

IN-DEPTH

# Art Law

UNITED KINGDOM



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# Art Law

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*In-Depth: Art Law* (formerly The Art Law Review) is a unique global overview of this dynamic and growing area of legal expertise. With a focus on recent trends and developments in key jurisdictions worldwide, it examines a wide range of topics including art disputes; fakes, forgeries and authentication; art transactions; artist rights; trusts and foundations; and much more.

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# United Kingdom

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## Summary

INTRODUCTION

YEAR IN REVIEW

ART DISPUTES

FAKES, FORGERIES AND AUTHENTICATION

ART TRANSACTIONS

ARTIST RIGHTS

TRUSTS, FOUNDATIONS AND ESTATES

SPECIAL CONSIDERATIONS

OUTLOOK AND CONCLUSIONS

ENDNOTES

## Introduction

Anybody reading 'The Art Basel and UBS Global Art Market Report 2024'<sup>[1]</sup> will very quickly realise that, while the international art market faced headwinds in 2023, the difficulties experienced by the British art market are rather more pronounced.

In 2023, global art market sales eased after two years of strong growth after the covid-19 pandemic, decreasing by 4 per cent year-on-year to an estimated US\$65 billion, which still surpassed pre-pandemic 2019 levels of US\$64.4 billion. Although factors like high interest rates, inflation and political instability contributed to slowing growth at the top end of the market, there was a notable 4 per cent increase in transaction volumes, and online sales continued to recover. This growth in buyer activity was particularly pronounced at lower price levels, creating a more buoyant trade environment for dealers and auction houses in those segments of the market.<sup>[2]</sup>

The United States preserved its leading position in the global art market, and as the principal centre for worldwide sales of the highest-priced artworks, accounting for 42 per cent of sales by value, down 3 percentage points year-on-year. Behind these figures lies a 10 per cent decline in US art market sales from a historical peak of US\$30.2 billion in 2022 to US\$27.2 billion in 2023, with the contraction reflecting a decrease in sales at the top end of the market.<sup>[3]</sup> China surpassed the United Kingdom to regain its position as the second-largest global art market with its share rising to 19 per cent. Following the easing of pandemic-related restrictions, sales in the Chinese art market increased by 9 per cent to an estimated US\$12.2 billion amid a strong surge of activity in the first half of 2023. In the latter half of 2023, that pace moderated, however, possibly influenced by projections of more gradual economic growth.<sup>[4]</sup>

The UK art market moved back to third place with a 17 per cent market share, down by 1 per cent year-on-year. Along with the broader impact of the pandemic, the UK market has come under pressure over the past few years owing to economic factors, including Brexit-related complexities. Sales in the United Kingdom decreased by 8 per cent to US\$10.9 billion in 2023. While the United Kingdom continues to serve as an important hub for high-value transactions in the art market, the decline in these high-end sales, along with the reduction of art imports to the United Kingdom contributed to a fall of 11 per cent in sales by value, leaving the market below its pre-pandemic level of US\$12.2 billion in 2019. By contrast, France retained its position as the fourth-largest art market at 7 per cent of global sales.<sup>[5]</sup>

## Year in review

Over the past year, the British art market continued to be influenced by economic challenges, the impact of Brexit on the cross-border flow of artworks and political instability, both at home and abroad.

### Change in government

In July 2024, parliamentary elections led to a change from a Conservative to a Labour government. Although the resulting political changes have yet to make their impact fully

felt on the art market, the impact of some of the proposed changes, such as the effective abolition of the 'non-dom' tax regime, through which non-UK domiciled individuals broadly only paid UK tax on money earned in the United Kingdom, is already being felt both by the art market and by cultural institutions that have benefited from the philanthropic engagement of high net worth individuals (HNWIs) and ultra high net worth individuals, who are now leaving the United Kingdom. Equally, changes to the capital gains and inheritance tax regimes will directly affect art collectors in the United Kingdom.

From a legal perspective, the change in government has, among other things, delayed the proposed extension of the Ivory Act 2018 to ivory from narwhals, killer whales, sperm whales and hippopotamuses, which was originally proposed to enter into force in September 2024. At the time of writing, it is unclear when the relevant statutory instrument will be placed before Parliament for approval.<sup>[6]</sup>

## AI and copyright law

New challenges for copyright law are presented by the accelerating development of artificial intelligence (AI) in two key respects:

1. First, are creative works generated solely by AI technology without any human intervention protected by copyright under UK law?
2. Second, are AI platforms permitted to scrape images and other creative works online for the purpose of machine learning without the permission of the copyright owner or payment of royalties?

