

# Art Law

*Contributing editor*  
**Pierre Valentin**



**2018**

GETTING THE  
DEAL THROUGH

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DEAL THROUGH 

# Art Law 2018

*Contributing editor*  
**Pierre Valentin**  
**Constantine Cannon LLP**

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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](http://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](http://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

# England & Wales

Pierre Valentin, Rose Guest, Fionnuala Rogers, Yulia Tosheva, Till Vere-Hodge and Emelyne Peticca

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## Buying and selling

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

Seller and buyer are free to agree when ownership passes. It is common practice to agree that ownership passes when payment is received by the seller (reservation of title clause).

Unless otherwise agreed by way of contract, or unless the circumstances point to the parties having agreed that ownership will pass at a different point in time, ownership passes from seller to buyer when the contract is concluded, regardless of whether payment has been made or delivery has occurred.

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

In a contract of sale, there is an implied term on the part of the seller that he or she has a right to sell the property, and in the case of an agreement to sell, he or she will have this right at the time when the ownership is to pass. There are two additional implied terms. The first is that the property is free (and will remain free until the time when ownership passes) from any charge or encumbrance not disclosed or known to the buyer before the contract is made; and the second is that the buyer will enjoy quiet possession of the property except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known.

These implied terms cannot be excluded by way of contract; however, the seller can limit the ownership that he or she transfers to the buyer to the ownership that he or she possesses. This limitation can be expressed in the contract, or ownership may be limited if it can be inferred from the circumstances of the transaction that it was the intention of the parties that the seller only intended to transfer the ownership that he or she possessed.

The statute of limitation provides that the buyer shall have six years from the date of the breach (which for an implied term will be the date of the contract) to bring a claim. If the contract was made by deed, the limitation period is extended to 12 years from the date of the breach.

Most business contracts fall within the scope of the Unfair Contract Terms Act 1977 (UCTA), with a few specific exceptions set out in the Act. In the likely event that UCTA applies to a business contract, or if the contract is with a consumer, the seller cannot limit its liability under the implied terms specified in the answer to question 2. Any clause attempting to do so is void.

### 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 register of ownership of art, antiques or collectibles in England and Wales, with some exceptions such as cars.

However, owners and insurers can register art, antiques or collectibles on a positive database held by the Art Loss Register ([www.artloss.com](http://www.artloss.com)). This is done on a purely voluntary basis. The positive database cannot be searched by the public.

If an artwork is stolen, the owner or insurer can register it as such with any of the lost or stolen art databases such as the Art Loss Register or Interpol ([www.interpol.int/Crime-areas/Works-of-art/Works-of-art](http://www.interpol.int/Crime-areas/Works-of-art/Works-of-art)). The stolen art database of the Art Loss Register is not publicly

available but it can be searched on request. Some data on the Interpol database of stolen works of art, including the most recent stolen works of art reported, can be searched by members of the public.

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

English common law prefers the dispossessed owner from whom the artwork was stolen, illustrated by the legal principle 'no one gives what he does not have'. The thief cannot acquire ownership, and in principle, nor can anyone who derives possession of the stolen artwork from the thief.

However, the statute of limitation comes to the rescue of the buyer in good faith: the ownership of the dispossessed owner whose artwork was stolen is extinguished after six years from the date of the first acquisition in good faith. This applies regardless of when the dispossessed owner discovered (or could have discovered) the whereabouts of the artwork. If the dispossessed owner's title has expired, the current possessor will typically have possessory title to the artwork; accordingly, he or she will prevail. Note that it is sufficient if the defendant in a recovery action by the dispossessed owner shows that someone in the chain of possession acquired the artwork in good faith more than six years before the claim was made, even if the defendant cannot show that he or she himself or herself bought the artwork in good faith.

The party relying on his or her or another possessor's good faith has the burden of proving good faith. Good faith is a matter of fact left to the discretion of the courts. In assessing good faith, a court will typically consider the circumstances of the buyer's acquisition, including the due diligence carried out with regard to the buyer's expertise and resources. If a buyer did not exercise any due diligence, he or she is likely to struggle to discharge the burden of proving his or her good faith.

### 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?

If there is no good-faith acquisition on which the current possessor can rely (or the six-year period following a good-faith acquisition has not yet expired), the dispossessed owner has a right to reclaim the artwork. However, if the dispossessed owner discovers (or ought reasonably to have known) the whereabouts or possessor of the artwork, he or she must bring a claim for a stolen artwork without unreasonable delay. The current possessor could defend his or her possession of the artwork by arguing that the dispossessed owner has unreasonably delayed in bringing a claim, despite the fact that he or she knew (or ought reasonably to have known) the whereabouts of the artwork. This is known as the equitable doctrine of laches.

