THE ART LAW REVIEW

Editors
Lawrence M Kaye and Howard N Spiegler

THE LAWREVIEWS

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PREFACE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

We hope you enjoy reading all of these excellent contributions.

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

Part II

Jurisdictions

Chapter 27

UNITED KINGDOM

Gregor Kleinknecht and Petra Warrington[1]

I INTRODUCTION

The United Kingdom remained one of the major centres of the international art market in 2019, retaining its second position with a 20 per cent market share, equivalent to US$12.7 billion, closely behind the United States and ahead of China. Although behind these figures lay a 9 per cent decline in the UK market, driven principally by the uncertainty around Brexit, the UK continued to dominate the European art market.[2] UK auction sales accounted for US$4.3 billion in sales, down by 20 per cent year on year, roughly in line with the change in total auction sale volumes worldwide, excluding private treaty sales.[3] The four large London auction houses (Christie's, Sotheby's, Bonhams and Phillips) typically account for around 70 per cent to 75 per cent of UK total auction sales.[4]

By contrast, dealer sales were largely stable.[5] Art fairs remained a critical part of the art market's infrastructure in 2019, accounting on average for 45 per cent of dealer sales.[6]

Like all other art market centres, the UK market was fundamentally affected by the coronavirus pandemic in 2020, with a large number of art fairs cancelled, dealers and galleries closing for several months during the national lock-down, and economic uncertainty contributing further to declining sales. UK galleries expected a 79 per cent drop in revenue this year, according to an *Art Newspaper* survey from April 2020.[7] According to the first comprehensive analysis of the impact of covid-19 on the gallery sector, published by Art Basel and UBS, art gallery sales fell by an average 36 per cent in the first half of 2020 with a majority of galleries expecting sales to continue to decrease for the rest of the year.[8] Earlier research by ArtTactic found that auction sales fell by 49 per cent for the leading auction houses in the first half of 2020.[9]

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1 Gregor Kleinknecht is a partner and Petra Warrington is a senior associate at Hunters Law LLP. The authors are grateful to colleagues Julia Richards and Vanina Wittenburg for their contribution to the 'Trusts, foundations and estates' section of this chapter. The law as stated is the law of England and Wales.

2 *The Art Market 2020*, an Art Basel and UBS Report, prepared by Dr Clare McAndrew, p. 17.

3 id., p. 134.

4 Laura Chesters, 'UK remains in second place in the global art market league table', *Antiques Trade Gazette*, 5 March 2020, www.antiquestradegazette.com/news/2020/uk-remains-in-second-place-in-global-art-market-league-table.

5 *The Art Market 2020*, an Art Basel and UBS Report, prepared by Dr Clare McAndrew, p. 18.

6 id., p. 186.

7 Georgina Adam, 'The art market shapes up for a post-pandemic future', *FT Magazine*, 18 September 2020.

8 Art Basel and UBS Report: 'The Impact of COVID-19 on the Gallery Sector: A 2020 mid-year survey'.

9 Melanie Gerlis, 'Art market report shows the severe impact of Covid-19', *Financial Times*, 9 September 2020.

At the same time, the pandemic accelerated the move by auction houses, dealers and art fairs to online platforms, viewing rooms and transactions. According to Art Basel and UBS, the share of online gallery sales rose from 10 per cent of total sales in 2019 to 37 per cent in the first half of 2020.

As covid-19 enters a second wave in the UK and across Europe in the autumn of 2020, it remains to be seen whether the UK art market is both sufficiently resilient and innovative to weather the coming months.

II THE YEAR IN REVIEW

While the impact of covid-19 on the art market has been attracting most of the news headlines over recent months, the art market continues (at the time of writing) to be affected by the uncertainty about the future relationship between the UK and the EU post-Brexit. It also faced a number of significant new statutory changes and regulatory developments this year, including the implementation of the 5th EU Anti-Money Laundering Directive (5AMLD) as of 10 January 2020, which means that the art trade will face an increase in regulation and transparency that will at first feel alien and inquisitorial. While large international art businesses and auction houses will be able to adapt to the changes in the law relatively seamlessly, small businesses and sole traders that do not have the same resources at their disposal are likely to find compliance more of an administrative and technical burden.