Regarding the first issue, the position currently remains that, if the work is an original literary, dramatic, musical or artistic work, copyright will subsist in it as a 'computer-generated work' for 50 years from the date on which it was made.<sup>[7]</sup> The second issue was the subject of a consultation by the Intellectual Property Office<sup>[8]</sup> but, following objections by the copyright and creative industries, the then-government confirmed in February 2023 that it would not proceed with controversial proposals that would have granted AI platforms an all-encompassing exception to copyright.<sup>[9]</sup>

The author is not aware of any reported cases of artists bringing successful claims in the United Kingdom in respect of the uncompensated and unauthorised use of images downloaded from the internet by generative AI art generators, although stock photo provider Getty Images was reported in February 2023 to have brought such an action against Stability AI in the English courts.<sup>[10]</sup> In December 2023, the High Court gave a judgment in that case.<sup>[11]</sup> Among other things, it dismissed a summary judgment application by the defendant and permitted an amended case to proceed.

The judgment disclosed further details of the case, although much of the evidence was said to be subject to a confidentiality order. In its claims, Getty Images alleges that Stability AI's deep learning AI model known as 'Stable Diffusion' infringes the claimants' copyright, database rights and trademark rights and constitutes passing-off, both insofar as (1) the defendant scraped millions of images from Getty Images websites without the claimants' consent and used those images to train and develop Stable Diffusion, and (2) the output generated by Stable Diffusion in the form of synthetic images reproduced a substantial

part of the claimants' copyright works and, in some instances, even their trademark. It will be instructive to follow the further development of this ground-breaking case.

## Art disputes

### 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 the 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 generally displace this rule in their contract for sale by stipulating that title passes only 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 would otherwise be formed at auction.

The SGA implies certain terms into all 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.<sup>[12]</sup>

There have been a number of high-profile cases in recent years 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 fair share of such fraudsters:

1. Inigo Philbrick, who had a gallery in Mayfair, was sentenced by a US court to seven years in jail for fraud-related offences and ordered to pay a forfeiture of more than US\$86 million.<sup>[13]</sup>
2. 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 United Kingdom.<sup>[14]</sup> Earlier, he had been indicted in the United States for money laundering offences<sup>[15]</sup> and made bankrupt in the United Kingdom.<sup>[16]</sup> He made his latest appearance in court in October 2023, when the Court of Appeal upheld a High Court judgment ordering him to draw maximum sums from his pension to pay creditors.<sup>[17]</sup>
3. In July 2021, art intermediary Angela Gulbenkian was sentenced to jail by Southwark Crown Court for stealing more the US\$1.4 million as part of an art deal and art investment transaction.<sup>[18]</sup>
4. The Insolvency and Companies Court continued freezing orders against the alleged participants in another art investment fraud scheme.<sup>[19]</sup>

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 their 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 themselves to a claim by the true owner in conversion if an artwork is discovered to have been 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 also 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.

## NFTs

Just as the value of non-fungible tokens (NFTs) is declining, so are the number of reported cases concerning disputes around NFTs increasing, perhaps unsurprisingly.

*Soleymani v. Nifty Gateway LLC*

In *Soleymani v. Nifty Gateway LLC*,<sup>[20]</sup> the Court of Appeal had to strike a balance between consumer protection and arbitration law in the context of the global market for NFTs. The claimant, Mr Soleymani, had acquired an NFT associated with an artwork in an online auction held on Nifty Gateway's crypto trading platform. The agreement between Mr Soleymani and Nifty Gateway was governed by New York law, and, like those of many other NFT marketplaces based in the United States, Nifty Gateway's terms of business contained an arbitration clause.

When Nifty Gateway alleged non-payment of the amount of the winning bid by Mr Soleymani, it referred the dispute to arbitration in New York under the JAMS Rules. Mr Soleymani responded by bringing proceedings in the English High Court, in which he sought, among other things, a declaration that the arbitration clause relied on by Nifty Gateway was unfair and, therefore, not binding on him under Section 62 of the Consumer Rights Act 2015 (CRA). Section 62 states that a term that has the object or effect of excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, in particular, by requiring the consumer to take disputes exclusively to arbitration, may be regarded as unfair. Nifty Gateway contested the claim and sought an order under Part 11 of the Civil Procedure Rules for a declaration that the English courts did not have jurisdiction to hear the claim, as well as an order staying the English court proceedings under Section 9 of the Arbitration Act 1996 (AA 1996).

At first instance, Nifty Gateway succeeded on both points but, on appeal, the Court of Appeal lifted the stay of proceedings and ordered a trial on the question of the validity of the arbitration agreement under Section 9(4) of the AA 1996. The Court of Appeal effectively found that, in cases where a UK consumer seeks to rely on domestic law consumer rights, the English courts are better placed than a foreign arbitrator to determine the validity of the arbitration agreement. It remains to be seen what remedies UK-based NFT buyers will

ultimately be able to pursue in the English courts – and whether these decisions will be recognised and enforced overseas.