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

English law does not accept the concept of 'acquisitive prescription'. The thief and subsequent possessors in bad faith cannot acquire ownership.

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

Seller and buyer are free to agree when risk of loss of, or damage to, art, antiques and collectibles passes from seller to buyer. In practice, they

often agree that risk will pass when ownership passes or upon delivery of the artwork by seller to buyer.

Unless otherwise agreed by contract, or the circumstances point to the parties having agreed that risk will pass at a different point in time, risk passes with ownership in business-to-business contracts. In consumer contracts, however, the artwork remains at the trader's risk until it comes into the possession of the consumer (or someone identified as taking possession for the consumer).

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

There are no mandatory due diligence enquiries that a buyer must legally carry out, but the burden of due diligence rests with the buyer ('buyer beware') unless otherwise agreed by the parties. Buyers typically search the stolen art database of the Art Loss Register and conduct enquiries on the ownership, authenticity, condition, provenance and lawful export of art, antiques and collectibles. Due diligence depends on the type of asset, its value, and the information volunteered by the seller. A buyer should be mindful of the following legislation relating to cultural property: Dealing in Cultural Objects Offences Act 2003; Cultural Property Armed Conflict Act 2017; and any UN security council resolutions enacted from time to time restricting the import or trade in cultural property – those currently in force are the Iraq (United Nations Sanctions) Order 2003 and the Export Control (Syria Sanctions) Order 2013. This legislation creates criminal offences of dealing in cultural property unlawfully excavated, removed or exported from certain countries. A buyer should also be mindful not to acquire criminal property as defined in the Proceeds of Crime Act 2002, which sets out money laundering offences.

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**9 Must the seller conduct due diligence enquiries?**

Sellers are subject to the legislation referred to in question 8, and should carry out due diligence to ensure that they are not in breach of the legislation by dealing in such cultural property. However, by making these enquiries, they protect themselves rather than the buyer. The seller is otherwise not legally required to carry out any due diligence prior to selling an artwork, although it is good practice for professional sellers (such as galleries and auction houses) to conduct due diligence on the owner prior to accepting property on consignment for sale.

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

The Consumer Rights Act 2015 states that goods must be of satisfactory quality, fit for purpose and if the sale is a sale by description, the goods must be as described (including in any presale material or representations). The Consumer Rights Act is not specific to artworks or second-hand goods, and therefore satisfactory quality for artworks is likely to be a relatively low standard. It is also common practice for condition reports to be provided with artworks and therefore it is more likely that the buyer and seller both agree on the condition of the artwork than for a buyer to attempt to rely on an implied warranty as to 'quality'. Similarly, 'fit for purpose' is unlikely to give a buyer much protection in relation to an artwork, unless for example it was an artwork that was intended for a specific purpose (such as an outdoor artwork).

In business-to-business contracts, the Sale of Goods Act 1979 requires the seller to provide similar implied warranties as to satisfactory quality and fitness for purpose. These warranties can be excluded (unlike title) and it is common practice to do so. Instead, the seller may decide to provide limited contractual warranties to buyers on authenticity and condition.

Note that the main English auction houses typically offer buyers a five-year after-sale guarantee that the lot is not a forgery as defined in the auction terms, or some other limited guarantee, subject to the buyer meeting certain conditions.

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

Unless the contract expressly states otherwise, authenticity is not guaranteed by the seller. This is usually the case even if the name of the artist is stated on the invoice. However, if the sale is considered to be a sale 'by description', and the name of the author of the artwork is part

of that description, the buyer may have the right to cancel the sale if the artwork turns out to be a forgery or not by that artist. Judging by the case law, it is unlikely that a statement by the seller that the artwork is by a named artist would be considered as more than a statement of opinion (although each case will depend on its facts) and therefore provided the opinion is reasonable and genuinely held, the buyer is unlikely to have any recourse against the seller.

If the seller has represented to the buyer that the artwork is authentic, and the statement is deemed by the court to amount to a statement of fact rather than a mere statement of opinion (even if such statement is oral), the buyer may have a claim that the seller is liable for misrepresentation. Misrepresentation can result in the rescission of the sale, or an award of damages for the difference in value.

There may be circumstances where the seller has assumed a duty of care towards the buyer, in which case the buyer may succeed in showing that the seller was negligent in discharging that duty when attributing the artwork to a given artist. This is more unusual because in an arm's-length transaction, such as one between seller and buyer, in principle the parties do not owe each other a duty of care.