On 18 May 2020, the Court of Appeal of England and Wales rejected an appeal in the judicial review proceedings against the Ivory Act 2018, one of the world's toughest bans on the trade and cross-border movement of antique ivory.[10] On 30 July 2020, the UK Supreme Court rejected an application for permission to appeal further the decisions dismissing the judicial review claims.[11] The Act is now expected to come into effect in the foreseeable future although certain secondary legislation required to implement the Act has yet to be brought forward.

III ART DISPUTES

i Title in art

Under the Sale of Goods Act 1979 (SGA), title passes when the parties to a transaction intend it to pass. Where this is not set out in contract, various assumptions assist with ascertaining when the parties to a contract intended title to pass. In the case of a private treaty sale of an artwork, title would be assumed to pass when the contract is entered into. Parties will generally displace this rule in their contract for sale by stipulating that title passes on payment of the purchase price. Auction terms also generally stipulate that title to a lot passes on payment, rather than on the fall of the hammer, which is the point at which the contract is usually formed at auction.

10 [2020] EWCA Civ 649.

11 UKSC 2020/0121.

The SGA implies certain terms into contracts of sale, including that, unless the seller expressly sells goods subject to limited title (or this can be inferred from the circumstances of the sale), the seller has a right to sell the goods, that the goods are free from any undisclosed charge or encumbrance, and that the buyer will enjoy quiet possession of the goods.[12]

As news headlines demonstrate, there have been a number of recent high-profile cases of art agents and dealers acting dishonestly, including by selling artworks more than once to different parties, or without permission from their owners, or by fraudulently securing loans against artworks. London, being one of the centres of the international art market, has attracted its share of such fraudsters. Inigo Philbrick, who was arrested by the FBI in the summer of 2020,[13] had a gallery in Mayfair. Matthew Green, part of the Green dynasty of art dealers in Mayfair, has been accused of fraudulent dealings and convicted of contempt of court for failing to cooperate in legal proceedings in the UK.[14] Also this year, art intermediary Angela Gulbenkian faces charges of theft and fraud and is reportedly awaiting extradition to the UK.[15]

Although the buyer has no legal duty to enquire into title under English law, this is of no comfort if the buyer has been the victim of fraud. Ultimately, the buyer, for his or her own protection, is responsible for performing due diligence in relation to the transaction and establishing good title. This includes making sufficient enquiries into the identity and reputation of the seller and the provenance of the artwork, and checking registers of lost or stolen art. A buyer who fails to perform due diligence may also unwittingly expose himself or herself to a claim by the true owner in conversion if an artwork is discovered to be stolen or otherwise misappropriated. In that case, the burden of proving that the purchase was made in good faith rests with the buyer.

A buyer who knowingly purchases stolen or illicitly excavated or exported cultural objects faces potential sanctions under criminal law. Under the Dealing in Cultural Objects Offences Act 2003, the Theft Act 1968, the Cultural Property (Armed Conflicts) Act 2017 and the Proceeds of Crime Act 2002, a dishonest buyer might commit various offences, including dealing in cultural objects that are tainted, handling stolen goods, or acquiring or possessing criminal property.

ii Nazi-looted art and cultural property

Claims related to art spoliated during the Nazi era typically crystallise in the London art market when artworks with tainted provenance are consigned for sale at auction or otherwise offered for sale; such claims are then generally resolved through negotiation between the claimants and present owners of the artwork, where appropriate, involving mediation. Historic claims are unlikely to succeed in civil court proceedings where the Limitation Act 1939 applies and claims have invariably become time-barred.

The Spoliation Advisory Panel was established for the purposes of the Holocaust (Return of Cultural Objects) Act 2009 and considers claims from anyone (or from any one or

12 Section 12(1) to (3), Sale of Goods Act 1979.

13 Reported in *The Art Newspaper*, www.theartnewspaper.com/news/art-dealer-inigo-philbrick-arrested-on-pacific-island-by-fbi.

14 Reported in *The Telegraph*, www.telegraph.co.uk/news/2020/01/11/fine-art-dealer-ran-10m-debts-fled-rehabilitation-clinic-spain.

15 Reported by Bloomberg, www.bloomberg.com/news/articles/2020-06-18/german-art-collector-wanted-in-the-u-k-arrested-in-portugal.

more of their heirs) who lost possession of a cultural object during the Nazi era (1933–1945), where such an object is (1) now in the possession of a UK national collection, or (2) in the possession of another UK museum or gallery established for the public benefit. The Panel's paramount purpose is to achieve a solution that is fair and just both to the claimant and to the institution. The Panel's proceedings are an alternative to litigation, not a process of litigation. The Panel will therefore take into account non-legal considerations, such as the moral strength of the claimant's case.

