

Art Law

Contributing editor
Pierre Valentin



2018

GETTING THE
DEAL THROUGH

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Pierre Valentin

Constantine Cannon LLP

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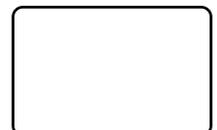


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Preface

Art Law 2018

First edition

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

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

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

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

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

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

GETTING THE 
DEAL THROUGH 

London
April 2018

Netherlands

Sjo Anne Hoogcarspel and Inge Naves

Brinkhof

Buying and selling

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

Ownership of a good passes from seller to buyer at the time of the delivery. Delivery can take place by giving the buyer actual possession of the good. It can also be agreed that delivery will take place upon the moment of receipt of payment.

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

The Dutch Civil Code (DCC) provides for the presumption that whoever has possession of a good is the owner of that good (article 3:119 DCC). This presumption can, inter alia, be refuted if it was later found that the seller did not have the power of disposition, for example, because the good was stolen. Nevertheless, the buyer may have acquired the ownership of the good provided, inter alia, that the transfer was not performed gratuitously and the buyer acted in good faith (article 3:86 DCC).

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

There is no general public register for the ownership of art. However, cultural objects that have been granted protective status under the Act of 9 December 2015, Relating to the Combining and Amendment of Rules Regarding Cultural Heritage (the Heritage Act) are registered in the Register for Protected Cultural Objects and Collections. The register is accessible via: <http://data.collectienederland.nl/vc/wbc-2/>. The listed owner is presumed to be the legal owner for the purposes of a claim for restitution of such a protected cultural object.

Theft or loss of an object can be reported to the Dutch police, which may decide to report it to Interpol for the purpose of putting it in its database of stolen art (see www.interpol.int).

Also, private initiatives such as the Art loss Register provide for the possibility to record theft or loss of an object against a fee (see www.artloss.com).

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

Dutch law tries to strike an equal balance between the rights of the victim of theft and the acquirer in good faith.

On the one hand, a buyer of stolen art will be protected from restitution claims from the original owner if the buyer acted in good faith at the time of purchase (article 3:86, subsection 1 DCC). On the other hand, the victim of theft may claim the restitution of his property within three years after the theft (article 3:86, subsection 2 DCC). The buyer will only be protected from such a restitution claim if he or she acted in good faith and has purchased the object in a commercial shop, excluding any acquisitions at auctions (article 3:86, subsection 3 DCC).

The burden of proof rests with the buyer that wishes to rely on good faith. Good faith is lacking in cases where the buyer actually knew or should have known, given the circumstances of the case, that there was a defect in title. Although there is no general obligation to investigate the validity in title, depending on the circumstances, a buyer may be required to do further fact-finding or research whether or not the goods

are stolen. In general, professional art dealers should exercise a higher degree of care than consumers – with no specific knowledge for buying art – to be able to rely on good faith. Also, in cases where the object is more valuable, a buyer should generally be more cautious. If the object is listed in a publicly available register of stolen art, such as the Art Loss Register or the Interpol database on stolen works of art, this will be taken into account when assessing the good faith of the buyer.

A bona fide purchaser of stolen art will become the legal owner of the object after having possessed the object for a period of three years (article 3:99, subsection 1 DCC), unless the object is a protected cultural object under the Heritage Act (article 3:86a, subsection 2 and article 3:99, subsection 2 DCC) or is a cultural object protected under Directive 2014/60 EU on the return of cultural objects unlawfully removed from the territory of an EU member state (EU Directive 2014/60 EU) (article 3:86a, subsection 1 and article 3:110a DCC).

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

Yes. Even a bad faith buyer can obtain legal title. In principle, the possessor of a stolen object becomes the rightful owner at the moment the right of the original owner to claim restitution expires, which is 20 years after the day of the theft (article 3:105 DCC and article 3:306 DCC). Again, different rules apply to cultural objects protected under the Heritage Act and cultural objects protected under EU Directive 2014/60 EU.

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

Yes. See question 5.

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

In general, the risk of loss or damage passes on transfer of ownership. This is usually the moment the buyer gets actual possession of the bought object. The parties are free to contractually agree on a different point in time.

