code certificates to artworks to demonstrate this commitment.

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

The remedies available in the case of fake, forgery or counterfeit will depend on the circumstances of the case.

A buyer must ensure that warranties relating to the authenticity of the work are included in the contract of sale. If this is done, selling a fake, forgery or counterfeit will constitute a breach of contract for which remedies could include damages or rescission of the contract.

Such fake, forgery or counterfeit sales can trigger section 18 of the Australian Consumer Law which disallows misleading and deceptive conduct. Remedies can include injunctions, damages, compensation orders, declarations (for example, that the contract of sale is void), adverse publicity orders or orders for delivery up for destruction. In June 2010, Justice Vickery of the Supreme Court of Victoria held in *Blackman v Gant* [2010] VSC 229 that the owner of a gallery had engaged in misleading or deceptive conduct by selling works falsely attributed to Charles Blackman and Robert Dickerson. The artists were entitled to a declaration that the works attributed were not artworks created by them. The court also imposed a mandatory injunction for the delivery up and destruction of the offending artworks.

Where a counterfeit, fake or forgery infringes copyright, an artist can make a claim for breach of copyright. Remedies for breach of the Copyright Act 1968 (Cth) include injunctions, declarations, damages, and additional damages for flagrancy.

2.5 Is there any VAT or sales tax?

Sales tax on artworks

Since the introduction of Australia's goods and services tax (GST) (equivalent to VAT), Australia does not levy sales tax.

GST on purchases within Australia

The purchase of artwork within Australia (for example between local buyers and sellers), will generally be subject to GST if the seller is registered or required to be registered for GST in Australia and the artwork is sold in the course of the seller's business. Where it applies, GST is levied at a rate of 10% of the value of the supply. The seller can pass on the GST to the purchaser contractually.

There are no specific exemptions from GST for the sale of artworks.

Buyers which are registered for GST and acquire artworks in the course of their business may be entitled to input tax credits for the GST paid on their acquisitions. Additionally, there are special rules dealing with "second hand" goods, which mean that a buyer can be entitled to input tax credits for artworks acquired for the purpose of resale, even if the buyer paid no GST on the acquisition (for example, if the artwork was acquired from a private seller).

GST on artworks imported into Australia

Artwork imported into Australia will also usually be subject to GST. GST on imports is payable by the importer and is charged at a rate of 10% of the total of the customs value, transport and insurance costs.

Australia's GST legislation does provide specific exemptions from GST for certain imports. The importation of works of art and collectors' pieces of a cultural nature that are covered by Annex B of the UNESCO Agreement on the Importation of Educational, Scientific and Cultural Materials (or Annex B of the Protocol adopted in 1976) for consignment to a public museum, public art gallery or public library which is a deductible gift recipient (see tax section below) is exempt from import GST.

Export of artworks from Australia

The export of artworks from Australia will usually be free of GST.

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

The Resale Royalty Right for Visual Artists Act 2009 (Cth) (the Resale Act) provides the legal framework for a national resale royalty scheme. This scheme applies to all commercial sales of art that occur after 8 June 2010.

The Resale Act right provides that 5% of the sale price of commercial sales over A\$1,000 be paid to artists and their beneficiaries. All living artists and beneficiaries of artists who have been dead for less than 70 years are entitled to the royalty. The artwork must have been produced by the artist or produced under the authority of the artist.

The transfer must be a resale rather than a first transfer. An art market professional (such as an auctioneer, owner, operator of an art gallery or museum, or an art dealer) must be one of the parties to the transfer of the work. For artworks created before 9 June 2010, the first sale of an artwork after that date is not subject to the resale royalty.

The seller(s) and the seller's agent (if any) are jointly and severally liable to pay the royalty, unless the seller has no agent, in which case the seller and the buyer's agent (or if the buyer has no agent, the buyer) are jointly and severally liable to pay the amount. There is a presumption that the resale royalty is payable unless the seller proves otherwise.

All commercial sales must be reported to the Copyright Agency Limited which is the administering collection society.

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

The PMCH Act implements a system of export permits for cultural property defined as "Australian protected objects". "Australian protected objects" are items of movable cultural heritage that fall within the categories specified in the National Cultural Heritage Control List (set out in Schedule 1 to the Protection of Movable Cultural Heritage Regulations 1987 (Cth)). The Control List is divided into nine sections, each of which cover a particular type of cultural object and describe the criteria that an object must meet in order to be classified as an Australian protected object. It also divides protected objects into two export classes:

- Class A outlines objects that cannot be exported and includes objects such as:
 - Victoria Cross medals awarded to Australian service personnel;
 - any piece of the suit of metal armour worn by Ned Kelly at the siege of Glenrowan; and
 - Aboriginal and Torres Strait Islander sacred and secret ritual objects, rock art and dendroglyphs (carved trees).

Class B outlines objects that can be exported if granted a permit under the Act. This includes objects such as:

- fossils and meteorites;
- heritage machinery;
- tools and weapons;
- archaeological objects relating to Australian history;
- objects of documentary heritage of significance to Australia;
- certain numismatic and philatelic objects; and
- fine and decorative art.

To obtain a Class B permit, a request is made to the Minister for the Arts. Collecting institutions can apply for a general permit to export temporarily any Class B object from their collections. The National Cultural Heritage Committee considers each export permit application before it is read by the Minister.

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

Australia does not have any designated "free ports" or "free economic zones".

3. PEACEFUL ENJOYMENT

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

All goods, including artworks, imported into Australia must be cleared through customs. For goods with a value exceeding A\$1,000, an import declaration will need to be lodged and any customs duty, GST and other taxes and charges paid.

Artworks such as paintings, sculptures and antiques attract a “free” rate of customs duty. However, as noted in *Question 2.5*, importing artworks will generally be subject to GST. The responsibility for collecting GST on imports rests with the Australian Customs and Border Protection Service and generally it will need to be paid on clearing the artworks through customs.

Importers that are registered for Australian GST may be eligible to participate in Australia’s deferred GST scheme for imports which allows them to defer the time for payment of the import GST due until the importer lodges its next “activity statement” for GST purposes.

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

Before 2012, the general rule was that a buyer who purchased personal property in good faith and paid a price equivalent to the reasonable value of the property was known as a bona fide purchaser for value without notice and had good title to that piece of property regardless of the prior interests of other persons. Purchasing in good faith simply meant that the buyer believed that the seller had an unencumbered title to that piece of property, and did not have any notice that the seller’s title was restricted in any way.

In January 2012 the PPSA created the PPSR, a single national register of security interests over personal property where a party can register their security interest in a piece of personal property, including artwork. “Security interest” is broadly defined and includes anything that, in substance, secures payment or performance of obligations (that is, traditional securities such as charges or mortgage and other security arrangements such as retention of title claims). It also covers short term leases and bailment.

The PPSA alters the general rule of title by giving priority to certain security interests that are registered on the PPSR. The bona fide purchaser will not lose title in the following circumstances:

- If the artwork was purchased in the ordinary course of the business of the seller (that is, from a gallery or auction room).
- If the artwork was purchased in any circumstances for less than A\$5,000 and the artwork will be used predominantly for personal, domestic or household purposes.

In both of these circumstances the bona fide purchaser takes the goods free of any security interest.

If the above two exceptions do not apply, the buyer’s entitlement to the artwork will be overridden by any third party security interest registered on the PPSR.

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

There is no bespoke legislation governing Holocaust-based claims. There are provisions that could address such claims but none have been tested in Australia.

The Proceeds of Crime Act 2002 (Cth) (the PoC Act) allows for confiscation and forfeiture of any proceeds of offences or benefits derived from, among other things, foreign indictable offences. A foreign indictable offence is defined in the PoC Act as an offence under a foreign law that, if committed in Australia, would be an offence attracting a penalty of at least 12 months imprisonment. It is possible that the PoC Act could be invoked in relation to Holocaust-based claims.

Australia is a party to the 1998 Washington Conference Principles on Nazi-confiscated Art (Washington Principles) which established non-binding principles that countries should follow to locate the pre-war owners or their heirs of art and take steps to expeditiously achieve a just and fair solution. Further, Australia acknowledges the code of ethics laid down by the International Council of Museums (ICOM). Notably, the Washington Principles and ICOM are not legally binding.

Australian property law, criminal law and the law of torts officially governs the legal process for recovering stolen art.

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

Under the PMCH Act, foreign governments have the right to make a request to the Australian government to find, seize and return looted property that is a protected object of that nation. However, this only applies to goods that arrived in Australia after 1 July 1987 (when the PMCH Act commenced). When the request is made by the foreign government, Australian authorities do not have regard to current ownership of the cultural object.

Australia also has standing agreements with certain countries to seize certain prohibited objects illegally imported into Australia. For example, it is illegal to import Chinese cultural relics created prior to AD 1911 or Egyptian antiquities belonging to the Egyptian government.

For repatriation of cultural objects, the PMCH Act only applies when nations (not individuals) request the object from the Australian government. As Australia is not a signatory to the 1995 UNIDROIT Convention, buyer protection from individuals is dependent on Australian property law. The bona fide purchaser rule as discussed in *Question 3.2* will apply.

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

Under the PMCH Act, the illegal export of cultural property is an offence. The PMCH Act provides that where a person exports or attempts to export an Australian protected object otherwise than in accordance with a permit or certificate, the object is forfeited. The PMCH Act came into force on 1 July 1987 and therefore only applies to goods exported (or attempted to be exported) after this date. Full penalties for breaches of the Act include fines up to A\$100,000 and/or imprisonment for up to five years.