If the Panel upholds the claim in principle, it may recommend:

a the return of the object to the claimant;

b the payment of compensation to the claimant, the amount being in the discretion of the Panel having regard to all relevant circumstances including the current market value, but not tied to that current market value;

c an *ex gratia* payment to the claimant;

d the display alongside the object of an account of its history and provenance during and since the Nazi era, with special reference to the claimant's interest therein; or

e that negotiations should be conducted with the successful claimant to implement such a recommendation as expeditiously as possible.

The Panel's recommendations are not legally binding but have, to date, in each case been accepted and implemented by the Secretary of State. The Panel operates under its own terms of reference and rules of procedure.[16]

The Panel also provides a private mediation service and may be designated to advise about any claim for an item in a private collection at the joint request of the claimant and the owner. The authors are not aware that the Panel has ever given advice in such a case.

Following the London Spoliation Conference in 2017, the Spoliation Advisory Panel and restitution committees of France, Germany, Austria and the Netherlands have come together to form a Network of European Restitution Committees for the purpose of enabling greater collaboration and information sharing between the committees.[17]

iii Limitation periods

Limitation periods for art claims are governed by the Limitation Act 1980. The general time limit for an action founded on tort or contract is six years from the date on which the cause of action accrued. The start of the limitation period can be deferred in cases where an action is based on the defendant's fraud or concealment of the claimant's right of action, or in cases where a mistake has taken place. In such cases, the limitation period runs from the time when the claimant discovered, or could with reasonable diligence have discovered, the fraud, concealment or mistake. The general limitation period still applies in cases of theft but, to prevent time running in favour of the thief, the limitation period is suspended in cases where a chattel has been stolen until the chattel is purchased in good faith by a third party, at which point time begins to run.

The position was different under the previous Limitation Act 1939, which applied until May 1981. Under that legislation, the six-year limitation period started running from

16 www.gov.uk/government/groups/spoliation-advisory-panel.

17 www.gov.uk/government/groups/spoliation-advisory-panel#uk-joins-network-of-european-countries-to-increase-cooperation-on-returning-nazi-looted-art.

the original conversion, rather than a good faith purchase. This is particularly significant in relation to historic claims involving the looting of objects during the Nazi era as legal title will inevitably have been extinguished where a conversion can be established.

iv Alternative dispute resolution

Alternative dispute resolution (ADR), including mediation, arbitration and expert determination, has become an established part of the dispute resolution toolkit in the UK. The fact that ADR proceedings can be agreed to be confidential, and lend themselves to the resolution of cross-border and multiparty disputes much more readily than proceedings before a national court, makes them particularly suited to the resolution of art and cultural heritage disputes.

It is now a well-established principle under the Civil Procedure Rules that a party to court proceedings that refuses to engage in ADR at the request of another party may be ordered to pay some (or even all) of the other party's costs of the proceedings if the court determines that the refusal to mediate was unreasonable, even if the party is successful at the trial.

The Civil Mediation Council serves as an independent body to represent and promote civil and commercial mediation in the UK; it promotes best practice and operates an accreditation scheme for organisations that provide mediation services.[18] Art Resolve provides specialist art mediation service in the UK.[19]

IV FAKES, FORGERIES AND AUTHENTICATION

The principle of *caveat emptor*, or buyer beware, applies to the purchase of artworks. The level of due diligence that is required by the buyer will depend on factors such as the relative experience of the buyer and the seller, and the reliance placed by the buyer on the seller's expertise in the subject matter. The outcomes of authenticity disputes usually turn substantially on their facts.

If an artwork turns out to be a fake or forgery, a buyer's recourse may depend on whether the artwork was bought through a dealer or at auction. Most major auction houses offer a limited contractual authenticity guarantee in relation to artworks catalogued without qualification as being by a particular artist, which entitles the buyer, subject to various conditions being fulfilled, to return an artwork within a set time period if the work turns out to be a fake or forgery.