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

There are no compulsory due diligence enquiries a buyer of art needs to make. Freedom of contract is the starting point. In the case of a sales contract, the object purchased needs to have the characteristics a buyer may expect on the basis of the agreement and, in particular, must be fit for the ordinary purpose or a buyer's particular purpose. What the buyer may expect in this regard depends on the terms of the contract but also on the circumstances of the case and the information provided by the seller prior to the deal. In certain circumstances, a buyer will be obliged to do further research and make enquiries to be able to rely on guarantees given or legitimate expectations as to the characteristics a buyer may expect. Such an obligation to conduct further due diligence may also arise on the basis of information given by the seller. For example, in a case where the information provided by the seller gives rise to

a reasonable suspicion that there may be an issue with ownership or provenance, the buyer should enquire further, to be able to rely on good faith protection.

9 Must the seller conduct due diligence enquiries?

The starting point is that a seller has a duty to disclose all information available to him or her that is relevant for the buyer to assess the characteristics of the object. In order to determine what a buyer may expect in the given circumstances of the case, account must also be taken of what the seller knew or ought to have known about the use for which the object is intended and about the intentions of the buyer. It all depends on the circumstances of the case. In general, professional parties are presumed to have more extensive knowledge of the objects concerned than a private party and as such they generally have a higher standard of care to observe. If a buyer is a professional party, the seller may expect certain knowledge and expertise to be present; for example a reliance on statements regarding authenticity or presumed knowledge of applicable export restrictions. If the seller is a private person without any specific expertise, it may be unreasonable for a buyer to rely on the seller's skill and judgement to ensure that all relevant information is disclosed.

In addition, the Heritage Act provides that the owner of a protected cultural object is obliged to inform a buyer, prior to the sales, that the object is protected as such.

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

There are no specific implied warranties – this is not a legal concept under Dutch law. However, it could be said that the notion that an object must have the characteristics a buyer may expect on the basis of the agreement and, in particular, must be fit for the ordinary purpose or a buyer's particular purpose, can be understood as such an implied warranty. In a business-to-business relationship, liability in this respect can be excluded or limited contractually.

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

In general, if the buyer can establish that the art, antique or collectible is a forgery it can claim dissolution of the sales contract on the basis of non-compliance (article 6:265 DCC) or revocation of the sales contract on the ground that it has been entered into under the influence of an error (article 6:228 DCC). The buyer can then claim repayment of the purchase price. However, whether a buyer can dissolve or revoke the sales contract on these grounds depends to a large extent on the statements made by the seller with regard to authenticity (for example, a painting may only be attributed to a certain artist, which implies that it is not beyond any doubt) and the circumstances of the sales. It will also depend on applicable terms and conditions, which may exclude the possibility to rely on these grounds. It is further noted that courts have interpreted a contract of sales of art as a contract with an element of chance because it is sometimes very difficult to establish without a doubt that a certain object is authentic or not. In a way, parties willingly take a chance in this respect. In a case where the contract has such an element of chance, buyers should accept the risk that the object is not authentic and cannot rely on the aforementioned remedies (see, inter alia, the Dutch Supreme Court decision of 3 April 1959, *Hercules Seghers*). Whether a sales contract has such an element of chance is a matter of interpretation of the contract.

In a case where the seller has acted fraudulently, in the sense that it willfully sold a forgery as an original, the buyer can claim nullification of the contract (article 3:44 DCC) and claim repayment of the purchase price.

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

In principle, the seller can claim that the contract of sales has been entered into under the influence of error and revoke the contract on that basis (article 6:228 DCC). The seller can then reclaim the object. The seller bears the burden of proof.

Export and import controls

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

Permission will have to be obtained from the Minister of Culture for the export of certain objects that have been granted protected status under the provisions of the Heritage Act, irrespective of whether the export is to an EU member state or to a third country (article 4.22 Heritage Act).

In addition, certain objects may only be exported outside the EU with a licence further to the implementation into Dutch law of Council Regulation (EC) No. 116/2009 on export of cultural goods (article 4.23 Heritage Act). Cultural objects are divided in 15 categories that are standardised throughout the EU. Objects that exceed a certain age and value are subject to this export licence.