Proceedings involving celebrity-endorsed NFTs

The trend observed in the United States of dissatisfied investors bringing proceedings following a collapse in prices for celebrity-endorsed NFTs, such as in a case involving Sotheby's Holdings Inc and others over a 2021 auction and promotion of Bored Ape Yacht Club NFTs, does not yet appear to have reached the United Kingdom. The California class action lawsuit alleges that the auction house 'misleadingly promoted' the NFTs and colluded with creator Yuga Labs to artificially inflate their prices. Sotheby's is among 30 defendants named in the lawsuit, with celebrities like Justin Bieber and Paris Hilton also accused of promoting the NFT collection without disclosing their financial links to it.<sup>[21]</sup>

*Osbourne v. Persons Unknown & Anor*

It is becoming clear (if it ever needed clarification) that the blockchain is not fraud-proof. In *Osbourne v. Persons Unknown & Anor*,<sup>[22]</sup> the claimant brought proceedings against persons unknown who had allegedly transferred without her consent two NFTs from her digital wallet with OpenSea, a peer-to-peer NFT marketplace. The High Court granted an interim injunction to freeze the NFTs until the end of proceedings such that they could not be dissipated, as well as an order compelling the operator of OpenSea, a US company called Ozone Networks Inc, to provide the contact information of the individuals in control of the wallets to which the NFTs had been traced.

Despite the growing body of case law in relation to a range of questions affecting NFTs, NFTs still give rise to a myriad of unresolved legal and ethical issues, which will no doubt be explored further as the law develops.<sup>[23]</sup>

## Nazi-looted art and cultural property

Holocaust restitution

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 the 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 because such claims will invariably have 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 one or more of their heirs) who lost possession of a cultural object during the Nazi era (1933–1945), where the 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 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.<sup>[24]</sup> 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 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:

1. the return of the object to the claimant;
2. the payment of compensation to the claimant, the amount being at the discretion of the Panel, having regard to all relevant circumstances including the current market value, but not tied to that current market value;
3. an *ex gratia* payment to the claimant;
4. 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
5. negotiations to be conducted with the successful claimant to implement its recommendation as expeditiously as possible.

The Panel's reports are published and accessible online.<sup>[25]</sup> Its two most recent decisions, at the time of writing, from March 2023 and March 2024 respectively recommended that an oil painting by Gustave Courbet in the possession of the Fitzwilliam Museum, Cambridge be returned, and that three paintings attributed to Peter Paul Rubens should remain in the possession of the Courtauld Institute of Art and on public display.

The Panel 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 author is 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 formed a Network of European Restitution Committees for the purpose of enabling greater collaboration and information sharing between the committees.<sup>[26]</sup>

### Colonial-era restitution

Recent years have seen a growing debate about the return of colonial-era cultural artefacts by UK and European institutions to their countries of origin. There have been calls to find an appropriate process to review museum collections, and discussion regarding whether a panel, such as the Spoliation Advisory Panel, which presently only deals with claims for the return of Nazi-era looted art, should be involved based on an expanded mandate, or whether an approach based on self-evaluation by individual institutions would be best suited to identify and analyse claims for the return of such items.<sup>[27]</sup> For the time being, there is no common process for dealing with claims for the return of artefacts taken during the colonial era, although, in August 2022, Arts Council England published updated guidance, entitled 'Restitution and Repatriation: A Practical Guide for Museums in England', to support the museums sector in matters related to the restitution and repatriation of cultural objects.<sup>[28]</sup>

UK national museums, such as the British Museum, are subject to statutes circumscribing their ability to deaccession objects from their collections.<sup>[29]</sup> The Charities Act 2022

initially included *ex gratia* powers to dispose of charity property, which would have enabled museums to deaccession objects in their collections and to facilitate the restitution and return of cultural objects, if the trustees considered that there was a moral obligation to do so,<sup>[30]</sup> however, following public controversy, the relevant provisions were not brought into effect, and the government subsequently clarified that it currently has no intention of relaxing the deaccessioning rules.<sup>[31]</sup>

Against this background, individual restitution decisions vary significantly on a case-by-case basis, with university museums pursuing increasingly liberal repatriation policies.<sup>[32]</sup> In August 2022, the London-based Horniman Museum agreed to return 72 objects to Nigeria, including a dozen Benin bronzes,<sup>[33]</sup> and the universities of Oxford and Cambridge approved the return of 213 Benin bronzes to Nigeria from the Ashmolean Museum in Oxford and the Museum of Archaeology and Anthropology in Cambridge, respectively.<sup>[34]</sup> In April 2024, constrained by their deaccessioning rules, the British Museum and the Victoria and Albert Museum chose instead to return Asante treasures historically looted by British expeditionary forces to modern day Ghana on long-term loans.<sup>[35]</sup>

### Cultural property

An attack by Just Stop Oil activists against Van Gogh's *Sunflowers* at the National Gallery in London in October 2022<sup>[36]</sup> and similar incidents in other leading museums across the world<sup>[37]</sup> prompted the International Council of Museums to publish a statement by museum leaders in November 2022, warning that these irreplaceable objects must be preserved as part of world cultural heritage and that the protesters' actions risked endangering this cultural heritage.<sup>[38]</sup>

### Limitation periods

Limitation periods for art claims are governed by the Limitation Act 1980 (save for some historic claims, which may fall within the scope of earlier limitation acts). 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 those 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 applies in cases of theft; however, 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 differed under the previous Limitation Act 1939, which applied until May 1981. Under that legislation, the six-year limitation period started running from 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 by the simple passage of time, even where a conversion can be established.

