

Lending to Museums

Ten issues to discuss with your client before loaning artwork to institutions

By **Azmina Jasani**

Public exhibitions thrive on the mutually beneficial relationship between private collectors and museums. For private collectors, lending artwork to museums confers numerous advantages. These include: sharing the viewing and appreciation of art with the general public who may otherwise not have access to it; promoting the study and scholarship of art; enhancing an artwork's provenance and, in turn, increasing its monetary value; enjoying potential tax benefits; and saving costs on storing and conserving the art. Likewise, museums profit considerably from art loans by private collectors, which afford them the opportunity to exhibit works they may otherwise not have been able to acquire and thereby fulfill their mandate of increasing public access, education and enrichment, while simultaneously allowing them to increase their profile and revenue.

Although it's in the interest of both parties to protect the artwork while on loan, things can and do go wrong. If your client is considering loaning artwork from his collection to an institution, it's imperative for him to take precautionary measures to protect his artwork while it's on loan and limit his exposure. Below are 10 key considerations you should discuss with your client.



Azmina Jasani is a senior associate with the Art & Cultural Property Law Group of Constantine Cannon LLP

Well-Tailored Loan Agreement

A collector looking to lend artwork must negotiate a personalized and specific loan agreement with the borrowing institution prior to making any loans. This loan agreement is needed primarily because common law principles of bailment, which apply to the lender (bailor) and the borrower (bailee), simply don't afford the lender sufficient protections in the event of loss or damage to the artwork. A bespoke agreement is therefore necessary to expand the borrowing museum's duty of care and to distribute some of the burdens that would otherwise be borne solely by the lender.

A well-documented loan agreement must specify:

- the identity of the parties to the agreement. When the artwork is being loaned to a traveling exhibition that will display it at more than one institution, a collector may want to enter into both a master agreement encompassing all relevant institutions and separate side letter agreements with each institution to cover specifics.
- the term of the loan. The agreement should explicitly state the dates or the period of time during which the artwork will be exhibited. In the context of a traveling exhibition, the agreement should provide the dates the artwork will be exhibited at each venue and, where applicable, the dates the artwork will be kept in storage

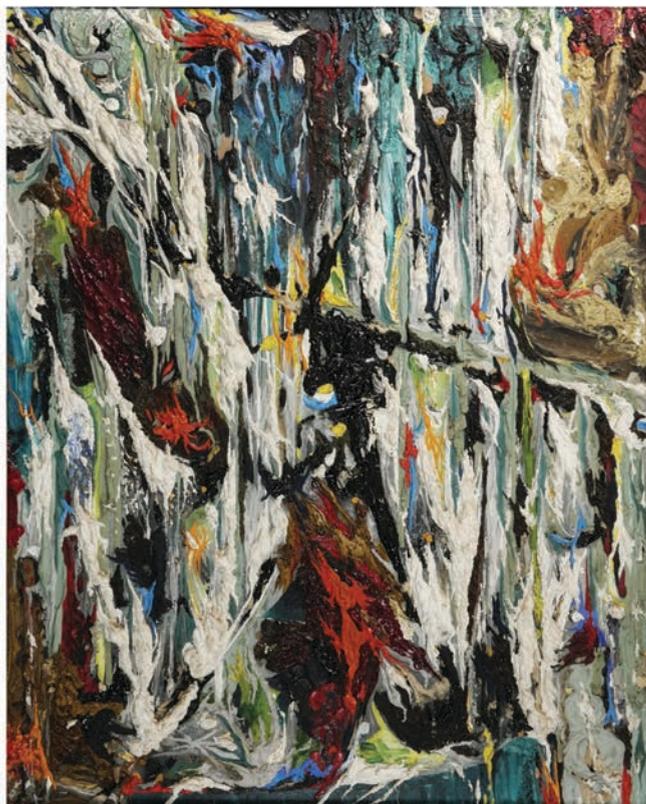




SPECIAL REPORT: ART, AUCTIONS & ANTIQUES

- (including its location) between exhibitions.
- a description of the artwork being loaned. This includes its title; the name of the artist; the medium or materials used for the artwork; the date of its creation; its size and provenance, the exhibition history and literature information.
 - who bears the burden of insuring the artwork and at what value.
 - who bears the cost of packing and shipping the artwork from and back to the collector's premises.
 - in the case of foreign loans, the applicability of immunity from seizure laws, and who bears the responsibility of customs clearance.
 - who bears the burden of condition reporting the artwork and when.
 - how the lender would like to be credited.
 - what reproduction, photography and film rights have been granted.
 - any conservation conditions and pertinent special instructions, including the temperature and how the artwork must be stored and exhibited.
 - the parties' right to cancel and/or terminate the loan agreement.
 - how notices might be given.
 - whether any repair or restoration rights have been granted to the borrowing institution(s).
 - the governing law and jurisdiction law clause.