The main age and value thresholds per category are:

Category of artwork	Age (years)	Value (€)
Archaeological object	100	0
Pictures and paintings	50	150,000
Watercolours, gouaches and pastels executed entirely by hand on any material	50	30,000
Mosaics in any material executed entirely by hand.	50	15,000
Original engravings, prints, serigraphs and lithographs	50	15,000
Original sculptures or statuary and copies produced by the same process as the original	50	50,000
Photographs, films and negatives thereof	50	15,000
Incunabula and manuscripts	50	0
Books	100	50,000
Printed maps	200	15,000
Archives	50	0
Antiques such as furniture, musical instruments, toys	50	50,000

For more information and a complete overview of the categories, see: <https://english.erfgoedinspectie.nl/publications/publication/2016/11/16/brochure-import-and-export-of-cultural-objects>. For the sake of completeness, it is noted that no export licence is required for intra-EU trade, but permission is required in the case of cultural objects protected under the Heritage Act.

Furthermore, the Netherlands is bound by the 1954 UNESCO Convention (Protection of Cultural Property) and the 1970 UNESCO Convention (Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property). On the basis of these Conventions, the Netherlands is obliged to seize and take into custody any object that is believed to be unlawfully exported from another state party to the Conventions.

If one violates the rules with regard to the import and export of cultural objects, the property may be taken into custody and one could be fined.

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

VAT

Depending on the VAT position of the exporter, generally the zero per cent VAT rate should apply to the export of art, antiques or collectible items or alternatively the export is out of scope for VAT (both options leading to no VAT liability for the exporter).

For import transactions, the importer is in principle liable to pay VAT. In the Netherlands the VAT rate for art, antiques or collectible items is currently 6 per cent in The Netherlands. The reduced VAT rate may be increased to 9 per cent as of 1 January 2019 (according to the announcement of the Dutch government, which has, however, not been formalised in legislative proposals as per the date of writing).

However, there are certain methods to suspend the import VAT liability, for example, importing under a customs regime (eg, ATA Carnet or Temporary Import).

Custom duties

Usually, if the goods qualify as art, antiques or collectible items within Chapter 97 of the Harmonized System no custom duties are levied. Upon the exportation of goods, the EU does not levy any custom duties.

Direct and indirect taxation**15 Outline the main types of tax liability arising from ownership and transfer of art, antiques and collectibles.****Direct taxation – personal income tax**

Private ownership of art, antiques or collectible items by a private individual can constitute taxable income in box 1 (eg, when ownership is part of an active trading activity) or box 3 (passive holding of art, antiques or collectible items).

In box 1 (active trading) the net results (ie, the net sale proceeds) are taxed at progressive rates of up to 52 per cent. Losses can be deductible.

In box 3 (passive holding) the annual tax burden is based on deemed rates of return realised with the passive holding of the items of art, antiques or collectibles. The tax rate in box 3 (for 2018) is maximised at 1.61 per cent of the value of the item at 1 January of the same year. Losses are not deductible. If the art is however held for the personal use of the individual (and not mainly as a passive investment) it is exempt from taxation in box 3.

Direct taxation – corporate income tax

If the art is held by a company (eg, a Dutch BV) the net result (gain or loss from sales activities, or income from letting out) constitutes taxable income for Dutch corporate income tax purposes. The tax rate is 20 per cent or 25 per cent (for that part of profits exceeding €200,000). The corporate income tax rate may be reduced to 16 per cent and 21 per cent (for that part of profits exceeding €200,000) over the next years according to announcements from the Dutch government, which have, however, not been formalised in legislative proposals as per the date of this publication.

Indirect tax – VAT

As regards VAT, it is important to distinguish whether the art, antique or collectible item qualifies as such under the applicable definitions in the Dutch VAT rules and regulations and what kind of person is involved in the transfer thereof. The reduced VAT rate of 6 per cent applies to sales by the artist or by entrepreneurs who are not resellers. In other circumstances the applicable VAT rate is normally 21 per cent.