Such authenticity guarantees also usually extend to private treaty sales via auction houses. This was recently illustrated in a dispute involving a painting attributed to Frans Hals. In 2010, Sotheby's brokered the sale of the painting between co-owners, Fairlight Art Ventures (Fairlight) and London dealer Mark Weiss, and US collector Richard Hedreen, who paid US$10.75 million for the painting. A few years later, following scientific analysis of the painting, Sotheby's accepted that the painting was a forgery, rescinded the contract for sale, and refunded the full purchase price to the buyer. Litigation ensued over whether the sellers were in the circumstances legally liable to repay their portions of the sale proceeds to

18 https://civilmediation.org.

19 https://artresolve.org.

Sotheby's. The sellers maintained that the painting was genuine and refused to agree a refund. Mr Weiss eventually settled out of court while Fairlight and Sotheby's continued to trial. The High Court found in Sotheby's favour in December 2019.[20]

Dealers may offer a contractual warranty or, if the contract is silent on these points, certain statutory warranties in relation to the quality of an artwork, its fitness for purpose and whether it matches its description will be implied into the contract for sale either under the SGA,[21] in business-to-business sales, or under the Consumer Rights Act 2015 (CRA)[22] in business-to-consumer sales.

If a sale is deemed a sale by description, and the artist is wrongly identified, the buyer will in principle have the right to cancel the sale. Traditionally, however, the English courts have not regarded sales of artworks, even if the artwork is clearly attributed to a particular artist, as sales by description. The case law in this regard has consistently concerned sales between art market professionals on both sides of the transaction and it remains to be seen whether the courts would be prepared to imply more readily a sale by description in a transaction between a dealer and a consumer, given the protections now afforded to consumers by the CRA.

V ART TRANSACTIONS

i Private sales and auctions

The operation of the art market has been greatly affected by covid-19. The increasing shift from face-to-face transactions to online dealings during the pandemic has had far-reaching legal and practical implications for art businesses of all types and sizes. Like other jurisdictions, the UK has seen an increase in online auctions and private treaty sales, both in the primary and secondary markets, being executed by remote means, as well as artists and dealers making greater use of online viewing rooms and social media platforms to market and sell works directly to an expanded and often global client base.

Many auction houses offered online sales before the pandemic but nevertheless faced a logistical challenge in moving more sales to an online format, due to the lack of opportunities for pre-sale viewings and changes to collection and delivery processes. Sales that try to preserve a traditional format with an auctioneer standing at a rostrum and taking bids on commission and via telephone, as well as online, are still classified as 'online only' sales if members of the public are not able to attend in person. This has implications, in particular, for the application of consumer protection legislation to such sales.

Sales of artworks to individuals are regulated in the UK through a range of consumer protection legislation, of which the CRA and the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 are of primary importance. The effect of this legislation is to impose requirements on art businesses selling to individuals, including to make prescribed information available to the consumer in writing before a contract is entered into, to imply various seller warranties into any contract for the sale of an artwork, and to inform the consumer about applicable cancellation rights if the sale is made off-premises (away from the trader's usual business premises) or by distance means

20 Case No. CL-2017-000071, unreported.

21 Sections 13–14, Sale of Goods Act 1979.

22 Sections 9–11, Consumer Rights Act 2015.

(e.g., telephone, email or via a website). Consumer protection legislation in the UK is largely derived from EU directives and regulations and it remains to be seen whether they will eventually be amended or revoked altogether following the end of the Brexit transition period.

ii Art loans

Loans of artworks for exhibition from private lenders to public museums will typically be insured under the Government Indemnity Scheme, which is administered by the Arts Council England.[23] Importantly, certain risks are excluded from cover under the scheme and borrowers and lenders should consider taking out additional commercial insurance cover for excluded risks.

Sections 134 to 138 of Part 6 (Protection of Cultural Objects on Loan) of the Tribunals, Courts and Enforcement Act 2007 provide immunity from seizure for the loan of certain artworks usually kept outside of the UK and not owned by a person who is resident in the UK, when the work enters the UK for temporary public not-for-profit exhibition at an approved museum or gallery. They are supplemented by the Protection of Cultural Objects on Loan (Publication and Provision of Information) Regulations 2008.

iii Cross-border transactions

The importation of cultural goods into the UK is not currently subject to any licensing regime, although certain imports are prohibited (e.g., on the basis of United Nations sanctions (see further below) or in the case of material originating from endangered species (e.g., ivory) under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)).