Over the past 20 years, museums across Australia have become increasingly active in repatriation, especially with regard to indigenous art. There is an official “Australian Government indigenous repatriation policy” which seeks to set up procedures for repatriation of exported indigenous art. A notable example was in 2011 when the Natural History Museum in London returned the remains of 138 Torres Strait Islanders to their place of origin.

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

Currently, there is no over-arching regime of anti-seizure guarantees ensuring the safe return of objects on loan to local institutions. However, the Australian government and state museums and galleries have provided guarantees or letters of comfort to international lending owners exhibiting in Australia where items of great value or significance

have been provided (for example, the Musée d'Orsay loaned *Portrait of the artist's mother*, also known as Whistler's Mother, to the National Gallery of Victoria in 2016). Usually, the lending owners and local institutions enter into contractual arrangements requiring the local institution to take all necessary measures to protect objects from being the subject of claims by third parties.

The Protection of Cultural Objects on Loan Act 2013 (Cth) encourages international loans for temporary public exhibition in Australia by limiting the circumstances in which lenders, exhibiting institutions, exhibition facilitators and people working for them can lose ownership, physical possession, custody or control of objects while they are in Australia. This protection is often referred to as immunity from seizure and suit. Under this Act most types of legal action including seizure and suit (legal proceedings brought to a court of law) and the enforcement of judgments and orders are prevented.

Eligible Australian borrowing institutions can apply for approval under the protection of cultural objects on loan scheme. Approval of Australian borrowing institutions lasts for up to five years. Once an institution is approved, objects that are imported by the institution for temporary public exhibition in Australia from a lender who is not ordinarily resident in Australia will be automatically protected. Approved institutions must ensure that the conditions of the scheme, including due diligence, consultation and publication standards, are satisfied for these loans. These requirements are outlined in the Protection of Cultural Objects on Loan Regulation 2014 (Cth). Protection for an object lasts for up to two years from the date objects are imported into Australia.

The scheme protects cultural material of any type, with minimal exceptions. One of the exclusions is Australian cultural heritage material identified as "Australian Protected Objects Class A" under the PMCH Act. As noted at Question 2.7 above, Class A objects cannot be exported.

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

In Australia, the owner of an original work of art still covered by copyright can exhibit the work in a public gallery without infringing its copyright protections. The consent of the author or copyright owner is not needed for such an exhibition. However, publication of the work in the form of reproductions supplied to the public, such as photographs of the work in catalogues or brochures, is prohibited without consent from the author or copyright owner, whether by sale or otherwise.

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

In short, no. All of these uses involve a reproduction of the copyright work and generally attracts copyright protection under the Copyright Act 1968 (Cth).

Regardless of any transfer of ownership of the physical artwork, the intellectual property in the work (namely the copyright) is retained by the artist or copyright assignee.

It is therefore advisable that purchasers of copyrighted artwork obtain the necessary consents and clearances for use of the material when the work is acquired.

Limited exceptions

The Copyright Act contains limited exceptions to infringement in relation to the reproduction of copyrighted artworks held by libraries or archives.

Museums and galleries are examples of bodies that can have collections falling within the meaning of "archives", and the definition is intended to apply to major collecting institutions but not to private commercial galleries.

Moral and other rights

In addition to economic rights conferred on a copyright owner, an artist will always retain moral rights in a copyright work. These remain with the artist no matter how many times the work is resold and these rights cannot be assigned.

A seller must take care not to breach an artist's moral right of attribution, which is the right to be identified clearly and reasonably prominently as the author. Care must also be taken not to falsely attribute authorship. This right of attribution is relevant in the context of (among other things) public exhibition and reproduction and publishing.

It is also important to avoid derogatory treatment (another moral right), that is, to avoid material distortion of, mutilation of, or a material alteration to the work which is prejudicial to the author's honour or reputation.

Remedies for breach of moral rights include injunctions, damages, declarations, orders for public apology, and orders that the false attribution or derogatory treatment be removed or reversed.

Under the Copyright Act, if the artist makes it known generally or specifically to the exhibitor/seller that he wishes to be identified in a particular way (for instance, by a pseudonym or symbol), and identification of the person in that way is reasonable in the circumstances, the request must be complied with.

4. SALE

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

The seller must undertake thorough research on provenance to ensure that the work is not a fake, forgery or counterfeit purporting to be an original (particularly in the case of works by significant artists). This is essential to avoid the risk of engaging in misleading or deceptive conduct. Galleries and dealers have been found to have engaged in misleading or deceptive conduct for making false representations.

Economic copyright rights and an artist's moral rights conferred by way of copyright ownership in a work will be infringed by a person who, in Australia, sells an article if they knew or ought reasonably to have known that the article was an infringing article (or if imported, if it had been made in Australia would be an infringing article), or imports such item for sale. Thus, the seller may wish to satisfy themselves that the work:

- Does not infringe copyright by reproducing a substantial part of another original work.
- Does not infringe the relevant author's moral rights (for instance, by mutilation of the canvas).
- That the physical artwork is not stolen property, particularly where there is no contract of sale in writing.

For significant transactions, the seller may wish to undertake background research on the buyer to ensure that the buyer will be able to pay the purchase price in full. Further protection can be achieved through a contract of sale which included clauses on warranties and remedies for breach of contract.

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

The types of due diligence applicable to the trade set out under *Question 4.1* above, also extend to collectors.

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

Australia does not have a regime or regulatory authority targeting money laundering specifically in artworks.

The Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) and Financial Transaction Reports Act 1988 (Cth) provide the foundation for Australia's general regulatory regime for the detection and deterrence of money laundering. The Proceeds of Crime Act 2002 (Cth) allows the Australian government to confiscate assets derived from crime including in circumstances not requiring a conviction of the relevant parties involved.

In addition, Australian launched its first Art Crime Consultative Committee in January 2014. The committee is a joint venture between the University of Western Sydney and the New South Wales Police Force aimed at enhancing the investigative and crime prevention capabilities of the police in this industry. This is achieved through increased access to art experts, greater training and an increase in cross jurisdictional liaison in the specialised area of art crime.

4.4 Is there a regime of temporary import for sale?

There is a regime for temporary import for sale whereby goods can be brought into Australia without incurring the payment of duties or taxes. Goods can be brought into Australia for up to 12 months for the purposes of sale under sections 162 and 162A of the Customs Act 1901 (Cth). An application must be lodged with the Australian Customs Service. Approval of the application will specify a particular date by which the goods must be exported from Australia, unless a sale has been made and the taxes paid.

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

Each auction and sale conducted in Australia will have their own terms on defaulting buyers.

If there is no contract of sale, common law contract principles will apply and a seller may be entitled to damages from a defaulting buyer.

5. ART PHILANTHROPY

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

Museums Australia is an association that advocates for Australian museums and galleries. Generally, Museums Australia's code of ethics is adopted by public institutions in the gallery, museum and library industries. In its Code of Ethics it advocates that a museum must not acquire, whether by purchase, gift, bequest or exchange, any object

unless it can be proven that the object in question was legally acquired and/or imported into Australia. Where the validity of the object's ownership is in question, the museum can act as a custodian. Loans, gifts and bequests are only to be accepted where they conform to relevant acquisition and exhibition policies. Improperly valued or attributed loans, gifts or bequests are not to be accepted into collections, particularly if tax benefits are involved.

Museums Australia has also published policies on the management of indigenous art. These include that consideration is to be given to the views of indigenous communities relating to display, collection, care and return of cultural materials. The policy provides for the repatriation of highly culturally important material from museums to indigenous communities. This material often comprises ancestral remains and secret or sacred material and will have been put into a collection without the permission or knowledge of the owners or custodians, resulting in significant cultural loss to indigenous Australians.

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

The legal regime governing private foundations and museums depends on the organisation and the legal structure that the private foundation or private museum chooses to adopt. However, to obtain any tax concession, the institution must obtain certification from the Australian Tax Office. At a minimum, the institution cannot be a profit-making business and must meet strict requirements to obtain exemption from taxes. In order to achieve gift deductibility status the Australian Tax Office has set out clear guidelines on the aims and conduct of the organisations. At its simplest, the operation of the organisation must be consistent with approved aims and, in the event of wind-up or dissolution, all of the assets of the institution must be transferred to a like-minded institution and cannot be disbursed. The foundation or museum can be registered as either an association, a club or a charity. The legal regime the foundation or museum has chosen to adopt will trigger different tax obligations with the Australian Taxation Office.

6. TAX

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

Australia does not presently levy wealth taxes.

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

Artworks and other cultural property assets are characterised as capital gains tax (CGT) assets. Unless the artworks are being held on revenue account (for example, as trading stock of a business dealing in artworks), Australia's regime for the taxation of capital gains will ordinarily apply to the disposal of artwork unless the artwork was acquired prior to 20 September 1985.

A taxable capital gain will arise on disposal of artwork if the capital proceeds from the disposal exceed the asset's cost base. Conversely a capital loss will arise if the asset's cost base (ignoring certain items) is greater than the capital proceeds.