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

In order to support (and increase) art in Dutch museums and in public buildings, Dutch tax law includes the possibility to pay inheritance tax due with qualified art items (eg, items of national importance). In a case where the inheritance tax is paid for with a qualified item, the value of the art will be increased by 20 per cent. Basically this works out as a discount for the heirs on the amount of inheritance tax.

Public benefit organisations

These organisations are focused on charity (for example sports, art, science) and are eligible for several tax benefits. One of these benefits is that donations (which includes donations of art, antiques and collectibles) to qualified charity organisations are tax exempt for gift and inheritance tax purposes. Furthermore, individuals or companies could, when all criteria are met, be eligible to deduct donations to a public charity from their Dutch taxable (corporate) income. These deductions are often limited.

Margin scheme for VAT

In the Netherlands a margin scheme is possible for traders in margin goods that are bought without VAT. The margin scheme entails that the VAT is not calculated based on the turnover but on the profit margin. The margin scheme applies to resellers only. Under Dutch VAT law, a reseller is an entrepreneur whose activities mainly consist of the resale of used art, antiques and collectibles. The margin scheme does not apply automatically; the reseller must opt in for this specific VAT scheme.

Collectors' pieces and works of art not intended for sale may be imported exempt from VAT by galleries, museums and other institutions that are approved by the Dutch government.

Customs Exemption

As mentioned, if goods qualify as art, antiques or collectible items within Chapter 97 of the Harmonized System no custom duties are levied and upon exportation of such goods the EU does not levy any custom duties. In addition, an exemption from customs duties according to article 43 of the Council Regulation on Exemption from Customs Duty applies to goods of an educational, scientific or cultural nature, which are listed in Annex II of the Council Regulation on Exemption from Customs Duty ((EC) No. 1186/2009 of 16 November 2009).

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

The usual type of security interest is the right of pledge. Under Dutch law, there are two types of pledge: possessory pledge and undisclosed pledge. In the case of a possessory pledge, the lender takes physical possession of the work. In the case of an undisclosed pledge, the work remains in the possession of the borrower. Pawnbrokers are generally where one can borrow against art.

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

If the borrower is a consumer, a loan will qualify as a consumer loan to which the provisions on consumer credit agreements apply (article 7:57 et seq DCC). These provisions mainly contain more extensive pre-contractual informational requirements to adhere to. However, the following exceptions may apply to the borrowing against art by consumers. First, if the liability of the borrower is strictly limited to the pledged item. Second, if the loan has to be repaid within three months and only insignificant costs are involved. In these two situations, the stricter rules do not apply.

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

No, there is no public register where security interests over art, antiques or collectibles can be registered.

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

If the borrower defaults on the loan, the lender may sell the pledged good without court intervention. The security interest (eg, the pledge) as such constitutes entitlement to enforcement (article 3:248 DCC).

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

In a case of execution, a pledgee in principle has preference over all other creditors. In a case of bankruptcy, the position of the pledgee depends on the type of pledge. If an art is encumbered with a possessory pledge, the pledgee takes in principle precedence over all other creditors. If a work is encumbered with an undisclosed pledge, other creditors (such as the tax authority) may rank above the pledgee.

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

The enjoyment and exercise of copyright is not subject to any formalities. All literary and artistic works are protected by copyright if such a work is the result of the author's own intellectual creation.

Copyright is automatically vested in the actual creator of a work (the 'author', article 1 of the Dutch Copyright Act (DCA)). However, there are some deviations to this rule. For example, employers are deemed to be the authors of works made by employees. Also, the person or company designated on the work as the author is presumed to be the author and, thus, the copyright owner, in the absence of proof to the contrary.

23 What is the duration of copyright protection?

In general, copyright expires 70 years after the death of the author (article 37(1) DCA). If a work was made by two or more authors, the copyright expires 70 years after the death of the last surviving co-creator (article 37(2) DCA).

If a legal entity is deemed to be the author of a work, the term of protection runs for 70 years after the work was first made public. The same term applies to anonymous works. However, if the author makes itself known within the 70 years after first publication, copyright protection will be extended for 70 years after the creator's death.