The cross-border movement within the EU of cultural goods originating from outside the EU is now affected by Regulation (EU) 2019/880, which came into force on 27 June 2019, although it remains to be seen what its impact will be in the UK following the end of the Brexit transition period. The Regulation requires the creation of a central electronic database for the licensing and registration of cultural goods, which must be implemented no later than 28 June 2025 and, as of 28 December 2020, prohibits the import into the EU of certain cultural objects of particular importance, whether for archaeological, historical, literary, artistic or scientific reasons, that have been illegally removed from their country of origin. Cultural objects that have been legally introduced to the EU and meet certain age and value thresholds will require a licence or importer statement.

In the meantime, the UK continues to operate a two-tier system in relation to any proposed exports of cultural goods from the UK, whether of a temporary or permanent nature. Regulation (EC) No. 116/2009 on the export of cultural goods (as amended) (the Regulation) regulates the export of certain cultural goods by requiring a Community licence to export them from the UK to a destination outside of the EU. UK national law applies if an item is being exported from the UK to a destination within the EU. From 1 January 2021, the UK rules will apply to all exports, regardless of their destination, although EU licences granted prior to that date will continue to be valid for their term and restrictions relating to any licences already in operation, such as temporary EU licences, will continue to apply.

The established framework for the UK export control regime is found in the Export Control Act 2002 and the Export of Objects of Cultural Interest (Control) Order 2003 (as

23 www.artscouncil.org.uk/protecting-cultural-objects/government-indemnity-scheme.

amended). Export licences are also subject to any sanctions in place and goods cannot be sent to embargoed destinations. Currently, the Iraq (United Nations Sanctions) Order 2003 prohibits the import or export of cultural property illegally removed from Iraq since 6 August 1990 and the Export Control (Syria Sanctions) (Amendment) Order 2014 prohibits the import or export of cultural property illegally removed from Syria since 15 March 2011.

The requirement for an export licence under the UK or EU rules is linked to the type of cultural goods in question, their age, value and how long they have been in the UK. The export control system operates by placing temporary export bars on items of 'national importance' to allow public institutions in the UK to raise funds to make a matching offer to purchase them at fair market price. National importance is judged by a group of experts in accordance with the Waverley criteria, to establish whether the item in question has a particularly close connection with the UK's history and national life, or is of outstanding aesthetic importance or scholarly significance. If one or more of the criteria is met, and the Secretary of State temporarily defers the decision to grant the export licence, public institutions are invited to put forward offers. The owner of the item is not compelled to agree a sale to any interested institution but is unlikely to be granted an export licence if he or she refuses an offer.

Import and export law rarely features in case law, with the recent exception of *R (Simonis) v. Arts Council England*,[24] which was heard and dismissed by the Court of Appeal in March 2020. The appeal concerned a painting entitled *Madonna con Bambino*, attributed to Giotto, which had made several journeys to and from Italy, where it was purchased in 1990, before the owner sought a permanent export licence to send the painting from the UK to Switzerland. The Arts Council decided that Italy, rather than the UK, was the competent authority under EU law to determine whether the export licence should be granted, given that the painting's earlier dispatch from Italy to the UK in 2007 had not been 'lawful and definitive' within the meaning of the Regulation. Both the court at first instance and the Court of Appeal agreed with the Arts Council. The result was that the owner of the painting would either be forced to return the painting to Italy, and to apply to the Italian authorities for an export licence to Switzerland, which is unlikely to be granted given Italy's stringent export laws, or for the painting to remain in the UK subject to restrictions on its movement.

iv Art finance

Art lending (i.e., the borrowing of money secured against art, antiques or other collectibles as security) is under-developed in the UK compared to other major art market centres, such as New York. Under English law, there is no fit-for-purpose non-possessory security interest for artworks where the borrower is an individual, although corporate borrowers can create a chattel mortgage. The Law Commission has produced a Goods Mortgages Bill, which has not, however, so far been brought forward by the government; the legal position is therefore unlikely to change in the foreseeable future. It remains to be seen whether the bill will be brought forward after Brexit to support the development of the London art market.

On 10 January 2020, 'art market participants' (including dealers, galleries, agents and auctioneers) became part of the 'regulated' sector for anti-money laundering purposes under the new Money Laundering and Terrorist Financing (Amendment) Regulations 2019, which implement the 5AMLD into UK law.

24 [2020] EWCA Civ 374.

Members of the art trade who carry out transactions, or series of linked transactions, involving works of art valued at €10,000 or more must now conduct ongoing risk-based due diligence on the parties involved in those transactions. The definition of works of art is in line with current VAT legislation and excludes antique furniture and some decorative objects.