A recent High Court decision in a case concerning a claim over allegedly fake antiquities highlights the importance of timely service of process once a claim form has been issued to prevent proceedings from becoming time-barred.<sup>[39]</sup>

## 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 United Kingdom. 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 English Civil Procedure Rules that a party to court proceedings who refuses to engage in ADR at the request of another party may be ordered to pay some (or even all) of that other party's costs of the proceedings if the court determines that the refusal to mediate was unreasonable, even if the former party is successful at trial.

The Civil Mediation Council serves as an independent body to represent and promote civil and commercial mediation in the United Kingdom. It promotes best practice and operates an accreditation scheme for organisations that provide mediation services.<sup>[40]</sup> Art Resolve provides specialist art mediation service in the United Kingdom.<sup>[41]</sup>

## 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 depends 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 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 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 Sotheby's. The sellers maintained that the painting was genuine and refused to provide

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.<sup>[42]</sup> In November 2020, the Court of Appeal dismissed Fairlight's appeal, upholding the lower court's decision that Sotheby's was entitled to reimbursement. The Court was not asked to consider whether the painting was a forgery.<sup>[43]</sup>

A case involving a potential Caravaggio painting,<sup>[44]</sup> *The Cardsharps*, auctioned in 2006, illustrates the opposite issue of under-attribution. Sotheby's described the artwork as a copy of a well-known and acknowledged Caravaggio work. The buyer purchased the painting on behalf of the art historian Sir Denis Mahon for £42,000. Sir Dennis cleaned and restored the painting and subsequently re-attributed it as being an 'autograph replica' of *The Cardsharps* painted by Caravaggio himself. The consignor, Mr Thwaytes, sued Sotheby's for £11 million, claiming that it had negligently advised him about the painting's attribution and value. After hearing extensive expert evidence, the High Court found for Sotheby's and ruled that the auction house had not been negligent. Sotheby's was entitled to rely on the connoisseurship and expertise of its Old Master paintings team in assessing the quality of the painting and had reasonable grounds for concluding that the quality of the painting was not sufficiently high to indicate that it might be by Caravaggio himself. The case constitutes an important precedent clarifying what duties a leading auction house owes to sellers.

Three further cases about authenticity and attribution, which further clarified the duties owed by a specialist art dealer to a buyer, were reported in 2022:

1. The first case<sup>[45]</sup> concerned a series of items described as Asian antiquities. The claimants alleged that all the objects were inauthentic and that, in attributing the works as he did, the selling antiquities dealer was liable for misrepresentation, breach of contract and negligence. In relation to one of the works, the claimants also alleged that the seller had acted fraudulently. The High Court found that the works were indeed all inauthentic; therefore, the claimants' claims succeeded, and the Court granted rescission of the sale contracts, but dismissed the claim in fraud.
2. The authenticity of further antiquities purchased by Qatar Investment & Projects Development Holding Co, and challenged in a separate case, remains undetermined after the six-year limitation period for bringing the claims expired, and the High Court rejected an appeal against an earlier decision not to grant an extension of time.<sup>[46]</sup>
3. The third case<sup>[47]</sup> involved a dispute about the attribution of an eighteenth century oil painting by French artist Chardin. The defendant art dealer, Simon Dickinson Ltd, a recognised expert in Old Master paintings, did not believe the painting to be wholly an autograph work by Chardin and sold the painting with the attribution 'Chardin and Studio' for a price of £1.15 million. The work was purchased by another art dealer, who arranged for a deep clean of the painting. This unexpectedly revealed Chardin's signature. The purchaser then sold the painting on as an autograph work by Chardin for US\$10.5 million. The claimants, who were the former owners of the painting, brought a claim alleging that Simon Dickinson Ltd had been negligent in its appraisal and sale of the painting on their behalf. The High Court dismissed the claims and concluded that Mr Dickinson was not negligent in his judgment that he was unable to present the painting to the market as a wholly autograph Chardin. The latter case has been criticised for setting the standards to be expected for research,

appraisal and sale of paintings undertaken by art dealers and other intermediaries unreasonably low to the detriment of sellers.<sup>[48]</sup>

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 in the contract for sale either under the SGA in business-to-business sales<sup>[49]</sup> or under the CRA in business-to-consumer sales.<sup>[50]</sup>

If a sale is deemed a sale by description, and the artist is wrongly identified, the buyer, in principle, has 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.