Australia's tax laws also contain special rules for the disposal of "collectables". Broadly, collectables include artworks (which in this context is defined to mean a painting, sculpture, drawing, engraving or photograph, reproductions of any of those items, or property of similar description or use) and antiques that are held mainly for the personal use

or enjoyment of the owner or their "associates". These rules operate so that:

- For collectables acquired for A\$500 or less, any capital gains or losses made on disposal are disregarded. Integrity rules apply that require that items normally sold as a set must be treated as a set for the A\$500 limit.
- Capital losses on collectables are quarantined and can only be offset against capital gains on other collectables.
- Similarly, excess capital losses on collectables in one year can only be offset against future year capital gains on collectables.
- Relevant to calculating the amount of the capital gain or loss, ownership costs such as maintenance, repair, insurance and borrowing costs cannot be included in a collectable's cost base.

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

Australia does not levy gift duties or death duties.

However, under Australia's CGT rules, gifting artwork can potentially trigger a CGT liability for the donor. This is because the market value substitution rule can apply to deem the donor to have received market value consideration for the artwork it has disposed of, notwithstanding the fact that no consideration was actually received.

Further, Australia's CGT rules must also be considered where artwork will be passed on death. Generally, both the transfer of artwork from a deceased to his personal legal representative and from the personal legal representative to the beneficiary of the deceased's estate will not be subject to CGT. An exception to this rule is if the artwork will pass to a tax-exempt entity, an Australian superannuation fund or a foreign resident, in which case, a taxable capital gain can arise for the deceased.

The fact that an asset is inherited as a result of death can have an impact on the taxation consequences that arise on a subsequent disposal by the beneficiary of the estate. For example, while no capital gain will arise on inheriting the artwork, the beneficiary will be deemed to receive the same cost base as the deceased had in the artwork.

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

Entities to which tax deductible gifts can be made

Under Australia's tax laws, certain entities are characterised as deductible gift recipients (DGRs), either specifically in the tax legislation or by endorsement by the Australian Tax Office. Broadly, an entity that makes a gift of money or property to a DGR will be entitled to claim a tax deduction for that gift, subject to the gift satisfying certain conditions.

Australia's Cultural Gifts Programme

The Australian government operates the Cultural Gifts Programme which allows for certain gifts made to endorsed public institutions to be tax deductible. The public institutions covered by this programme include public libraries, public museums and public art galleries which have been characterised as DGRs, as well as the "Australiana Fund" and the Commonwealth of Australia's "Artbank".

Under the Cultural Gifts Programme, gifts of property, including artworks (other than testamentary gifts and contributions), that are made to the above DGR institutions will be tax deductible if:

- The gift is accepted by that DGR institution for inclusion in a collection it is maintaining or collecting.
- The gift has a value of A\$2 or more (other than for Artbank).
- Certain valuation requirements are satisfied.

Generally, the amount of the tax deduction can be up to the average GST inclusive market value of property gifted (as determined by two or more valuations obtained from valuers approved by the Secretary to the Department of Communications and the Arts). However, the circumstances of the donation can impact on the amount of the deduction available. For example, if artworks are gifted with conditions that prevent the institution having full custody, control and clear title, the amount of the deduction allowed can be reduced. Another example arises where a professional artist gifts work they produced or created for the purposes of sale, in which case he may only be entitled to a deduction equal to his costs of creating or producing the artwork, or the wholesale (not retail) value.

Tax deductible gifts made under the Cultural Gifts Programme will also be exempt from CGT, with any capital gains or losses on the gift being disregarded.

Tax deductible gifts generally (gifts other than under the Cultural Gifts Programme).

Gifts of artworks, can also be made to DGRs outside of the Cultural Gifts Programme.

Gifts of property with a value of A\$2 or more, including artworks, to DGRs may be tax deductible if acquired within 12 months of the gift or where the property has been valued by the Australian Tax Office at A\$5,000 or more.

Where a tax deduction is available, the amount that can be deducted is either the property's acquisition cost or its market value depending on factors including when it was acquired and its value at the time of the donation. The specific circumstances of a gift can have an impact on the amount that can be deducted.

Unlike the situation in respect of gifts made under the Cultural Gifts Programme, CGT can still potentially apply to the gift (based on the market value substitution rules) although the tax deduction for the gift can be offset against the gain.

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

Private foundations and private museums are not automatically entitled to any special tax treatment on creation or endowment. However, entities that are charitable and registered with the Australian Charities and Not-for-profits Commission (ACNC) may be entitled to apply for a variety of tax concessions from the Australian Tax Office, including an exemption from income tax (which includes CGT).

A foundation may also be entitled to obtain an income tax exemption and characterisation as DGR if it can be characterised as either a Private Ancillary Fund (PAF) or a Public Ancillary Fund (PuAF).

A PAF is a philanthropic fund established by a will or trust instrument to which private businesses, families and individuals can make tax deductible donations. Importantly, a PAF cannot fundraise from the public and can only make distributions to other DGRs that are not themselves ancillary funds.

GERMANY

- *Bundeskriminalamt* (BKA), Federal Criminal Police Office.
- *Landeskriminalämter* (LKA), State Offices of Criminal Investigation.
- *Verwertungsgesellschaft Bild-Kunst* (VG Bild-Kunst), Collecting Society Bild-Kunst.

7.3 Selected collector and trade associations

- Arbeitskreis Deutscher Kunsthandelsverbände (ADK): <http://arbeitskreis-kunsthandel.de>.
- Arbeitsgemeinschaft Deutscher Kunstvereine: www.kunstvereine.de.
- Bundesverband Bildender Künstlerinnen und Künstler: www.bbk-bundesverband.de.
- Bundesverband Deutscher Galerien und Kunsthändler eV (BVDG): <http://bvdg.de>.
- Bundesverband des Deutschen Kunst- und Antiquitätenhandels eV (BDKA): www.bdka.de.
- Bundesverband Deutscher Kunstversteigerer e.V. (BDK): <http://service.kunstversteigerer.de>.
- Bundesverband der Fördervereine Deutscher Museen für Bildende Kunst: www.bundesverband-der-foerdervereine.de.
- Deutscher Kunsthandelsverband eV (DK): www.deutscherkunsthandel.org.
- Deutscher Künstlerbund: www.kuenstlerbund.de.
- Deutscher Kunstrat: www.deutscher-kunstrat.de.
- Deutscher Museumsbund: www.museumsbund.de.
- Deutscher Kulturrat: www.kulturrat.de.
- Deutsche Stiftung Eigentum: www.deutsche-stiftung-eigentum.de.
- Independent Collectors: www.independent-collectors.com.
- Kulturkreis im Bundesverband der Deutschen Industrie: www.kulturkreis.eu.
- Kunstsammler eV: www.kunstsammlerverein.de.
- Verband Deutscher Antiquare eV (VDA): www.antiquare.de.

7.4 Selected publications

- Klaus Ebling/Marcel Schulze (Hrsg.), *Kunstrecht*, 2. Auflage, München 2012.
- Kerstin Odendahl/Peter Johannes Weber (Hrsg.), *Kulturgüterschutz - Kunstrecht- Kulturrecht*, Festschrift für Kurt Siehr zum 75. Geburtstag, Baden-Baden 2010.
- Haimo Schack, *Kunst und Recht*, 2. Auflage, Köln u.a. 2009.

GREECE

Alkisti-Irene Malamis and Aristeidis Papathanasiou | Malamis & Associates

1. CULTURAL PROPERTY AND ART MARKET

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

Due to the long cultural history of Greece and the abundance of archaeological sites (fully excavated or not) all around the country, Greek legislation tries to combine the protection and conservation of the national patrimony. Such protection is aimed at unauthorised resellers, exporters and those who attempt to cover and build over or next to an archaeological site, but it also aims to serve as a tool that allows the sharing of Greece's "treasures" with the rest of the world.

According to the Greek Constitution, "monuments and traditional territories and elements are under the protection of the state"

The legislative system is a complex mixture between ratified international treaties, national laws and bi-lateral agreements. The term "national cultural patrimony" includes all tangible and intangible objects situated within the borders of Greece dating from ancient times to the present and also includes objects that are inside territorial waters. The main legislative act that governs "national cultural patrimony" is Law 3028/2002 which sets out the main categories of national cultural patrimony, such as cultural goods, monuments (ancient and contemporary, movable and immovable), archaeological sites/places, and intangibles such as myths, songs and folklore.

National cultural patrimony focuses mostly on movable and immovable monuments from ancient time until the present. A "monument" is defined as any cultural object that can constitute a tangible testimony and can be included in the cultural patrimony of the country. They are categorised according to their age as follows, with special rules applying for each one:

"Immovable monument" include:

- Ancient monuments dating up to 1830.
- More recent cultural goods that are more than 100 years old, that are characterised as monuments due to their architectural, urban, social, ethnological, folkloric, technical, industrial or generally historical, artistic or scientific significance.
- Even more recent cultural goods that are less than 100 years old, that are characterised as monuments due to their architectural, urban, social, ethnological, folkloric, technical, industrial or generally historical, artistic or scientific significance.

"Movable monuments" include:

- Monuments dating up to 1453.

Monuments dating from between 1453 and 1830, which constitute findings from excavation or other archaeological research or have been removed from immovable monuments, as well as church icons and operational tools from

the same era. The following are also included as long as they are characterised as monuments due to their social, technical, folkloric, ethnological, artistic, architectural, industrial or generally historical or scientific significance:

- Monuments dating from between 1453 and 1830 that do not fall under the category above.
- More recent cultural goods more than 100 years old.
- Even more recent cultural goods less than 100 years old.

Modern works of art, created within the last 100 years can be considered to be part of the "national cultural patrimony" only if they are of great significance. As a result, when dealing with art in Greece it is first of all important to verify if a work of art falls under any category of "national cultural patrimony" as described above or not.