Her Majesty's Revenue and Customs (HMRC) is the supervising body responsible for overseeing art market participants, keeping a register of supervised businesses, and checking that they are complying with their obligations under the new regulations. Failure to comply with the regulations is an offence, which can result in a range of sanctions including fines, suspension from dealing in high-value transactions and imprisonment.

Compliance includes putting into place risk assessments for new and existing clients, implementing anti-money laundering policies and procedures (and ensuring that they are followed), appointing a nominated officer and a compliance officer, where appropriate, and continually monitoring and training staff. Art market businesses were originally required to register with HMRC by January 2021 but this deadline has now been extended to 10 June 2021; businesses are nevertheless expected to carry out risk assessments and put policies and procedures in place to ensure they are compliant before that date.

Importantly, the new money laundering compliance regime will have ramifications beyond the UK and EU in so far as it will affect non-European buyers who seek to purchase artworks in galleries, at fairs or at auction in the UK as much as non-European dealers who transact as buyers and sellers in the London market, whether in person or online.

On 7 February 2020, the British Art Market Federation published guidance on anti-money laundering for UK art market participants, which was approved by HMRC.[25]

VI ARTIST RIGHTS

i Moral rights

Moral rights are personal rights granted to the creators of artistic works, pursuant to Chapter IV of the Copyright, Designs and Patents Act 1988. The four components of moral rights are identified as: (1) the paternity or attribution right, which is the right of an artist to be identified as the creator of a work; (2) the right of integrity, which is the right of an artist to object to derogatory treatment of his or her work; (3) the right not to have a work falsely attributed, which entitles an artist not to be identified as the creator of a work created by someone else; and (4) the right to privacy in certain photographs and films. Like the economic rights associated with copyright described further below, moral rights arise automatically, except for the right of attribution, which must be asserted by the artist. Moral rights can be waived by the artist but are not capable of assignment.

ii Resale rights

Artists' resale rights (ARR) were introduced to the UK via the Artist's Resale Right Regulations 2006, implementing a European directive. Originally, the rights were restricted to living artists until January 2012, when amending legislation came into force entitling successors of deceased artists to exercise any inherited resale rights. Subject to certain exceptions, ARR entitles artists and their heirs to claim a percentage of the sale price on any resale of an

25 www.gov.uk/government/publications/art-market-participants-guidance-on-anti-money-laundering-supervision.

original artwork in the secondary market (i.e., through an auction house or other art market professional), while copyright in that artwork subsists. ARR is collected and distributed through two entities in the UK: the Artists Collecting Society and the Design and Artists Copyright Society. Since their introduction, ARR have been subject to criticism by art market professionals and it remains to be seen whether they will be retained in the longer term after Brexit.

iii Economic rights

Copyright is the most significant intellectual property right subsisting in an artist's works and is designed to protect the artist's economic interests. Unlike in certain other jurisdictions, under UK law copyright arises automatically at the point when an original artwork is created if the artist meets the criteria for protection under national law and does not require registration. For artistic works, the term of copyright is the life of the author plus 70 years from the end of the calendar year in which the author died. Copyright can be transferred by inheritance, licensed or assigned.

In view of Brexit, the UK government does not intend to implement the controversial Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC into UK law but has stated that any future changes to the UK copyright framework will be considered as part of the usual domestic policy process.[26]

More unusually, artists may try to protect their creations, brands or names by registering a trademark. An ultimately unsuccessful attempt was made by the street artist Banksy, through his representatives, Pest Control Office Limited, to trademark his well-known *Flower Thrower* image. Following a complaint by a greeting card company, Full Colour Black, the EU trademark was invalidated in September 2020 by the European Union Intellectual Property Office on the grounds of bad faith, the office concluding that Banksy showed no intention to use the trademark to commercialise goods at the time of its registration.[27] The decision throws into question whether other trademarks in the artist's portfolio will face similar challenge.

VII TRUSTS, FOUNDATIONS AND ESTATES

Trustees holding and managing art collections are not subject to wealth tax in the UK, but they may be liable to inheritance tax (IHT) or capital gains tax (CGT) on certain events.

The IHT treatment of art collections will depend on the nature of the trust. Where the trust is subject to the 'relevant property regime' (broadly speaking, discretionary trusts), then the trustees will generally be liable to IHT every 10 years or on appointments out of the trust, currently at a maximum rate of 6 per cent on the value of the trust fund, if the assets do not qualify for exemption. If the trust is a life interest trust, then no IHT will arise until the death of the life tenant or earlier termination of the life interest.