## Art transactions

### Private sales and auctions

During the covid-19 pandemic, the United Kingdom saw an increasing shift from face-to-face transactions to more online dealings, with online auctions and private treaty sales, both in the primary and secondary markets, being executed remotely. At the same time, artists and dealers made greater use of online viewing rooms and social media platforms to market and sell works directly to an expanded and often global client base. While there has since been a resurgence in fair attendances, and art lovers have rediscovered the buzz of seeing art in person, many of these online sales formats are here to stay.

Most auction houses now routinely offer hybrid in-person and online sales, having invested in moving more sales to an online format and adapted their processes for pre-sale viewings and for collection and delivery. 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 those sales.

Sales of artworks to individuals are regulated in the United Kingdom 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 (e.g., telephone, email or via a website).<sup>[51]</sup> Consumer

protection legislation in the United Kingdom is largely derived from EU directives and regulations, and it remains to be seen whether they will eventually be amended or revoked altogether in the aftermath of Brexit.

A recent but increasingly common and controversial trend when buying art from galleries, or directly from an artist's studio, is the insertion of 'no-resale' clauses in the sales contract or associated terms and conditions. These clauses seek to restrict the ability of the new owner to resell the artwork, or to prohibit such sales outright, for a defined period. From a gallery's or artist's perspective, these clauses are intended to avoid short-term speculation and to stabilise the market in an artist's work by maintaining control over access and pricing; however, these clauses constitute an obvious interference with the buyer's ownership rights and, while they have not yet been tested in the UK courts, are likely to be deemed unfair, and therefore unenforceable, at least where the buyer acts as a consumer.<sup>[52]</sup>

The Ivory Act 2018 entered into force in June 2022, after the Supreme Court rejected an application for permission to appeal the earlier decisions of the Court of Appeal<sup>[53]</sup> dismissing judicial review claims at the end of July 2020.<sup>[54]</sup> The Ivory Act implements one of the world's toughest bans on the trade and cross-border movement of antique ivory.<sup>[55]</sup> The ban applies to domestic dealings with objects made from or containing more than a de minimis amount of elephant ivory, as well as exports from and imports into the United Kingdom,<sup>[56]</sup> with only a limited list of exemptions available.<sup>[57]</sup> These include items made before 1918 that are of 'outstandingly high artistic, cultural or historical value' but they require either registration or a certificate of exemption to be issued by the Secretary of State.<sup>[58]</sup> The government has issued guidance on dealing in items containing ivory or made of ivory, and on when and how to register an item or apply for an exemption certificate to deal in ivory.<sup>[59]</sup>

In 2023, the definition of the term 'treasure' contained in the Treasure Act 1996 was expanded to encompass a new significance-based class of treasure, which comprises items that are more than 200 years old and that contain metal.<sup>[60]</sup> The previous definition of 'treasure' only captured items that were at least 300 years old and that are made substantially of gold or silver. The change means that museums have a right of first refusal on a greater number of significant items found in the United Kingdom. The existing Code of Practice on the Treasure Act 1996 was also updated in July 2023.<sup>[61]</sup>

Since 10 June 2021, art businesses that are art market participants (AMPs) have been required to comply fully with the regulatory requirements of the Fifth EU Anti-Money Laundering Directive (5AMLD) and the UK implementing regulations,<sup>[62]</sup> as well as to register with His Majesty's Revenue and Customs (HMRC) as the sector regulator. While HMRC initially allowed AMPs time to become compliant, it has now started to carry out inspections and take enforcement action, including by 'naming and shaming' supervised businesses that have been fined for breaches of the rules.

## Art loans

Loans of artworks for exhibition from private lenders to public museums will typically be insured under the Government Indemnity Scheme (GIS), which is administered by Arts Council England.<sup>[63]</sup> Certain risks are excluded from cover under the GIS, and borrowers and

lenders should consider taking out additional commercial insurance cover for excluded risks.

The Tribunals, Courts and Enforcement Act 2007 provides immunity from seizure for the loan of certain artworks usually kept outside the United Kingdom and not owned by a person who is resident in the United Kingdom, when the work enters the United Kingdom for temporary public not-for-profit exhibition at an approved museum or gallery.<sup>[64]</sup> The provisions are supplemented by the Protection of Cultural Objects on Loan (Publication and Provision of Information) Regulations 2008.

The Cultural Objects (Protection from Seizure) Act 2022 allows approved museums and galleries in England and Scotland to apply for extended periods of immunity from seizure protection for objects already on loan.<sup>[65]</sup>

### Cross-border transactions

The import of cultural goods into the United Kingdom is not subject to any licensing regime, although certain imports are prohibited (e.g., on the basis of United Nations sanctions or, in the case of material originating from endangered species, under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Ivory Act 2018). The country of origin may require an export licence to be obtained, and failure to do so may not only constitute an offence in the country of origin but may also adversely affect the subsequent international marketability of an artwork.