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

Greece has ratified the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property through Law 1103 of 1980. The public authority responsible for the application of the Convention, is the Department of Documentation and Protection of Cultural Goods in the Ministry of Culture.

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

The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of Rome, 24 June 1995 has been ratified by Greece through the enactment of Law no. 3348 of 2005.

Other important conventions and bi-lateral treaties signed by Greece include the following:

- European Convention of Valletta of the 16th of January 1992 on the Protection of the Archaeological Heritage, ratified by national Law no. 3378/2005.
- European Convention of London of the 6th of May 1969 on the Protection of the Archaeological heritage, ratified by national Law no. 1127/1981.
- International Convention of Paris of the 23rd of November 1972 on the Protection of the International Cultural and Natural Heritage ratified by national Law no. 1126/1981.
- International Convention of Granada in 1985 for the Protection of Architectural Heritage in Europe, ratified by national law no. 2039/1992.
- Ratification of MoU between the Greek Government and the US Government, regarding the enforcement of restrictions in the import of Greek cultural items of archaeological and byzantine patrimonial items until the 15th century A.C., national Law no. 4026/2011.
- MoU between the Greek Ministry of Foreign Affairs and the Public Entity Administering of the Cultural Heritage of the Republic of China, regarding the co-operation on the prevention of theft, illicit excavations, import and export of cultural goods, national Law 3914/2011.

- Bi-lateral Agreement between Greece and the Swiss Federation regarding the Import, Transit and repatriation of cultural goods of 17.02.2011.
- Ratification of Co-operation Agreement in the sector of cultural inheritance between the Greek Government and the Russian Federation, national Law no. 2600/1998.
- Ratification of the Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999, national Law 3317/2005.
- Ratification of the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict and its Protocol, national Law 1114/1981.

Under the Greek Constitution (Article 28), ratified international agreements have a superior legal effect where there is a conflict with national legislation.

Even though Greece has ratified the vast majority of the important international treaties, no specific legal provisions exist on some topics. The International Council of Museums Code of Ethics is sometimes followed in the exchange of art collections between museums, however it does not have binding legal force. Greece does not participate in the "Bizot Team" for the Administration of Loans and Exchange of Works of Art between Institutions.

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

In general, the Greek market is introverted and data about trade volumes and dealers' presence is not publicly available. Modern and contemporary artwork (mostly paintings) by famous Greek artists have been auctioned in the past by international houses outside Greece and has reached high prices.

2. PURCHASE AND EXPORT

2.1 What due diligence is required from a buyer?

Authenticity. The authenticity of a work of art is usually evaluated by experts and no explicit provisions exist in national law. In Greece there is no authorised public body of experts that advise on the authenticity of works of art, both ancient and contemporary. The experts of the National Gallery (*Ethniki Pinakothiki*) can only give their scientific opinion on authenticity for works belonging to the Greek state or for other works only if ordered by an official public body or by the courts.

Anti-money laundering provisions. Law 3691/05.08.2008, which implements the provisions of Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, is the main legal instrument used against money laundering in Greece. Bank accounts of an art trading business can be considered by Greek banks to be high-risk accounts for possible money laundering. The National Bank of Greece has instructed banks to control money transfers of large amounts, for the purchase of works of art, by persons that are behind offshore companies and companies with seats in "tax-friendly" jurisdictions and on those whose tax declarations cannot justify a high income. Moreover, the Greek Ministry of Finance has the right to monitor all transactions by auction houses. Auction houses from their side, must show due diligence and check the financial records of their clients.

Origin. There are no particular provisions in the law regarding the certification of origin of a work of art. The buyer is advised to always request from the seller solid representation and warranty provisions in the purchase agreement.

Greek museums often do not proceed to check on the origin of their exhibited works, especially in cases where the author is still alive. However, for collections' donations to museums, the existence of a collector's permit for the donor and a permit for art possession are usually requested.

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

Attention must be drawn to artwork that falls under the category of "national cultural patrimony". According to Law 3028/2002, all movable monuments created before 1453 belong to the state and cannot be traded. Only after a decision by the Ministry of Culture, following the approval of the competent board, can one possess, but not own, monuments/works of art from this period. The possession of these items can be transferred only with permission from the competent authority and after all the relevant data of the candidate for new possessor is notified to this authority.

For all other movable monuments belonging to a public entity, the transfer of ownership is possible only after a decision from the Minister of Culture and again following approval from the competent board.

All other movable monuments that are part of national patrimony can be freely transferred. However, the intention to sell and the data of the future buyer must be notified to the relevant authority. The state has a one month deadline to exercise its legal pre-emption right to purchase the work at the same price offered by the buyer.

A work of art can be sold by a private agreement. General principles of Greek civil/private law concerning contracts and sale of property apply to such an agreement, including the responsibility of representation, responsibility for legal or material problems in the object sold.

Auction houses usually have their own terms and conditions for purchases that need to be in accordance with Greek law and must not be abusive to the buyer.

Where an auction is organised for monuments of national patrimony, permission by the competent authority is needed for a specific list of objects. If a monument is sold at auction, the Greek state, authorised museums and monument collectors also have a pre-emption right to purchase it at the same price.

2.3 Are there any consumer protection rules that apply?

General rules on consumer protection apply, including liability for misrepresentation and false attributes of the object sold.

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

A seller/trader or an auction house can be found liable under civil and criminal law if the work of art sold is found to be forged, faked or a counterfeit. Under criminal law the liable person faces imprisonment for forgery and fraud and under civil law, damages can be requested. Such damages, according to jurisprudence, besides the return of the price paid, can also represent moral damages (for psychological stress) and lost profits. The amount of damages can

be increased in the case of a wilful act by the seller, that is, if it can be proved that the seller was aware that the piece of art was not authentic.

2.5 Is there any VAT or sales tax?

If an artist in Greece (or his heir) sells a unique work (not copies) to a third party, VAT for this transaction is the reduced VAT regime of 13%.

If a local gallery sells the painting on behalf of the artist in Greece, the VAT is again 13%, however if the painting is first sold to the gallery and then to a third party the VAT for the second transaction is 23% (soon to change to 24%).

In an auction, VAT is calculated on the commission of the auction house.

For a transaction between individuals (for example, two collectors) who are not art professionals no VAT is imposed.

Import VAT paid by the importer is 13%.

Apart from VAT, there is no additional sales tax.

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

The copyright owner/author of original works of art has a non-transferable and non-waivable resale right under Greek Copyright Law 2121/1993 Article 5, which implements Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art.

The artist's percentage on the resale price is calculated as follows (sums calculated in euros):

- 5% on a sales (pre-tax) price up to 50,000.
- 3% from 50,000.01 to 200,000.
- 1% from 200,000.01 to 350,000.
- 0.5% from 350,000.01 to 500,000.
- 0.25% on a price above 500,000.

In practice the above amount is included/calculated in the price of the sold artwork. By law it is the seller and/or the art sales businessman (or both) who have the obligation to pass the payment to the artist.

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

In general it is forbidden to export works of art that are considered national cultural patrimony. However, there are exceptions to that rule for more recent works, for monuments that have no great significance to the cultural heritage of the country (and where there is no harm to the unity of a collection) and for temporary export. In all such cases, export is allowed only with official permission. For monuments created within the last 100 years, permission is granted if their presence in Greece is not considered of high importance to the country's cultural heritage.

There is an exception, namely a special provision for monuments that are temporarily imported and are lawfully in the possession or in the ownership of the interested party, and their export is allowed.

Moreover, movable monuments created before 1830 can be exported if it is certified that they were imported into Greece less than 50 years ago, and where they have not been exported in the past.

The export of cultural goods belonging to the state is stricter and the same rules on the loan of such goods (see Article 25 of law no. 3028/2002).

Temporary export of monuments for exhibition purposes to museums or similar venues is allowed in cases where there are assurances about their safe transport, exhibition and return, after considering the following factors:

- The significance of the exposition abroad for the promotion of the cultural heritage of Greece.
- The reciprocity of the importing country (rarely considered in practice).
- If the export takes place for conservation purposes.
- If the export takes place for scientific or educational purposes.

In order to export modern and contemporary works of art that do not fall under the category of national cultural patrimony, their value, purpose and country of destination must be declared to the customs authorities. Beforehand, permission from the competent service of the National Gallery must be issued.

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

No "free ports" exist in Greece.

3. PEACEFUL ENJOYMENT

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

Import VAT and clearance. As in all EU countries, the import and supply of goods remains free of VAT if they are subjected to the special customs arrangements for the temporary import of goods in the EU. Only if the items are definitively imported into the EU from a non-EU country following an auction, is VAT levied.

Import VAT from countries outside the EU is 13% and then the trader/reseller (if they are a professional in the art market and not a collector) might fall under the special VAT regime for works of art under Directive 94/5/EC supplementing the common system of value added tax and amending Directive 77/388/EEC - Special arrangements applicable to second-hand goods, works of art, collectors' items and antiques.

Customs duties. There are no customs duties if the artwork is imported from an EU country, however customs expenses calculated on the declared value of the item are due if the item is imported from a non-EU country.

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

There is no special regime for the protection of an art buyer; the principles of civil law apply. If an alleged legitimate owner seeks the return of an item from its buyer, good faith is taken into consideration as a general principle of law in the examination of the liability of the buyer. According to a special provision in Greek civil law, the acquirer of a movable good is not considered to be in good faith if he is aware, or (if following severe negligence) he is not aware, that the seller is not the actual owner of the good. Also the acquirer is not considered to be a lawful owner if the transferred good has been stolen or has been lost. An exception to this last provision exists for works of art purchased from a public auction (Articles 1036 to 1040 Greek Civil Code).