The purpose of a loan agreement is to document the intention of the parties and to reduce the level of uncertainty in the event that problems arise. Hence, the loan agreement should be kept simple and to the point.



Alfonso Ossorio, "Fire and Ice" - Price Realized: \$187,000

Comprehensive Estate Services:

USPAP and AAA certified appraisals
Monthly auctions
Regular specialty sales
Single-owner sales

Auction Services:

New York's only downtown auction gallery
Flexible & personalized arrangements
Competitive commission rates

The Estate of Dr. Alan York

In January of 2016, Roland began the ongoing process of liquidating the Estate of Dr. Alan York, one of the most expansive Political Item collections in private hands.

So far, we have conducted seven single owner sales of the property, each of which have brought world record prices for the items offered. Our lean, careful, and specialized approach has realized an aggregate total price of nearly \$2,000,000

What can we do for you?

Roland NY
www.rolandauctions.com

Insurance

Ensure that the artwork is comprehensively insured for the full duration of the loan period. Before loaning any artwork, collectors must reach an agreement with the borrowing museum on who bears the cost of insuring the artwork while on loan and at what value. They must also agree on who's responsible for taking out the relevant insurance policy. In most cases, museums will bear the costs and responsibility of insuring the artwork for the amount specified by the lender. It's advisable for lenders to seek current valuations of the artwork prior to agreeing to an insurance amount. The typical insurance coverage is nail-to-nail, which protects the lender from the time the artwork is removed from the collector's wall until the time it's unpacked and returned back to the collector at his premises.

The museum's insurance policy must name the lender as the loss payee and should cover for all forms of risks, including terrorism. As prominent museums are unfortunately deemed to be potential targets of terrorism-related activity, it's increasingly common for them to be insured accordingly. Acts of war, government invasion and the like, on the other hand, are unlikely to be covered. Parties should agree on how claims of partial loss of or damage to the artwork will be handled, and the insurance policy should reflect the parties' intention. If the museum is responsible for the insurance cover, it's advisable for the collector to request a copy of the insurance certificate or policy from the museum for his records. If he chooses to rely on his own insurance policy for the duration of the art loan, then he'll generally be required to add the





museum as an additional party or to provide a waiver of subrogation against it to protect the museum in the event of loss. All specifics relating to insurance must be documented in the loan agreement.

International Loans

Check whether the jurisdiction where the borrowing museum is based has appropriate immunity from seizure laws. Immunity from seizure laws exists to protect cultural objects on loan from foreign jurisdictions to public institutions for the purpose of temporary exhibition. In the event that a claim is asserted over the loaned artwork, anti-seizure legislation guarantees that the work can't be seized or subjected to judicial process. Such laws were introduced to assuage the fears of collectors that loaning to foreign institutions might expose their art to the threat of judicial seizure.

The United States enacted immunity from seizure legislation in 1965 and was the first country to do so.¹ Many European countries began adopting anti-seizure legislation in the 1990s and 2000s. The United Kingdom passed its immunity from seizure laws in 2007,² after the highly publicized seizure of important Russian-owned works by Picasso, Matisse and Cezanne by customs authorities in Switzerland, who were acting on a court order obtained by a private company for unpaid debts by the Russian government. Confiscating the paintings was just one of the many ways in which the company sought to collect its unpaid debt from the Russian government. After being prompted by the Swiss federal authorities, the Swiss Council ordered that the paintings be returned to Russia. To ensure that collectors aren't discouraged from lending to their museums, several countries have adopted anti-seizure laws, but there still remains a long list of countries without any such legislation.

Before agreeing to make a foreign loan, then, it's important for collectors to ascertain whether the country where the borrowing museum is based has enacted appropriate anti-seizure laws and if so, whether they afford sufficient levels of protection. It's also important for the collector to consider whether the artwork at issue is likely to attract claims.