#### Regulation (EU) No. 2019/880

The introduction and import into the European Union of cultural goods originating from outside the European Union is affected by Regulation (EU) No. 2019/880 (Regulation 2019/880), which came into force on 27 June 2019.<sup>[66]</sup> Regulation 2019/880 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. It already prohibits the import into the European Union 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. The introduction and import into the European Union of other cultural objects that meet certain age and value thresholds defined in Regulation 2019/880 will require either an import licence or an importer statement.

While Regulation 2019/880 initially formed part of retained EU law under the EU (Withdrawal) Agreement Act 2018 following Brexit, the UK government repealed Regulation 2019/880 by Article 2 of the Introduction and the Import of Cultural Goods (Revocation) Regulations 2021, which came into force on 24 September 2021.<sup>[67]</sup> The revocation will not impact the continued application of Regulation 2019/880 to Northern Ireland as part of the Ireland/Northern Ireland Protocol.<sup>[68]</sup>

Although Regulation 2019/880 no longer applies directly to the rest of the United Kingdom, UK AMPs who trade with the European Union must nevertheless comply with its requirements. Regulation 2019/880 is complemented by Commission Implementing Regulation (EU) No. 2021/1079, which provides further details in relation to the implementation of key provisions of Regulation 2019/880.<sup>[69]</sup>

## Export regime

Since 1 January 2021, EU Regulation (EC) No. 116/2009<sup>[70]</sup> on the export of cultural goods (as amended) no longer applies to the United Kingdom, and UK rules now govern all exports, regardless of their destination. EU licences granted before that date continued to be valid for their term (up to a limit of 12 months), and restrictions relating to any licences already in operation, such as temporary EU licences, continue to apply. Following the end of the Brexit transition period, a UK licence to export cultural objects to any destination outside the UK is required. This does not apply to the export of goods of cultural interest from Great Britain to Northern Ireland.<sup>[71]</sup> Exports from Northern Ireland directly to non-EU countries continue to require an EU export licence.

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 amended). Export licences are also subject to any sanctions in place, and goods cannot be sent to embargoed destinations. As at the time of writing, 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 rules is linked to the type of cultural goods in question, as well as their age, their value and how long they have been in the United Kingdom. Arts Council England has published a range of guidance notes for exporters.<sup>[72]</sup> The export control system operates by placing temporary export bars on items of 'national importance' to allow public institutions in the United Kingdom 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 United Kingdom'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.

In January 2021, following instances where the export deferral system was deemed to have failed,<sup>[73]</sup> the government introduced a mechanism of legally binding offers through amendments to statutory guidance. It legally requires an owner, who has entered the export deferral process, to accept a matching offer for the object to be purchased (if they agreed to accept such an offer by granting the buyer a legally binding option agreement at the end of the first deferral period). The option is exercised by the buyer once they have raised the purchase price during the second deferral period (the option period). If the buyer chooses not to exercise the option because they failed to raise the necessary funds, then a licence would normally be granted.

In April 2023, the innovative international collaboration between the National Portrait Gallery and the Getty Museum jointly to acquire Joshua Reynolds' *Portrait of Mai (Omai)* made the press headlines after a UK export licence had been deferred three times by the arts minister to allow a UK buyer to match the price.<sup>[74]</sup> The shared ownership of the work and strategic partnership between the two institutions is intended to enable and maximise public access to the work. The two institutions will share the painting for public exhibition, research and conservation care. Whether this novel approach is compatible with



the objects and intent of the export licensing regime is, in the author's respectful opinion, open to question.

Import and export law rarely features in case law, with the recent exception of *R (Simonis) v. Arts Council England*,<sup>[75]</sup> 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 United Kingdom to Switzerland. Arts Council England decided that Italy, rather than the United Kingdom, 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 United Kingdom in 2007 had not been 'lawful and definitive' within the meaning of Regulation 2019/880. Both the court at first instance and the Court of Appeal agreed with Arts Council England. 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, or for the painting to remain in the United Kingdom subject to restrictions on its movement.

### Nicosia Convention

The Council of Europe Convention on Offences relating to Cultural Property (the Nicosia Convention) entered into force on 1 April 2022.<sup>[76]</sup> The United Kingdom remains a member of the Council of Europe (not to be confused with the European Union) but has so far neither signed nor ratified the Convention.

The Convention complements a number of existing international legal instruments aimed at protecting cultural heritage, including the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict (together with protocols), the 1970 UNESCO Convention and the 1995 UNIDROIT Convention.

Where the Nicosia Convention differs from these other instruments is that it aims to prevent and combat the destruction, damage and trafficking of cultural property by providing a criminal justice response to cultural heritage protection: it establishes specific criminal offences, such as theft and other forms of unlawful appropriation, unlawful excavation and removal, illegal import and export, and illegal acquisition and placing of artefacts on the international art market. It also criminalises the falsification of documents to prevent fake certification of tainted objects, and intentional damage or destruction of cultural property.