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

Greece has ratified the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects and the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property which both contain provisions useful for holocaust-based claims. However no specific national legislation or case law is available.

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

A buyer can argue that he was in good faith, however, it appears difficult to avoid restitution. The state will examine any request for restitution by a foreign state. The Ministry of Culture has exclusive responsibility for such issues.

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

Due to the rich ancient history of Greece, it is often the case that foreign museums and private collectors possess items of cultural property that have been illegally exported from Greece and/or are the result of an unauthorised excavations. International conventions, as ratified by domestic laws or bi-lateral agreements with other countries, apply. If a foreign museum agrees to return items of cultural property to Greece, it can be the beginning of a harmonious co-operation for future exhibitions between Greece and the museum (Getty Trust/Hellenic Ministry of Culture, 2006).

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

Museums, libraries and public or other institutions have their own loan regulations. The national cultural heritage law includes a special provision for the export of movable goods belonging to the state. There is also a temporary export provision for exhibition purposes.

Greece is one of the countries that has no explicit legal provisions for an anti-seizure/immunity from seizure regime. Thus, it is common practice that immunity from seizure declarations or letters of comfort are issued by a

representative of the government or by a museum, claiming that they will put their best endeavours into the goods under loan being returned to their country of origin.

Items belonging to museum collections cannot be confiscated (that is, seized to satisfy a debt) under Article 45 of the national cultural patrimony law.

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

The author can raise objections based on his/her non-waivable moral right in the work, in respect of the time, place and manner that his/her work becomes available to the public. On the same ground, the author can forbid any alteration/modification to his work and any violation due to the conditions of the presentation of his work to the public.

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

For works of art that are exhibited, the publication of the work of art in the exhibition catalogue is permitted.

4. SALE

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

The seller is advised to be able to provide before sale, full information to the buyer in relation to the authenticity and origin of the work of art.

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

No, there are no particular standards of due diligence applicable to the trade.

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

Anti-Money laundering rules (Law 3691/05.08.2008, implementing the provisions of Directive 2005/60/EC) apply to all the involved parties.

Banks control money transfers for large amounts, for the purchase of works of art, by persons that are behind offshore companies and companies with seats in "tax-friendly" jurisdictions and on those whose tax declarations cannot justify a high income. Moreover, the Greek Ministry of Finance has the right to monitor all transactions by auction houses. Auction houses from their side, must show due diligence and check the financial records of their clients.

4.4 Is there a regime of temporary import for sale?

It is possible to temporarily import works of art into Greece for sale purposes, this however must be declared to the customs authorities. Also the pre-requisites for export from the country of origin must have been met.

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

Every auction house has its own rules, usually described in its section on terms and conditions. In practice, a Greek auction house makes the sale on behalf of the third party, sometimes with a private agreement to this purpose. There are no specific legal rules in the case of a buyer's default; usually there is a provision in the terms and conditions of each auction house and also in the specific contract, to be entitled to the return of the work.

In private treaty sales, general rules on sale of movable goods apply (found in the Civil Code).

5. ART PHILANTHROPY

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

Usually each Greek museum, public (or private), has its own rules and regulations in relation to loan agreements, deposits and donations. If the loan is for antiquities belonging to the Antiquities Authority or to public museums, the Ministry of Culture is the signatory party.

"Cultural sponsorship" which includes monetary deposits or donations of artwork to public museums and non-profit cultural private entities is administered by Law 3525/2007. The law applies to all monetary deposits or other kinds of financial aid in kind, tangible or intangible, or services that are offered by national or international, natural or legal persons with cultural aims, for the support of specific cultural activities or goals of the beneficiary, offered in return for the promotion of the sponsor.

The Sponsorships Office of the Ministry of Culture is responsible for signing a written donation agreement between the donor and the acquirer.

Monetary donations from companies to public museums are usually deposited in the museum's deposits and loans fund account. Certain museums do accept donations in the form of copyrights, stocks or bonds.

Also several public museums accept monetary donations targeted to fund specific matters, or a specific exhibition, or sometimes for one of its departments. However, museums do not normally accept conditional donations.

In general, for museum sponsorship there are no major tax deductions or other incentives. It is often the case in practice, especially for a low monetary deposit, that sponsors prefer to pay invoices for the costs of an exhibition or the printing expenses for a museum book, rather than fall under the regime of Law 3525/2007.

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

Under law 3028/2002 museums must serve an important cultural role for the public, and must be non-profit organisations. Private museums can be officially recognised by the Greek state (Minister of Culture) if they fulfil certain criteria.

Museums (private and public) are usually "public benefit foundations" that serve an overall philanthropic and cultural purpose (Law 2039/1939). If not officially recognised by the Ministry of Culture, a public benefit foundation may not qualify as a museum.

6. TAX

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

No wealth tax is imposed on art and other cultural property assets.

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

There is no capital gains tax yet on the transfer of works of art. Only where a whole business is transferred is there a capital gains tax of 20% on the value of the business.

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

Yes. In general, gift and inheritance tax have the same percentages, which vary from 0% to 40% depending on the family relation between the person offering and the person accepting the item.

Inheritance tax on the inheritance of artworks can be paid in kind and specifically by giving to the state artworks of the same value as the tax due.

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

The value of movable cultural objects transferred by way of donation to the state or to recognised museums can be deducted from gross income. The pecuniary value of the antiquities is estimated by a special assessment committee. Only 20% (in the case of a natural person) or 10% (in the case of a legal entity) of a deposit or gift to a public cultural organisation is deducted from the income tax due, according to the recent Law 3842/2010.

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

A special tax regime applies to all public benefit foundations (PBF).

Income tax. PBFs are taxed only on their income:

- From the lease of property (20% on the net income). From securities (10% on the net income).
- From the agricultural exploitation of land.

Property tax. 3% calculated on the value of real estate and 1% of the value of the estate in use.

Inheritance/gift tax. There is a flat inheritance and gift tax of 0.5% that the PBF must pay if it receives money or tangible property from a third party in the form of an inheritance or gift.

7. USEFUL PRACTICAL INFORMATION/REFERENCES

7.1 Principal laws and regulations

- Law 3028/2002 on the Protection Of Antiquities And Cultural Heritage In General. Year of current version/last amendment: 2009.

- Law 3842/2010, Restoration of Tax Justice, the Fight against Tax Evasion and other Provisions (2010).
- Law No. 2121/1993 on Copyright, Related Rights and Cultural Matters (2010).
- Law 3524/2007, Harmonisation of Greek legislation with Directives 2001/84/EC and 2004/48/EC on the resale right for the author of an original work of art and enforcement of intellectual property rights and other relevant Provisions.
- Law 3525/2007 on Cultural Sponsorship.
- Presidential Decree 67 of 2003 Amendments and additions to Presidential Decree 133/1998 on the return of illegally exported cultural Objects (93/7/EC).
- Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods. (Codified version).
- Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a member state.

7.2 Selected law enforcement authorities

- Economic Crime Controlling Authority (SDOE).
- Greek Civil, Penal and Administrative Courts.
- Customs authorities at EL.Venizelos airport, Piraeus harbour, Athens and Thessaloniki.
- Greek police, special division for the protection of cultural goods.

7.3 Selected collector and trade associations

- Benaki Museum, Private Foundation: www.benaki.gr.
- Alexander S. Onassis Public Benefit Foundation: www.onassis.org.
- The Hellenic Association Of Antiquarians and Art Dealers: www.antiques.com.gr.
- Association of Conservators of Antiquities and Works of Art: www.ssaette.gr.

7.4 Selected publications

- *Law 3028/2002 for the protection of antiquities and cultural heritage in general.* Text-commentary-explanations by Dimitrios Papapetropoulos (2006).
- *Legal framework for monuments collectors, dealers of antiquities and of modern monuments* by Gianna Karybali-Tsitsiou (2009).
- *Protection and return of cultural goods.* Foundation of International Legal Studies Elias Krispis, Volume 25, Editor: Anastasia Samara-Krispi (2011).

MEXICO

- Ministry of Public Education: www.gob.mx/sep.
- Ministry of Culture: www.cultura.gob.mx.
- Ministry of Foreign Affairs: www.gob.mx/sre.
- National Institute of Anthropology and History: www.inah.gob.mx.

7.3 Selected collector and trade associations

- Carlos Slim Helú – Grupo Carso.
- César Cervantes – Taco Inn.
- Eugenio Garza Laguera – FEMSA Collection.
- Eugenio López Alonso – Colección JUMEX.
- Aurelio López Rocha – Colección Alma Colectiva.
- Isabel y Agustín Coppel – Coppel Stores.
- Juan Antonio Pérez Simón – Grupo Carso.
- Andrés Blaisten – Biotecnología.
- Alfredo Suárez – Colección Suárez.
- WTC and Polyforum Siqueiros.
- María Asunción Aramburuzabala.
- Asociación de Artistas Plásticos de México AC: www.artac-iap.galeon.com.
- Asociación Nacional de Artistas Plásticos, Corredores de Arte y Anticuarios: www.anapcaa.org.
- Sociedad Mexicana de Autores de las Artes Plásticas: www.somaap.org.