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

Yes, the owner, possessor or holder of a drawing, painting, sculpture, architecture or a work of applied art is permitted to make public or reproduce a work without the copyright owner's consent as far as this is necessary for the public exhibition or public sale of that work (article 23 DCA). This includes the right to use the artwork in an advertisement to promote such a public exhibition or public sale, but commercial exhibition is not allowed without consent. Also, the copyright owner can limit this exhibition right contractually.

In any event, the moral rights of the author of a work must be respected (ie, the right to be named as the author).

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

See question 24. Yes, copyright-protected drawing, painting, sculpture, architecture or a work of applied art can be reproduced in printed and digital museum catalogues or in advertisements without the copyright owner's consent. However, the purpose of the catalogue or advertisement must be limited to the promotion of the exhibition and exclude any commercial use. For example, consent of the author will be required if a catalogue that contains an image of the work is sold by a museum for profit.

In any event, the moral rights of the author of a work must be respected (ie, the right to be named as the author).

26 Are public artworks protected by copyright?

Public artworks (including public sculpture, street art or architecture) are protected by copyright like any other work that is the result of the author's own intellectual creation. However, copyright owners cannot prohibit the reproduction or publication of an image of an artwork that has been made to be permanently situated in a public place (article 18 DCA).

27 Does the artist's resale right apply?

Article 43a of the DCA provides for the right, for the benefit of the author of an original work of art, to receive a percentage of the price obtained for any resale, made by professionals from the art market, of his or her work (such as auction houses, galleries or any other art market) with a minimum sales price of €3,000. The resale royalty is payable to the author of the work and, after the death of the author, its testamentary successors

The resale right applies to works of graphic art or plastic art such as collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware and photographs, which are made (in limited numbers) by the artist himself or herself or under his or her authority. Copies are included if they are original works of art according to professional usage (limited productions or signed works, for example).

The resale royalty provided for in article 43 of the DCA is set at the following rates:

- 4 per cent for the portion of the sale price up to €50,000;
- 3 per cent for the portion of the sale price from €50,000,01 to €200,000;
- 1 per cent for the portion of the sale price from €200,000,01 to €350,000;
- 0.5 per cent for the portion of the sale price from €350,000,01 to €500,000; and
- 0.25 per cent for the portion of the sale price exceeding €500,000.

However, the total amount of the royalty may not exceed €12,500. The obligation to pay the royalty rests with the professional art dealer involved in the sale. The resale royalty becomes due at the moment the sales price of the original work of art becomes due, and, in any case, three months after the contract of sales was concluded. The limitation period for an action for payment of the royalty is three years following the day when the owner acquired knowledge of both the claimable royalty and of the person owing the royalty. In any case, the limitation period is 20 years from the time the compensation became due.

Beneficiaries can collect resale rights directly, but it is possible to join a collective management organisation like Pictoright. However, this is not compulsory.

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

Authors have the following moral rights (article 25, DCA):

- i the right to object to the disclosure of the work without mentioning the name of the author, unless objecting would be unreasonable;
- ii the right to object to the disclosure of the work under a different name than the name of the actual author and to changes in the name of the work or the author mentioned on the work, unless objecting would be unreasonable;
- iii the right to object to alterations made to the work, unless the nature of the alteration is such that objecting would be unreasonable; and
- iv the right to object to any distortion, mutilation or other impairment of the work that could be prejudicial to the reputation or name of the author or to his or her dignity as the author.

Moral rights cannot be assigned. Only testamentary successors are entitled to moral rights.

Authors can waive their moral right under (i), namely, the right to attribution. The rights under (ii) and (iii) can only be waived as far as it concerns alterations to the work or to the title. The right under (iv) cannot be waived.

Agency

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

Normally an agent is not entitled to receive any commission or compensation directly. The agent's role is to negotiate and possibly conclude transactions on behalf of the principal, after which the principal will pay a commission or compensation to the agent. The principal must supply to the agent a statement of all transactions concluded at the end of each month so that the commission can be calculated. An agent should disclose any commission or compensation paid to him by third parties to facilitate the transaction to the principal.