### Art finance

Art lending (i.e., the borrowing of money secured against art, antiques or other collectibles as security) is underdeveloped in the United Kingdom compared to other major art market centres, such as New York. Under English law, there is no fit-for-purpose non-possessory security interest in artworks where the borrower is an individual, although corporate borrowers can create a chattel mortgage, known as a 'charge', which is registrable at Companies House. The Law Commission produced a Goods Mortgages Bill in 2017, which would have supported the development of the London art market; however, at the time of writing, it has not been brought forward by the government.<sup>[77]</sup> The legal position is, therefore, unlikely to change in the foreseeable future.

On 10 January 2020, AMPs (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 implemented the 5AMLD into UK law.

Members of the art trade who carry out transactions, or a series of linked transactions, involving works of art valued at €10,000 or more must 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.

HMRC is the supervising body responsible for overseeing AMPs, keeping a register of supervised businesses, and checking that they are complying with their obligations under the new regulations. Since 10 June 2021, AMPs must be registered with HMRC as the sector regulator. 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. After an initial period of allowing AMPs to become compliant, HMRC are now enforcing compliance with the regulations.

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, continually monitoring and training staff, and reporting suspicious activities.

The money laundering compliance regime has ramifications beyond the United Kingdom and the European Union insofar as it affects non-European buyers who seek to purchase artworks in galleries, at fairs or at auction in the United Kingdom, as well 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 AMPs, which was approved by HM Treasury.<sup>[78]</sup> The guidance was last updated in February 2023 and now clarifies, for example, that the regulations do not apply to primary market sales by artists, certain intermediaries and art shippers.<sup>[79]</sup>

In June 2021, HMRC published additional guidance on understanding money laundering risks and taking action for AMPs.<sup>[80]</sup> A government consultation on an extension of the regulations, bringing, among other things, digital art and cryptoasset businesses within their scope, closed on 14 October 2021.<sup>[81]</sup>

## Artist rights

### 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 (CDPA). 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 their 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.

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.

There is a scarcity of recent case law in the United Kingdom on the treatment of moral rights, and most of it is dealt with under the question of derogatory treatment within the meaning of Section 80(2) of the CDPA.<sup>[82]</sup> The recent burning of Banksy's *Morons* in the United States to sell an NFT of the artwork for a higher price has flagged questions of moral rights in the context of cryptoassets.<sup>[83]</sup> The scope of moral rights protection under UK law in similar circumstances remains uncertain; it is arguable that the right to integrity under the CDPA would not be infringed by the destruction of an artwork.<sup>[84]</sup>

## Resale rights

Artists' resale rights (ARRs) were introduced in the United Kingdom through the Artist's Resale Right Regulations 2006 (the ARR Regulations), implementing Directive No. 2001/84/EC.<sup>[85]</sup> 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.<sup>[86]</sup>

Subject to certain exceptions, ARR's entitle artists and their heirs to claim a percentage of the sale price on any resale of an original artwork in the secondary market (i.e., through an auction house or other art market professional), while copyright in that artwork subsists. ARR royalties are collected and distributed through two entities in the UK: the Artists Collecting Society (ACS) and the Design and Artists Copyright Society (DACS).

ARRs have been controversial in the United Kingdom since they were first introduced and have been subject to criticism, in particular, by art market professionals.<sup>[87]</sup> In March 2022, DACS and the ACS brought what may be described as a 'test case' following a legal dispute with an art gallery over compliance with the UK ARR legislation.<sup>[88]</sup> In February 2023, DACS and the ACS announced that they reached a settlement in the case.<sup>[89]</sup>

A significant section of the art trade had supported Brexit in the hope that this would lead to the abolition of ARR's in the United Kingdom because the ARR Regulations derived from an EU directive. While the United Kingdom had committed in the Brexit treaties to protect ARR's in any event,<sup>[90]</sup> the government effectively reconfirmed in June 2023 that ARR's will be retained in UK law, at least for the foreseeable future, when it tabled an amendment to the Retained EU Laws Bill with a list of laws to be revoked at the end of 2023, and that list did not include the legislation regarding ARR's.<sup>[91]</sup>

## Economic rights

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

The Court of Appeal's judgment in *THJ v. Sheridan*<sup>[92]</sup> could potentially be construed as preventing UK museums from charging copyright reproduction or licence fees for images of two-dimensional artworks that are themselves out of copyright. Although the case did not *prima facie* concern the art industry at all, the judgment focused on the concept of originality and held that UK copyright law is to be interpreted in accordance with the relevant EU law. Copyright, therefore, applied only in relation to a subject matter that was original in the sense that it was the author's own intellectual creation. By contrast, the originality test is not met where the content of the work is dictated by technical considerations, rules or constraints that leave no room for creative freedom. This may be said to be the case with photographs that are simply a faithful and full reproduction of another two-dimensional underlying artwork and represents a different and higher standard than that traditionally applied by UK judges, which required nothing more than the application of skill, labour and judgment. The ruling has not yet seen application in the context of museums' digitisation and image licensing practices, and fees for those images may continue to be charged based on contractual rights and obligations outside copyright law.