7.4 Selected publications

- Rita Elder, *Desafío a la Estabilidad/ Defying Stability, Procesos Artísticos en México 1952-1967/ Artistic Processes in México 1952-1967*, 2014, Editorial Universidad Nacional Autónoma de México/ Turner.
- Cuauhtémoc Medina, Olivier Debroise, *La Era de la Discrepancia/ The Age of Discrepancies, Arte y Cultura Visual en México/ Art and Visual Culture in México 1968-1997*, 2014, Editorial Turner.
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THE NETHERLANDS

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1. CULTURAL PROPERTY AND ART MARKET

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

The Netherlands has various national patrimony and cultural heritage laws and regulations for movables and immovables (real estate). From 1 July 2016 the new Heritage Act will be in force. The new Heritage Act integrates various rules and regulations into one single Act, including the former Cultural Heritage Preservation Act 1984, the Dutch Monuments Act of 1988 and the Convention Implementation Act 1970.

In general, the following movable cultural property is protected by Dutch legislation:

- Objects or collections predominately privately owned and designated as protected under the Heritage Act.
- Objects from public collections funded by the state or public bodies.
- Objects from ecclesiastical collections.
- Archives.
- Unlawfully excavated archaeological objects.

The Heritage Act defines movable cultural objects of national cultural relevance as something irreplaceable and indispensable for the cultural heritage of the Netherlands.

The main purpose of the Heritage Act is to prevent loss of access through export to objects significant to the cultural history of the Netherlands. Predominantly it is privately owned objects that are protected. Objects in public collections are not included since they are regarded as protected already. If an object is listed in the Heritage Act inventory of the Dutch Ministry of Education, Culture and Science (the Ministry), it cannot be exported without a permit. At present, according to the Ministry, around 150 objects and around 31 collections (with thousands of items) are listed. The Cultural Heritage Inspectorate (part of the Ministry) regularly checks listed objects and collections.

State collections are supervised by the same Inspectorate. For temporary export outside the EU of a listed object, for instance on loan for a foreign exhibition, a permit from the Ministry is required. Any transfer of listed objects in ownership or relocation within the Netherlands is subject to notification to the Inspectorate. A failure to notify qualifies as an economic crime. Sale of a listed object to a foreign party is not invalid but any transfer abroad requires a permit. If an object has been brought to another EU member state without a permit, the Netherlands can start proceedings for the return of the listed object under Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a member state.

If notification has been properly made before transferring an object on the list of the Heritage Act, only the Minister can grant permission to export it. If export is permitted, the owner is free to carry out the action notified for a period of one year. When the Ministry denies export because of a (intended) sale, the Dutch state will at the same time make an offer to purchase the listed object. If the Dutch state and the owner of the listed object do not agree on the

price, the District Court of The Hague has jurisdiction to fix a price. If the price is too high for the state, the object can be exported.

Immovables (real estate) can be protected under the Heritage Act. Only objects that are of public interest owing to their beauty, scientific/academic relevance or to their cultural-historical value can be listed. At present more than 62,000 monuments, 450 archaeological monuments and 400 city and village views have been granted protection and are listed by the Ministry. The Heritage Act forbids destroying or damaging a listed object. A licence from a local authority (or the Ministry in some cases) is required to demolish, move, change or otherwise interfere (including restoration) with the object. With regard to cultural heritage the Surroundings Act (*Omgevingswet*) may also apply.

The newly established Dutch National Monument Organisation (*Nationale Monumenten Organisatie* or NMO) is an association of six large scale heritage organisations that promotes the protection and conservation of monuments. In January 2016 it was given, in management from the central government, 29 monumental buildings and objects, mainly comprising of ancient castles, ruins, houses, churches and memorials throughout the Netherlands.

The Heritage Act can apply to movable objects of archaeological nature in the ground. The provisions with regard to the protection of sites holding archaeological monuments have been amended with the implementation of the 1992 Valetta Convention (European Convention on the Protection of Archaeological Heritage). The old excavation permit system has been replaced with a new certification system regulated by law. Archaeological objects from excavation sites are protected against the risk of being (illegally) removed or transferred or being stolen. When nobody can prove ownership otherwise, the ownership of objects excavated from a site protected under the Heritage Act goes to a public authority (city, province or state). It is therefore important when purchasing archaeological finds in the Netherlands to check their provenance. Violations of the Heritage Act are prosecuted under criminal law.

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

The Netherlands is a party to the 1970 UNESCO Convention on Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property. The Dutch Act ratifying and implementing the UNESCO Convention was enacted in 2009 by the Dutch 1970 Convention Implementation Act. This act has been integrated into the Heritage Act in Chapter 6, paragraph 1. It designates as Dutch cultural property the objects protected by the Heritage Act in accordance with Article 1 of the Convention which require a permit for any transfer abroad. The Heritage Act prohibits, among other things, importing into the Netherlands cultural property removed from the territory of a state party (to the UNESCO Convention) in breach of the Convention or unlawfully appropriated in a state party, including the export of cultural property arising from occupation as covered by the UNESCO Convention. The Heritage Act limits the Dutch legislation to objects of great cultural, historical and scientific importance that belong to the statutorily protected cultural heritage of a country and only applies to cultural property exported from or unlawfully appropriated in a state party after the entry into force of the Act on 1 July 2009.

Legal proceedings for return are set out in the Heritage Act. Cultural property that has been brought into the Netherlands in breach of this prohibition may be reclaimed by the state party from which the property originated or by those with valid title to that property. Legal proceedings for the return of the property are contained in the Dutch Code of Civil Procedure. Defences to those proceedings based on acquisition in good faith, acquisitive or extinctive prescription or acquisition of a pledge in good faith are suspended in whole or in part. When there is reasonable

suspicion that cultural property found by authorities has been obtained in breach of the prohibition, it can be taken into custody.

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

The Netherlands concluded that the UNIDROIT Convention was not suitable for ratification. The Netherlands reasoned that the 1970 UNESCO Convention provided greater scope, for example, to adopt the basic principles of the UNIDROIT Convention. The Heritage Act is partly based on the same principles as expressed in the UNIDROIT Convention.

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

There is a thriving art and antiques market in the Netherlands. According to trade registrations there are around 3,000 antique dealers (of varying quality), around 1,000 art galleries and exposition rooms and several art fairs. The Netherlands also has an active art and antiques auction market. The world leading art fair TEFAF Maastricht (The European Fine Art Fair) takes place in the Netherlands and held its 28th edition in 2015 with over 75,000 visitors, with representatives from 262 leading museums from Europe, the USA, Asia and Australia in attendance and 266 specialist dealers from 22 countries. More than 30,000 works of art, antiques and design were exhibited with an aggregate value of EUR3 billion. Each object is examined by experts for quality, condition and authenticity and also checked with the Art Loss Register. TEFAF Maastricht also organises PAN Amsterdam, a national art and antiques fair with around 125 Dutch and Belgian participants. Other important art markets and fairs are ART Rotterdam, the Kunst RAI, ART Breda, the Unseen Photo Fair and the Affordable Art Fair.

2. PURCHASE AND EXPORT

2.1 What due diligence is required from a buyer?

There is no general obligation under Dutch law that requires a due diligence investigation from a buyer before purchase. According to the Dutch Civil Code goods sold and transferred must be in conformity with the purchase agreement.

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

A verbal purchase agreement is valid under Dutch law. However, it is advisable for any purchase of an art object or antiquity to draw up a written and signed agreement stipulating details on price, payment, delivery, transfer of ownership, guarantees, jurisdiction and applicable law and anything deemed relevant with regard to the artist, originality, provenance, state of the object including damages, age, measurements, preferably including photos. It is not uncommon to include warranties of authenticity and title in written sales agreements pertaining to art and antiquities. A buyer cannot rely on any lack of conformity when, at the conclusion of the contract, he was aware of it or it was reasonably known to him and he failed to give notice to the seller.

Ownership of a movable object in general transfers with actual delivery. When a purchase has been made and the purchase price paid ownership still only passes on delivery. The exception is when it has been agreed that ownership stays with the seller until full payment or other requirements have been met. However, the purchaser assumes risk for the object from the moment of delivery, even if ownership has not been transferred yet.

A particular feature when buying art or antiquities at auction is that often, in the general conditions of the auction house, liability for lack of conformity has been excluded to some extent. This may differ from auction to auction. Time limits for claims may also be limited with auctions. Even if there is some form of guarantee with regard to a purchase at auction it may be that the time limit for making a claim due to lack of conformity is much shorter than the general time limit in law, through exclusion in the general conditions of sale.

2.3 Are there any consumer protection rules that apply?

For a so-called "consumer sale" (purchase by a private buyer acting for purposes which are outside his trade, business or profession from a professional seller) different protective rules apply with regard to time limits for claims and the application in whole or in part of general conditions of sale limiting the rights of a buyer.

In a consumer sale, consumers who buy at a distance (for example, online or over the phone), have the right to cancel the agreement within 14 days without giving any reason. This does not apply when the sale was conducted at a public auction.

In a consumer sale, the conformity of a purchased object is not presumed to be in accordance with the purchase agreement if any discrepancies or defects occur or are discovered within the first six months of delivery. This diminishes the burden of proof for the consumer.

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

When a buyer discovers that the purchased object is not in conformity with the purchase agreement, for instance because it is a fake, forgery or counterfeit and the "real thing" was implied or guaranteed in the purchase agreement, the buyer must give notice to the seller within an appropriate time period (according to jurisprudence, within two months) after he found out or ought to have discovered the lack of conformity. The Dutch Civil Code contains a limitation period of two years for an agreement of sale, which starts when the buyer gives notice.