As mentioned, not all countries have immunity from seizure laws, and those that do have no uniform criteria for enforcement. Each country's anti-seizure laws are unique: Some governments limit the types of works that are protected, while others control the number and types of museums and public institutions who benefit from such protection. Some countries require an application form to be submitted on which a determination is made, while others demand that public notices of the upcoming exhibition and the pertinent artwork's appearance therein be issued in the paper before immunity can be granted. It's therefore imperative to confer with an attorney who practices in the applicable jurisdiction and obtain the necessary clearance prior to making any loan.

Obtain customs clearance. The specific customs regulations of the country where the borrowing museum is based must also be carefully reviewed. The responsibility for seeking customs clearance for import and export usually rests with the borrowing institution, and all such clearance must be sought prior to shipment. Collectors must ensure that any loan agreement they sign makes it clear that all transport and customs procedures pertaining to the loaned artwork must be carried out under the supervision of the collector or his representative. A collector may wish to appoint a courier to act as his representative, who can be physically present at all pertinent times and oversee the transport, installation and any storage of the artwork while on loan.

To maintain confidentiality and avoid uninvited exposure, many collectors who elect to remain anonymous opt for the phrase “Private Collection” or the like.

Agree on the applicable law and jurisdiction clause. Disputes are inevitable. Even the best of relationships can sour and result in arduous litigation. To avoid conflict over the question of which country’s law applies and which country’s court should hear the dispute and to avoid incurring substantial legal fees even before litigating on the merits, collectors and museums must reach an agreement on the applicable law and jurisdiction clause that applies to the loan, and their agreement must be recorded in the loan agreement.

Check whether any government insurance will be provided. Buying insurance cover for an international art loan can get expensive. Certain institutions are therefore entitled to make use of their government’s insurance policies when borrowing objects of cultural significance. For example, the governments of the United States³ and the United Kingdom⁴ have endeavored to facilitate the lending of art by offering indemnity insurance to specific institutions provided certain criteria are met. However, often, a government’s indemnity insurance isn’t as comprehensive as may be necessary. We therefore advise collectors to carefully review the scope of any government insurance and, if necessary, ask the borrowing institution to purchase its own policy to cover liabilities that may be outside the scope of a government’s indemnity insurance scheme. The responsibility of the borrowing museum to purchase this additional insurance cover must also be carefully recorded in the loan agreement.

Be mindful of international tax laws. Attorneys advising collectors must educate themselves on the tax laws of the host country to confirm that making the loan won’t render their clients liable for any taxes there. In the event that a collector unexpectedly passes away while his artwork is on loan in a foreign jurisdiction, for example, the artwork may suddenly become subject to estate tax. Countries that value and encourage art and cultural philanthropy—like the United States⁵ and the United Kingdom⁶—have carved out appropriate exceptions, but this may not always be the case.

Due Diligence

Make sure to carry out appropriate due diligence on the borrowing institution. Not all museums are equal in reputation and prestige. Collectors can inadvertently reduce the value and diminish the importance of their artwork by loaning it to a poorly run institution or one with a complicated history or dubious ties, which can in turn deter future exhibitors of the work. It’s therefore critical to verify the reputation of the borrowing museum and ensure that your research is current and up to date.

Before parting with their cherished asset, collectors should inspect the security measures and protocols in place at the borrowing museum and refrain from solely relying on a museum’s reputation and prestige. Collectors and their advisors may not always be able to unearth every detail in relation to a museum’s security, but it’s imperative that they investigate and ask the right questions.





Identification Decisions

To avoid misunderstandings and potentially irreversible damage, collectors must inform the museum exactly how they wish to be identified in the exhibition catalog and on the exhibition label, details of which should also be recorded in the loan agreement. To maintain confidentiality and avoid uninvited exposure, many collectors who elect to remain anonymous opt for the phrase “Private Collection” or the like. Collectors must carefully weigh the pros and cons of literally going public with their art.