In view of Brexit, the UK government no longer implemented the controversial Directive (EU) No. 2019/790<sup>[93]</sup> but has stated that any future changes to the UK copyright framework will be considered as part of the usual domestic policy process.<sup>[94]</sup>

More unusually, artists may seek to protect their creations, brands or names by registering a trademark. Street artist Banksy attempted, through his representatives Pest Control Office Limited, to trademark a series of his well-known images and to create a trademark portfolio to address the problem that his anonymity prevents him from asserting copyright protection for his works. Following a challenge by a greeting card company, Full Colour Black, the European Union Intellectual Property Office (EUIPO) initially invalidated a number of these registered trademarks, including for *Flower Thrower*<sup>[95]</sup> and *Monkey Sign*,<sup>[96]</sup> on the grounds of bad faith: the EUIPO concluded that Banksy showed no intention to use the trademarks to commercialise goods at the time of its registration. A board of appeal subsequently overturned the decision invalidating the trademark for the *Monkey Sign* image, finding that there was insufficient evidence to justify the conclusion that Pest Control behaved dishonestly when it originally filed the trademark application.<sup>[97]</sup>

## Trusts, foundations and estates

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

The IHT treatment of art collections depends on the nature of the trust. If the trust is subject to the 'relevant property regime' (broadly speaking, discretionary trusts), 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 qualifying interest in possession trust, then no IHT will arise until the death of the life tenant or earlier termination of the life interest.

Relevant IHT exemptions include the following:

1. Conditional exemption: this 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 must provide undertakings relating 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, the exemption can 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 in relation to public access can often be burdensome for a new owner. The requirements for public access were temporarily relaxed during the covid-19 pandemic when property owners were not able to provide reasonable public access owing to government guidance on social distancing. Until April 2022, HMRC considered temporary adjustments to agreements on an individual basis, including reducing the number of visitors and closing certain rooms.
2. Acceptance in lieu: this scheme allows trustees to offer artwork to public institutions in exchange for IHT tax credit. A wish can be expressed in relation 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.
3. Business property relief: this presently remains available at a rate of either 50 per cent or 100 per cent if the artwork is held by or used by a business and the further qualifying criteria are met. Following the Autumn Budget 2024, business property relief is expected to be restricted to a maximum value of £1 million from April 2026.<sup>[98]</sup>

Trustees are liable to CGT (24 per cent) on the disposal of chattels exceeding £6,000 in value on or after 30 October 2024, although there are special rules about the treatment of sets of chattels. 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.

## Special considerations

On a European level, the trade in artworks and cultural artefacts between the United Kingdom and the European Union has been fundamentally affected by Brexit. From a practical point of view, the changes affecting the VAT treatment of imports and

exports, new customs entry and exit procedures, and changes to the cross-border dispute resolution regime have had the most significant impact on the art industry. Artworks sold from the United Kingdom to the European Union are now generally subject to import VAT in the destination country and vice versa. UK export licences continue to be issued by Arts Council England. Imports of (qualifying) artworks from the European Union into the United Kingdom will require an EU export licence.

Brexit-related changes also have much more far-reaching implications for a wide range of factors beyond the trade in goods and services. These include the ability of art businesses and institutions to employ European staff, and artists living and working in the United Kingdom, after the free movement of people came to an end. The United Kingdom and the European Union have continued to facilitate the return of cultural objects illicitly removed from the United Kingdom or the European Union after 1 January 1993, or not returned at the end of a period of lawful temporary removal (previously governed by Council Directive 93/7/EEC<sup>[99]</sup>), but the direct right of action in the courts of another EU Member State has been removed.

## Outlook and conclusions

The UK art market continues to face an element of uncertainty about its continuing global competitiveness in a post-Brexit environment. At the same time, the growing regulation of the art market increases the compliance burden, in particular, on smaller art businesses. However, the findings of the 'The Art Basel and UBS Global Art Market Report 2024'<sup>[100]</sup> identify some reasons for optimism, including that HNWIs remain optimistic in a challenging market, spending in the first half of 2024 showed signs of stabilising; HNWIs demonstrated a strong willingness to buy from new galleries in 2023 and 2024, and there is strong support for new and emerging artists.

As far as developments in art law are concerned, the interface between AI, art and copyright will remain an area of focus, including any developing case law that may emerge in this area. Likewise, the full implementation of Regulation 2019/880 in June 2025 will have a significant impact on the wider European art market, including in the United Kingdom.

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