Poor performance or non-performance of the obligation of a party to a contract, allows the other party to avoid a contract, unless this remedy is regarded as inappropriate given the special nature or the limited extent of the breach of contract. A buyer can choose this remedy unless the non-performance is minor. In the case of a fake, forgery or counterfeit, general performance (delivery of the real thing) is impossible and the buyer can claim avoidance of the contract and/or damages. As mentioned in *Question 2.2* above a buyer cannot rely on any lack of conformity if, at the conclusion of the contract, he was aware of a lack of conformity or this was reasonably known to him.

A buyer purchasing a clearly fake Rembrandt painting for EUR100 will not be able to claim damages or avoidance of the contract. With regard to fake, forgery or counterfeit and claims for damages or avoidance in court, the buyer has the burden of proof. Often expert's reports will be used or needed to give proof. There is some case law published in the Netherlands. In clear-cut cases where there is non-conformity and the buyer has claimed on time, the purchase agreement will be dissolved and the buyer can claim repayment of the purchase price and possibly damages. But

the overriding principles of reasonableness and fairness apply. The court will carefully investigate not only the written contract but any statements made and the circumstances pending the sale and transfer. Dutch law and case law on sale and purchase is extensive and complex and this chapter only contains a brief outline.

2.5 Is there any VAT or sales tax?

There is a VAT system in the Netherlands. This means that VAT is due with respect to the following events:

- Supply of goods and services.
- Importation of goods (non-EU countries).
- Intercommunity acquisition of goods (EU countries).

VAT must be calculated on the remuneration charged (present rates: 6% and 21%). However, if goods or services are supplied to purchasers established abroad, no VAT or 0% VAT may be due. Should local VAT be charged to foreign entrepreneurs however, this could in principle be recovered by them if they would have been able to recover it had they been established within the Netherlands.

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

The artist's resale right was introduced in the Netherlands in 2006 in compliance with Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art. The relevant articles of the law introducing resale right in the Netherlands can be found in the Dutch Copyright Act. Until 1 January 2012 the resale right only applied to living artists, from that date the resale right royalties also apply to makers who died no more than 70 years earlier before the relevant resale. According to Article 43a (1) of the Dutch Copyright Act the resale right is the right of the maker and his hereditary successors in title to receive compensation for each sale of an original work of art that involves a professional art dealer, with the exception of the first transfer by the maker. The compensation or royalty is due from the time that the price of the sale of the original work is due, but at the latest three months from the conclusion of the (re)sale agreement. The definition of originals of work of art in the Dutch Copyright Act is in accordance with the Directive. Copies of these works that have been made in limited numbers by the maker himself or under his authority fall under the scope. The obligation to pay the resale right compensation is with the professional art dealer(s) involved in the sale. If more than one professional art dealer is involved in a sale, each dealer has several liabilities. There is a limitation period for the action for payment of three years following the day when the owner (of the right) acquired knowledge of both the claimable compensation and of the person owing the compensation. In any way the limitation period is 20 years from the time the compensation became due. The resale right only applies to makers who:

- Are a national of a member state of the EU and their successors in title.
- Are a national of a state party to the agreement on the European Economic Area (EEA) of 2 May 1992, and their successors in title.
- Have their habitual residence in the Netherlands, and their successors in title.

The Dutch Resale Right further applies to makers and their successors in other states for the duration and to the extent that such other states permit resale right protection for makers from the EU or EEA.

Applicable rates

Below a minimum sale price of EUR3,000 the resale right royalty does not apply. The applicable rates of the Dutch resale right royalties are as follows:

- From EUR3,000 to 50,000: 4%.
- From EUR50,000 to 200,000: 3%.
- From EUR200,000 to 350,000: 1%.
- From EUR350,000 to 500,000: 0.5%.

The maximum sum due in resale royalties is EUR12,500.

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

Apart from the protective measures in the Heritage Act and the 1970 UNESCO Convention, the Netherlands strictly applies the EU requirements that certain cultural objects in EU member states can only be exported outside the EU with an export licence. Whether a licence is required depends on the thresholds for value and age and the category of the cultural property, which apply in all EU member states under Council Regulation (EC) No. 116/2009.

The full list with relevant categories, descriptions, value thresholds and custom codes including a practical brochure has been published by the Dutch Cultural Heritage Inspectorate on its website.

Export licences must be applied for on specific application forms (for permanent export with photos) which should be sent to the Tax Department/Customs – Central Office for Import and Export (CDIU). The Customs and Cultural Heritage Inspectorate can require examination before an export licence is granted.

Works of art containing parts of endangered species may have limitations placed on their export, or require export licences based on the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) ratified and entered into force in the Netherlands in 1984.

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

The Netherlands has many customs-bonded warehouses. Goods imported from outside the EU but in bonded warehouses can be regarded as transit goods that have not yet been imported to the Netherlands. Import tariffs and customs procedures are not applied. When the goods are shipped to an EU client, duties and VAT will be paid at that point.

3. PEACEFUL ENJOYMENT

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

Imports are taxable with VAT. For companies that regularly import goods, a special licence can be obtained with which the payment of import VAT can be delayed. There is a regime for temporary import, for example, for expositions. However, this can only be applied by restricted organisations such as scientific and cultural organisations. Further information on applicable rates and procedures can be found on the website of the Dutch Tax and Customs Administration.

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

The general rule is that a buyer of a movable object who acquired in good faith from a seller who was not authorised or qualified to sell or transfer is protected against title claims and the transfer will be deemed valid. Good faith means that the buyer neither knew nor ought to have known (reasonably could have known), that his predecessor was not qualified to sell or dispose. A transfer for no consideration is not protected. There are several exceptions and the law with regard to time limitations is extensive and complicated.

The owner of a movable good who lost possession because of theft can reclaim it from a holder for three years from the day it was stolen. An exception to the three year rule is when a natural person not acting as a professional or businessman bought the good from a professional dealer in business premises (like a shop or gallery) in the normal course of business (not being an auction). The object bought in good faith cannot then be reclaimed.

However, the Dutch Civil Code will not protect the holder against claims of a member state of the EU for cultural goods that were unlawfully bought outside the territory of the member state. Different time limits apply for these claims with a maximum of 30 years.

Another exception to the protection of a good faith buyer is when an owner claims a good that was listed or protected under the Heritage Act at the time the owner lost possession. Time limits run between five years and 30 years.

A further exception to the protection of a good faith buyer is when a claim is lodged by a state party based on the 1970 UNESCO Convention with regard to cultural property unlawfully appropriated or removed from the territory of the state party (see *Question 1.2* above). Time limits for these claims run between five years and 30 years and even 75 years for movables forming part of public collections listed in inventories of museums, archives and collections of libraries or ecclesiastical institutions.

Apart from various other exceptions and time limitations in the Dutch Civil Code and as described above, Dutch law contains a general time limit for claims of 20 years. Unless the law or international treaty prescribes otherwise, any (possible) claim is limited to a time period of 20 years without any different treatment for good faith or bad faith holders. So after 20 years a bad faith holder can become the owner and be protected. This rule has been justified with a claim to legal certainty, although from time to time this is the subject of public debate.

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

Holocaust-based claims are dealt with by the Advisory Committee on the Assessment of Restitution Applications for items of Cultural Value and the Second World War (The Restitutions Committee). The Restitutions Committee advises on claims to works of art where the original owner lost possession because of theft, confiscation or sale during the Nazi regime.

The Restitutions Committee works independently from the Ministry of Education, Culture and Science. Since 2002, a claim to a stolen work of art can be submitted to the Restitutions Committee as an alternative way to settle a dispute.

The Restitutions Committee has two tasks. Firstly, to advise on decisions to be taken by the Minister of Education, Culture and Science on applications for the restitution of cultural objects which are currently part of the National Art Collection or are held by the Dutch state. This collection contains about 3,800 works. The Minister will follow the advice.

Secondly, to advise on disputes concerning the restitution of items of cultural value between the original owner (or its hereditary successors in title) who, due to circumstances directly related to the Nazi regime, involuntarily lost possession of such an item, and the current owner, not being the state of the Netherlands.

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

The 1954 UNESCO Convention for the protection of cultural properties in the event of armed conflict and its (1954) protocol has been incorporated in the Netherlands through the Heritage Act. A claim can only be made for cultural goods that have been exported from occupied territory on or after 14 January 1959 during an armed conflict.

The Heritage Act applies to cultural property illegally exported from or unlawfully appropriated in a state party from 1 July 2009 (see *Question 1.2* above). The legal proceedings for return and the right of defence are contained in the Dutch Code of Civil Procedure. The Cultural Heritage Inspectorate and Dutch customs are responsible for observance of the act.

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

In addition to the 1995 UNIDROIT Convention and the 1954 UNESCO Convention, Directive 2014/60/EU stipulates the restitution of cultural goods which, given national rules, may not leave the territory of a member state. In the Netherlands these cultural goods are for instance the objects that are protected by the Heritage Act, in addition to objects from public collections of museums, archives, libraries and religious institutions. The Directive applies to cultural property that has been illegally exported from 31 December 1992. Legal proceedings by member states are contained in the Dutch Code of Legal Procedure. The Cultural Heritage Inspectorate is the authorised institution and considers requests including custody based on this Directive. The court will decide on any claims.

In addition, Council Regulation No. 116/2009 on the export of cultural goods applies.