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

The principal is responsible for payment of a commission to the agent within a certain time.

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

By definition, an agent works for the principal. An agent has the obligation to look after his or her principal's interests and act dutifully and in good faith at all times. Therefore, the agent should disclose any commission or compensation paid to him or her by third parties to facilitate the transaction to the principal. It will depend on the agency agreement made with the principal in this regard whether the agent is allowed to

keep such commission or compensation received. In any case, an agent will need implied or expressed consent of the principal to keep the commission or compensation received.

Consigning items

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

The consignment of an artwork does not change the ownership of the artwork. It depends on the terms of the consignment agreement, but the general idea will be that the consignor wishes to keep his or her identity confidential and for that reason uses a middleman (a dealer) to sell the art work on his or her behalf but in the dealer's own name to keep his or her identity concealed. Assuming that the art work has not been sold yet, if the dealer goes into liquidation, the consignor can claim the return of his or her property from the administrator. Since it is presumed that whoever has possession of a good is the owner of that good, the consignor will need to provide evidence that he or she (and not the dealer) is the owner, for example by showing the applicable consignment agreement. There is no register where consignors can register interest in consigned art works.

Auctions

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

Public auctions in which goods are sold to the highest bidder need to comply with the Act on Official Surveillance at Auction Sales 1971, which provides that it is prohibited to hold a public auction other than before the presence of a notary or court-appointed bailiff. Although often notaries or court appointed bailiffs are present at public auctions, it is noted that this law does not seem to be actively enforced. Moreover, it is unclear how this 1971 Act needs to be complied with in case of the current practice of online sales of goods.

For online auctions, see questions 48-49.

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

Yes, auctioneer offices may sell items privately and offer advantages or loans against art, antiques or collectible items. It is noted that if the auctioneer office acts as a pawn broker (ie, money is lent to a consumer in exchange for possession against a fee), specific regulations that seek to protect consumers apply. For example, these regulations set a maximum on the interest rate that can be applied. Auction guarantees are not prohibited by law.

Spoilation during the Nazi era

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

In general, claims to art looted during the Nazi regime will be time barred due to the expiration of statutory limitation periods. Restitution claims that are time barred can be brought before the Restitution Committee (see question 36).

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

Since 2002, the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War (the Restitutions Committee) advises the Minister of Education, Culture and Science on restitution claims in relation to items of cultural value that are part of the Dutch national art collection.

The Restitution Committee advises about such applications on the basis of the yardsticks of reasonableness and fairness, taking into account, *inter alia*, the Washington Conference Principles on Nazi-Confiscated Art. One of the requirements for restitution is that it must be highly likely that the supposed original owner was indeed the owner and that he or she lost possession of the artwork involuntarily as a result of circumstances directly related to the Nazi regime. Therefore, among other things, the Committee investigates who the original owner of the

Update and trends

In November 2018, the new Governance Code of Culture will be presented. This Code gives a framework and good practices for governance of foundations active in the cultural sector. Adherence is voluntary but use of the Code is often a condition for a subsidy to be awarded.

claimed artwork was and how this owner lost possession of the work during the Second World War. The connection between the applicant and the original owner is also investigated. Only rightful claimants to the assets of the original owner are entitled to claim restitution. On the basis of this investigation, and the hearing of parties involved, the Committee gives an advice to the Minister. Although this is non-binding, it is usually followed.

Restitution claims that relate to works of art that are not part of the Dutch national art collection but, for example, part of a collection of a provincial or municipal body, an association or private individual can also be submitted to the Committee for investigation and opinion, as an alternative way of settling a dispute. This is done on a voluntary basis. The Committee will then issue a binding expert opinion regarding claims on works lost involuntary as a result of the Nazi regime. Usually, the basis of the binding expert opinion is an agreement between the parties declaring that they agree to be bound to the advice. If need be, it can be enforced contractually.

More information on the Restitution Committee and the procedures can be found at its website: www.restitutiecommissie.nl/en/.