26 https://questions-statements.parliament.uk/written-questions/detail/2020-01-16/4371.

27 https://euipo.europa.eu/eSearch/#details/trademarks/012575155.

Relevant IHT exemptions include the following.

a Conditional exemption, which is an IHT deferral scheme. The tax may be clawed back on a subsequent transfer or failure to observe the terms of the undertakings. To qualify for this exemption, the assets must meet a pre-eminence test and the owner is required to provide undertakings as to public access and the maintenance and preservation of the assets. The exemption can be claimed on certain chargeable events, including when assets are transferred by an individual into a trust, preventing an immediate IHT charge. In certain circumstances it can also be claimed to defer CGT. Conditional exemption was historically regarded as a good way to hand down family heirlooms to the next generation in a tax-efficient manner, but the rules have tightened significantly in relation to public access and can often be burdensome on a new owner.

b The acceptance in lieu scheme allows trustees to offer artwork to public institutions in exchange for IHT tax credit. A wish can be expressed as to the ultimate destination of the property. To qualify for this exemption, the objects must either be of pre-eminent importance on the grounds of their national, scientific, historic or artistic interest, or associated with an important historic building.

c Business property relief may be available at 100 per cent if the artwork is situated in a building that is open to the public and run as a business.

Trustees are liable to CGT (currently at 20 per cent) on the disposal of chattels exceeding £6,000 in value (although there are special rules about the treatment of sets of chattels). However, no CGT is payable on 'wasting assets' (i.e., assets with a predictable life not exceeding 50 years, including fine wines, antique clocks and watches, and some motor vehicles), provided the disposal is not deemed to be made as part of a trade or business.

VIII OUTLOOK AND CONCLUSIONS

As we approach the end of 2020, the art market continues to face uncertainty about the future relationship between the UK and EU; at the same time, the reach of the UK art market has always been much wider than Continental Europe and no doubt London will continue to thrive as a leading centre of the international art market. Covid-19-related restrictions are tightened as the UK faces a second wave of the pandemic. Both issues will no doubt continue to dominate headlines for some time to come. But there will be other developments to watch as we enter 2021, in particular, the way in which the government will implement proposals for a network of new freeports across the UK following the end of the Brexit transition period, with the first of the new sites expected to be open for business in 2021, and the impact they will have on the London and the UK as an art market hub.[28] Art market participants will need to keep their focus on implementing the requirements of 5AMLD in anticipation of HMRC as the sector regulator starting to police and enforce the tighter anti-money laundering and compliance regime in the course of next year.

28 www.gov.uk/government/news/government-outlines-new-plans-for-freeports-to-turbo-charge-post-brexit-trade.

Appendix 1

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Gregor Kleinknecht is a German *Rechtsanwalt* and an English solicitor and partner at Hunters Law LLP, specialising in art and cultural heritage law. Having started his career at two leading international City of London law firms and at a US law firm, Gregor founded and led the award-winning boutique firm of Klein Solicitors before joining Hunters following the merger of the two firms in February 2014. Gregor is also a mediator and arbitrator with Art Resolve, the dedicated dispute resolution service for art and cultural heritage claims. He conducts both transactional and dispute resolution work for a wide range of national and international artists, collectors, galleries, dealers, auctioneers, art consultants, funding organisations and landed estates. Gregor also advises and has successfully acted for claimants in Holocaust restitution claims. He is recommended as a leading individual in art and cultural heritage law by the main legal directories. He chairs the board of the Professional Advisors to the International Art Market and is a member of numerous other professional and arts organisations. He frequently speaks and publishes on a wide range of legal topics.

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Petra Warrington is a senior associate at Hunters Law LLP, practising art and cultural property law and intellectual property law. She advises collectors, artists, trustees and members of the art trade in relation to both non-contentious matters and disputes. Petra obtained a BA and MA in history of art before pursuing a legal career and held research, collection management and business roles at museums, galleries and auction houses in the United States and London. Petra is an accredited mediator and a member of Art Resolve, an officer on the IBA Art, Cultural Institutions and Heritage Law Committee and a member of the Professional Advisors to the International Art Market. She is recommended in the art and cultural property section of *The Legal 500* and *Chambers HNW*.

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