A special EU and UN regulation is applicable to the protection and return of stolen objects from Iraq: museums, archives and libraries (Iraq sanctions Order II [2004]; UNSC Resolution 1483 [2003]; Council Regulation [EC] No. 1210/2003). Council Regulation No. 1332/2013 of 13 December 2013 amending Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria also applies.

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

In this respect a difference must be drawn between private property and cultural objects owned by a foreign state. Articles 436 and 703 of the Dutch Code of Civil Procedure forbid both executory and precautionary seizure of goods intended for public service. On the basis of international (customary) law, applicable through Article 13a of the General Legislative Provisions Act, cultural goods owned by a foreign state that are on loan in the Netherlands for an exhibition are considered to be goods intended for public service. Therefore, these cultural goods are protected to a large extent. On the basis of Article 3a of the Court Bailiffs Act a bailiff is required to contact the Ministry of Justice

before acting to make sure international law is not incompatible with imminent seizure. Occasionally the Dutch state issues on request a notification which states that everything will be done to protect the cultural objects owned by a particular state from being encumbered while on Dutch territory.

However, these measurements are not foolproof because immunity from seizure does not mean immunity from jurisdiction. Legal proceedings cannot be excluded. Privately owned works of art are not protected by this legislation.

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

According to the Dutch Copyright Act works of art can freely be exhibited in public without consent from the author or copyright owner, insofar as this is deemed necessary for a public exhibition or public sale of the works.

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

The Dutch Copyright Act states that unless otherwise agreed, whoever owns, possesses or holds a drawing, painting, sculpture or a work of architecture or applied art, is permitted to reproduce and disclose that work to the public insofar as that is necessary for a public exhibition or public sale of that work, subject to the exclusion of any other commercial use. A museum will therefore require permission to reproduce works covered by copyright in exhibition catalogues, postcards and posters that are for sale.

4. SALE

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

The sale of a work of art is governed by the general rules of Dutch law applicable to the sale of movable goods not subject to registration. A successful claim in court to vitiated consent, such as error, threat, fraud or abuse of circumstances leads to annulment of the agreement.

To prevent the risk of a successful claim it is important that the seller not only gives correct but also sufficient information. The buyer should have a "correct idea of the state of affairs". This criterion must be approached with reasonableness and fairness. However, apart from "own opinions" and/or "sales talk" the buyer should be able to rely on the information given to it by the seller. In accordance with the Dutch Civil Code, goods sold and transferred must be in conformity with the purchase agreement. Good faith on the part of the seller is not relevant in this instance. Good faith can be relevant in a claim for damages on the basis of an unlawful act.

To define the due diligence required it is also important to know if the seller is aware of certain facts and knows or ought to know that this is of importance to the buyer when concluding an agreement. The courts will decide case-by-case based on facts, circumstances and the principles of reasonableness and fairness what level of seller's due diligence is required. Other facts and circumstances may also be of importance to define the due diligence of the seller, such as the expertise of the parties and the price. A professional buyer has a greater duty to inspect and a professional seller has a greater duty to inform.

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

The difficulties that can occur in a transaction where a private person buys a work of art at auction is illustrated in a fairly recent decision of the Amsterdam Court of Appeal (Court of Appeal Amsterdam, October 9th 2012, LJN: BY5415). The Court decided that in this case the sale should be considered a consumer sale and therefore the legal protection regime for consumers applied. This meant, for instance, that the auction house had inspired justified expectations with the specifications in their catalogue that a real painting by Jopie Huisman was on sale which in fact was a fake. The buyer, being a non-professional consumer, could not be expected to investigate although this was required according to the general conditions of sale of the auctioneer. Also the time limit for the right to complain is extended for consumers (despite other provisions on time limits in the general conditions of sale).

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

The Anti-Money Laundering and Anti-Terrorist Financing Act (*Wet ter voorkoming van witwassen en financieren van terrorisme*) (Wwft) entered into force on 1 August 2008. The Wwft implements the EU's Third Anti-Money Laundering Directive into Dutch national law. The Wwft provides a comprehensive set of measures to prevent use of the financial system for money laundering or terrorist financing. Institutions are responsible for doing their own client assessment, before and during the business relationship. Whereas art dealers must, in principle, comply with all client assessment measures, the intensity with which measures are applied can be adjusted to the risk posed by a certain type of client, relation, product or transaction. Payments in cash surpassing EUR15,000 must be reported to the Financial Intelligence Unit, in accordance with the Wwft.

4.4 Is there a regime of temporary import for sale?

There is a regime for temporary import, for example, for exhibitions. However, this can only be applied by restricted organisations such as scientific and cultural organisations.

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

A party who is confronted with a defaulting party has several options under the Dutch Civil Code. Firstly, the seller can commence legal proceedings and claim performance of the agreement in court. In the case of non-performance the seller is entitled to terminate the agreement. In the case of an attributable breach of contract the seller can also claim damages, these may include alternative compensation, losses due to delays and resulting damages. In addition to termination, the seller has a right of recovery. A written notice will terminate the sale and the rights of the buyer.

5. ART PHILANTHROPY

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

There is cultural property on loan in almost every museum and public collection in the Netherlands. Dutch law has specific rules with regard to a loan for use. There can be no payment for this form of loan, otherwise it would be rent, although transport and handling fees may apply. The borrower must return the item, is a temporary holder and

ownership will not pass. The law is not mandatory but directory and parties can agree otherwise. In general, loan agreements for cultural property are made in writing specifically outlining the purpose of the loan, obligations of the owner and borrower, applicable law and jurisdiction, arrangements on return, safety, insurance, maintenance, transport, condition and licences for instance with regard to depicting the work in a catalogue (apart from the right of a copyright holder).

Deposit is the placing by a depositor of a good with a depositary who will preserve the good and return it. Deposit of art is often used for security reasons.

Donations to museums occur regularly and are form free for movable goods although in practice written gift or donation agreements will be drafted. For tax purposes a notarial deed may be required. Museums and public collections also regularly inherit specific legacies.

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

A foundation is founded by notarial deed. The rules governing the foundation can be found in its articles of association and the law. Public and private museums are often set up in the form of a foundation.

6. TAX

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

A wealth tax is levied at a flat rate of 1.2% on its value if art is purchased and kept by a private individual as an investment. No wealth tax is due if art is kept for personal use by a private individual. No wealth tax is payable by companies.

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

Not for private individuals. With professional dealers and businesses, profits are taxed in the normal way, that is, whether the profits are actually taxed depends on the nature of the business and whether or not the business has made a profit.

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

Yes, there is inheritance tax and gifts are taxed, depending on the value of the respective inheritance or gifts. Tax rates vary and many deductions apply for instance for (surviving) spouses and children. Non-profit institutions can get relief for gifts if they qualify as an acknowledged institution for public benefit (so-called ANBI institution).

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

Business entities get a tax break for gifts to ANBI institutions. If these gifts are made to a cultural institution, which qualifies as a so-called cultural ANBI institution (acknowledged cultural institution for public benefit), the tax break may be increased by 50% (multiplier). There is also a tax break for private individuals, under the condition that the (receiving) public institution qualifies as a so-called ANBI institution. For a gift from a private individual to a cultural ANBI institution the tax break may be increased by 25% (multiplier).

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

Normally, a foundation will not be taxed for corporate income tax purposes. Whether the foundation can recover VAT (for example, on purchases) will depend on the activities performed by the foundation. The same applies for private museums. A foundation may, under certain circumstances, be taxed for inheritance tax or gift tax unless the foundation qualifies as an ANBI institution (see *Question 6.3*).

7. USEFUL PRACTICAL INFORMATION/REFERENCES

7.1 Principal laws and regulations

- 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.
- Civil Code (*Burgerlijk Wetboek*).
- Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*).
- Heritage Act (*Erfgoedwet*).
- Copyright Act (*Auteurswet*).
- Convention for the protection of cultural properties in the event of armed conflict and its (1954) protocol (*Haagse Conventie 1954*).
- Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a Member State.
- Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), ratified and entered into force in The Netherlands in 1984.

7.2 Selected law enforcement authorities

- Cultural Heritage Inspectorate (*Erfgoedinspectie*): www.erfgoedinspectie.nl.
- Dutch Tax and Customs Administration (*Belastingdienst*): www.belastingdienst.nl.
- Dutch Customs (*Douane*): www.douane.nl.
- Police: www.politie.nl. The Dutch police introduced a specialist team to fight crime with regard to art and antiques. The national art and antiques unit has ten regional contacts and a nationally operating public prosecutor. The unit can be reached through the National Police.
- CITES-bureau, *Rijksdienst voor Ondernemend Nederland* (permit section): www.rvo.nl.
- Pictoright (author's rights organisation for visual artists, administrating and collecting reproduction rights, resale rights and collective rights): www.pictoright.nl.

7.3 Selected collector and trade associations

- Federation of valuers, brokers and auctioneers in movable goods (*Federatie van Taxateurs Makelaars Veilinghouders in Roerende Zaken*): www.federatie-tmv.nl.
- Association of Fine Art Dealers in The Netherlands (*Koninklijke Vereniging van Handelaren in Oude Kunst*): www.kvhok.nl.
- Dutch Antiquarian Booksellers' Association (*Nederlandsche Vereeniging van Antiquaren*): www.nvva.nl.
- Netherlands Gallery Association (*Nederlandse Galerie Associatie*): www.nederlandsegalerieassociatie.nl.
- TEFAF Maastricht: www.tefaf.com.

7.4 Selected publications

- I.C. van der Vlies, A.Salomons, *Kunst, recht en beleid*, Den Haag, Boom Juridische uitgevers, 2012.

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