Lending to museums

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

The insurance arrangement has to be agreed between the parties. Typically, the lender is responsible for the all-risk and nail-to-nail insurance of the object on loan. It is possible for museums to apply for an 'indemnity certificate' to be issued by the state to save on the insurance costs. Basically, the state then gives a subsidy for an exhibition or long-term loan, subject to the suspensive condition of loss or damage to the objects given on loan. This makes it easier for museums to loan foreign objects of art for exhibitions in the Netherlands. The insurance premium will go down since the museum will only have to insure part of the risk of damages involved; the rest of the damages incurred will be covered by the subsidy.

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

No. Museums need to respect a judicial seizure order, should this occur. However, it is possible to request the Ministry of Foreign Affairs to issue a guarantee against seizure in which it is usually stated that the Dutch State will oppose attempts at seizure or other enforcement measures when such measures are contrary to international law. Whether this will be issued largely depends on the circumstances of the case, and in particular on information available on the provenance of the object concerned. Also, it will only be issued in cases where the object is owned by the state of origin.

Cultural patrimony

39 Is there a list of national treasures?

Yes. The Minister of Education, Culture and Science, acting *ex officio*, may designate a cultural object as a protected cultural object that is of particular cultural-historical or scholarly significance or exceptional beauty and that, being irreplaceable and indispensable, should be preserved as part of protected Dutch cultural heritage (article 3.7 Heritage Act). In general, consent of the owner is necessary for such a designation (article 3.9 Heritage Act). There are no entitlements for compensation.

Protection as a cultural object under the Heritage Act has various consequences for the owner.

For example, the following actions are prohibited without prior written consent of the Heritage Inspection:

- relocating it;

- offering it for auction;
- disposing of it;
- encumbering it;
- renting it out;
- providing it on loan; and
- allocating it to a non-Dutch resident in the event of the division of a joint property (article 4.4 Heritage Act).

Objections against these actions may only be based on the consideration that there is a risk of the loss of the protected cultural object for cultural heritage present in the Netherlands (article 4.6 Heritage Act).

Reference is also made to the consequences for good faith acquisition set out in questions 5 and 6 and concerning export and import set out in question 13.

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

No. In a case where the Minister of Education, Culture and Science has raised an objection against disposal, allocation to a non-resident or relocation to a permanent residence of the owner outside the Netherlands, these objections will be published in the State Gazette and potential buyers of the object can then come forward (article 4.9 Heritage Act). Also, the state has the right to negotiate a sale to the state (article 4.13 Heritage Act). If such negotiations do not lead to agreement on the price, the price shall be determined at the request of either party, by the District Court in The Hague, unless the owner indicates that he or she will refrain from the action or the Minister withdraws the objections to said action (article 4.14 Heritage Act).

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

An archaeological find discovered during an excavation and of which no party can prove ownership shall be the property of the province where the find has been discovered; the municipality where the find has been discovered if such municipality has a designated depot for such finds; or the state, if the find was discovered outside the territory of any municipality (article 5.7 Heritage Act).

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

Further to the implementation of EU Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a member state, EU member states can claim the return of cultural objects that are classified as national treasures and which have been unlawfully removed from their territory (article 1008 of the Dutch Procedural Code (DPC)). 'Unlawfully removed' means either removed from the territory of a member state in breach of its rules on the protection of national treasures or in breach of Regulation EC 116/209 or not returned at the end of a period of lawful temporary removal or any breach of another condition governing such temporary removal (article 2, subsection 2 EU Directive 2014/60).

A claim for return of an object on this basis needs to be brought within three years after the competent authority of the requesting member state became aware of the location of the cultural object and of the identity of its possessor. In any case, a claim for return on this basis expires 30 years after the date the object was unlawfully removed from the territory of origin (3:310a DCC). When the return of the object is indeed ordered, the court may award the possessor a fair compensation according to the circumstances of the case, provided that the possessor demonstrates that he or she exercised due care and attention in acquiring the object (article 3:86a DCC). These proceedings are about the physical return of the object to the member state of origin, and the competent court will not decide on who is the actual legal owner of the object. This will be dealt with by the competent court in the member state of origin upon return.