Packing and Shipping

Carefully manage and oversee the packing and shipping of the artwork. The loan agreement must specify the party responsible for arranging the packing and shipment of the artwork and bearing the costs arising therefrom. The borrowing entity usually bears the cost of packing and shipping. The loan agreement must also outline all pertinent dates on which the artwork will be shipped and delivered. The biggest risk of loss or damage to the artwork is while it’s being packed, crated and transported from one location to another. It’s therefore imperative that collectors only entrust their artwork to reputable fine art shippers, who are experienced in transporting fragile and expensive works of art. There are plenty of horror stories that come to mind, even one in which a logistics company mistook an artwork for rubbish and shredded it with the packing material. It’s also important for collectors to ascertain the security protocols of the fine art shipper’s storage facility. Most fine art shippers don’t carry sufficient insurance, and it’s vital that the applicable insurance policy sufficiently covers any loss or damage to the artwork while it’s being packed, crated and shipped. As previously

mentioned, some collectors may wish to appoint couriers who are assigned to oversee the packing, crating, shipping and installation process on their behalf.

Condition Reports

Professionals must prepare a condition report recording the condition of the artwork each time it’s transported from one location to another. At a minimum, a condition report must be prepared immediately prior to packing and shipping the artwork from the collector’s premises to the museum, at the time of unpacking at the museum, repacking and shipping back to the collector and unpacking at the collector’s premises. A condition report should also be prepared if the artwork is placed in storage. Condition reports are essential in determining the point of damage to the artwork and remove any uncertainty around the question.

Special Conditions and Instructions

The collector must specify whether any atmospheric conditions need to be maintained by the museum while the artwork is being transported, stored and exhibited. He also must provide museums with any special installation instructions that may be applicable, and all such specifications and instructions must be documented in the loan agreement. Examples of special conditions or instructions include noting whether any direct sunlight can reach the work, specifying the temperature of the environment in which the work will be stored and exhibited and/or indicating the level of humidity and any appropriate levels of artificial and natural lighting. The loan agreement must also specify whether any special frames, nails or screws are to be used or avoided when installing the works and any special care that needs to be taken during installation.

If the borrowing institution undertakes any emergency repair or restoration, collectors must ask for full details of the work undertaken in writing.

Reproduction Rights

The museum may wish to obtain photographs of the loaned artwork for use in their exhibition catalog and for other promotional materials. It may also wish to reproduce the image of the loaned artwork on mugs, t-shirts, tote bags, pens and other items sold in the museum's gift shop for commercial purposes. Before any such use is made, the museum must seek permission from the owner of the artwork, and if the artwork is under existing copyright, it also needs permission from the copyright owner of the artwork. An owner of an artwork has the right to the work itself, but doesn't own the copyright that subsists in the work. The artist, the artist's estate or an artist's collecting society (which may manage a deceased artist's intellectual property rights) usually owns the copyright in an artwork. In some jurisdictions, like the United Kingdom, copyright also subsists in the image of the artwork and accordingly, depending on the terms of hire, permission for use may also be needed from the copyright holder of the image.

The loan agreement must accurately reflect the reproduction rights granted to the museum by the owner and must explicitly state that the museum has the responsibility of seeking the appropriate consent from the copyright owner of the artwork and, where applicable, the image.

Repair or Restoration Rights

We advise collectors not to grant museums the right to repair or restore the artwork without their prior written consent, except in emergencies in

which immediate action must be taken to protect the artwork or the health and safety of the visiting public and/or the museum staff. If the borrowing institution undertakes any emergency repair or restoration, collectors must ask for full details of the work undertaken in writing. As with everything else, these expectations must be carefully outlined in the loan agreement.

Weigh Costs and Benefits

Lending artwork, especially to international museums, isn't without risks. And, although art loans should be encouraged, your clients must carefully weigh the costs and benefits involved before parting with their asset. If they choose to lend, collectors must ensure that all necessary precautions have been taken and the pertinent issues highlighted above are considered to minimize their exposure and maximize the security and value of their artwork. 

Endnotes

1. 22 U.S.C. 2459. See also "Immunity from Judicial Seizure Applications—Cultural Objects," U.S. Department of State, www.state.gov/s//c3432.htm ("The U.S. Department of State administers the Immunity from Judicial Seizure statute, which protects from seizure or other judicial process certain objects of cultural significance imported into the United States for temporary display or exhibition").
2. Tribunals, Courts and Enforcement Act 2007, Part 6, Protection of Cultural Objects on Loan, Sections 134-38.
3. See Arts and Artifacts Indemnity Act of 1975.
4. See National Heritage Act 1980, Section 16.
5. See Internal Revenue Code, Section 2105(c).
6. See Inheritance Tax Act 1984, Section 5.