In addition, the Netherlands has ratified and implemented the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transport of Ownership of Cultural Property (UNESCO Convention 1970). State parties and the lawful owner can reclaim cultural property that was imported into the Netherlands contrary to the provisions of the UNESCO Convention or that was unlawfully appropriated in a state party (article 6.7 Heritage Act and article 10:11a-d DPC).

The Netherlands is a signatory party to the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects but did not ratify this treaty.

Anti-money laundering

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

Art dealers that buy or sell goods for which they pay or receive more than €10,000 in cash need to comply with the Anti-Money Laundering and Terrorist Financing Act. This Act is also applicable to art dealers than only act as intermediaries, if payment in cash for the goods bought or sold by their clients exceeds €15,000. In order to comply with the obligations of this Act, the art dealer needs to verify and store information on its contract partners, representatives, the ultimate beneficial owner and the transaction as such. In particular, the art dealer will need to:

- identify and verify its contract partner and representatives (for natural persons via a passport or ID card, for a legal entity via a chambers of commerce registration);
- identify and verify the ultimate beneficial owner;
- verify whether the contract partner or representative qualifies as a politically exposed person or is listed on an international sanctions list;
- establish the purpose and nature of the intended transaction; and
- monitor the business relationship.

The art dealer will need to take a copy of the identification document (passport or ID card) of the contract party or the representative. In the

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case of a suspicious transaction or contract partner or representative, this should be reported to the Financial Intelligence Unit.

Endangered species

44 Is your jurisdiction a party to the CITES Convention?

The CITES convention has been implemented by EC Council Regulation No. 338/97 of 9 December 1996 on the protection of species of wild fauna and flora as well as the Dutch Nature Conservation Act. EU certificates for import and export can be applied for at the Government Agency for Entrepreneurs.

45 Is the sale, import or export of pre-1947 worked endangered species subject to a licence?

Antiques or 'worked specimens' are defined in EC Council Regulation No. 338/97 of 9 December 1996 as items that were significantly altered from their natural raw state prior to 3 March 2047 (which is 50 years prior to the adoption of the Regulation) for the purposes of jewellery, adornment, art, utility or musical instruments. Items acquired prior to 3 March 1947 in their natural state, such as a raw elephant tusk or turtle shell, cannot be considered as antiques and are subject to the requirement to obtain an EU certificate for import and export. Such pre-convention antiques may be sold, exported or imported within the EU without an EU Certificate provided they were imported in the EU legally. For export outside or import inside the EU a CITES permit will be required.

46 Is the sale, import or export of post-1947 worked endangered species authorised? On what conditions?

See question 45.

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

There is a general property ban for tiger bones and rhino horns, which also extends to products made of these materials, including but not limited to art and antiques. An exemption for this property ban can be obtained in a case of non-commercial use only (for example, for

educational purposes). The commercial import and export of pre-convention elephant ivory is prohibited, excluding elephant ivory which has been altered significantly from its natural raw state.

Consumer protection

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

Further to the EU Consumer Rights Directive, consumers buying art at a distance (for example online or by means of distance communication such as telephone or email) or outside the dealer's business usual business premises have the right to cancel the contract within 14 days of the date on which the consumer takes physical possession of the object bought, without giving any reason. This cancellation right cannot be excluded by contract.

This cancellation right can also be exercised in case of sales via online auctions, unless the auction qualifies as a 'public auction', which is defined as a method of sale where property is offered by a trader to consumers, who attend or are given the possibility to attend in person, through a transparent, competitive bidding procedure run by an auctioneer, and where the successful bidder is bound to purchase the property, so a 'live traditional auction'. This means that if a consumer, instead of bidding in the public auction room, bids online or on the telephone, he or she cannot invoke the cancellation right afterwards.

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

In the case of distance contracts of sale, comprehensive obligations further to consumer protection laws apply. For example, information obligations require sellers to provide information on the goods sold, the identity of the seller, the address and contact details of the seller, pricing, delivery, payment methods, complaint policies, guarantees etc, before the contract is concluded. The consumer needs to be able to store this information on a durable medium.

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Getting the Deal Through

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