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**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?**

The seller is unlikely to have a good claim against the buyer if he or she sold an artwork believing, for example, that it was a copy when it turns out that it was authentic. The doctrine of mistake is notoriously difficult to rely upon in subjective art-related matters, and the concept of 'fundamental error' at the root of the contract does not exist in English law. However, the seller may well have a claim against his or her professional selling agent. The seller may succeed against the selling agent in a claim in negligence or misrepresentation. There is case law on this point. The standard of due care is set higher for specialist selling agents than generalist selling agents.

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**Export and import controls**

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

Artworks of a certain age with a value exceeding certain thresholds require an export licence to leave the UK. The age and value thresholds depend on the type of artwork.

A UK export licence is required if the artwork is removed to another EU country, and the artwork meets or exceeds the UK age and value thresholds. An EU export licence is required if the artwork is exported to a non-EU country, and the artwork meets or exceeds the EU age and value thresholds. Note that the UK and EU age and value thresholds are not the same.

In England, export licences are issued by the Export Licensing Unit of the Arts Council England.

The application for a UK or an EU export licence may be referred to an expert adviser, usually a museum curator. The expert adviser will consider if the artwork meets one or more Waverley criteria, which are used to decide if an artwork is sufficiently important to warrant being 'saved for the nation'. If the expert adviser considers that the artwork meets one or more of the Waverley criteria, the export licence application is referred to the Arts Council Reviewing Committee on the Export of Works of Art. The Reviewing Committee will consider the application and hold a hearing during which the applicant has the opportunity to argue that the artwork does not meet the Waverley criteria. If the Reviewing Committee concludes that the artwork does meet one or more of the Waverley criteria, it will recommend to the Secretary of State for the Department of Digital, Culture Media and Sport that the export licence be deferred for a period of months (usually up to six months) to allow a UK institution or a private buyer to raise funds to acquire the artwork in order to keep it in the UK. There are certain conditions attached to the purchase by a UK buyer, including that the artwork be accessible to the public. The Reviewing Committee will set the 'fair market price', which a UK buyer must offer. If the applicant bought the artwork recently at auction, the fair market price is typically the hammer price plus the buyer's premium. Certain costs incurred by the applicant are excluded from the fair market value, for example, insurance and storage costs. The Secretary of State can extend the deferral

period if a UK institution has a reasonable prospect of raising the funds to acquire the artwork. If at the end of the deferral period a UK buyer comes forward with an offer to purchase at the fair market price, the owner has a choice: either he or she accepts the offer, the artwork is sold to the UK buyer and it remains in the UK; or he or she rejects the offer and the export licence is refused. If the export licence is refused, the artwork must remain in the UK, and, in principle, the Arts Council will not consider a new application for a period of 10 years, unless circumstances changes (eg, the artwork is downgraded to a copy or a studio work).

If the provenance of an artwork for which a UK or EU export licence is sought indicates, or the Arts Council is aware, that the artwork was removed from another EU country, the Arts Council will require the applicant to provide evidence that the artwork was lawfully exported from that EU country.

If the exporter can show that the artwork has been in the UK for less than 50 years, an export licence must be obtained if the artwork requires one, but the application will not, in principle, be referred to an expert adviser; accordingly the export licence will be granted.

Failure to obtain an export licence or providing inaccurate or misleading information in order to obtain an export licence constitute a criminal offence.

There are export controls in respect of artworks containing CITES listed materials as dealt with in questions 44 to 47, and in certain cultural property as dealt with in questions 39 and 40.

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

No tax is payable in the UK upon the export of art, antiques and collectible items.

The standard rate of UK import value added tax (VAT) at the date of publication is 20 per cent. The rate of customs duty varies depending on the classification of the goods. Typically, art, antiques and collectible items are taxed at the lower rate of UK import VAT of 5 per cent, and there is no customs duty. In order to benefit from the lower rate of VAT, the item must fall within the scope of Chapter 97 of the EU Customs Tariff. Once imported into the UK, art, antiques and collectible items can move freely around the EU without further import tax. The UK is often seen as a gateway to the EU for the art market as it has the lowest rate of import VAT for art, antiques and collectibles, compared to France at 5.5 per cent, Italy at 10 per cent and Germany at 19 per cent. With Brexit, this may change.

There are import tax reliefs and deferrals, but most are only available through a registered importer or agent. Special VAT suspension regimes are subject to strict conditions, and the importer may be required to provide a guarantee equal to the amount of import VAT that would be due if the property left the VAT suspension regime. 'Temporary admission' is typically used by the auction houses and dealers when importing art, antiques and collectible items for sale. Art, antiques and collectible items can also be kept under a customs bond in the UK in suspension of import VAT. They must remain in a bonded facility (usually a warehouse) and can only be brought out for a 24-hour period at a time for specific purposes. Public museums offer a system of temporary relief from import VAT when artworks are imported into the UK temporarily for public benefit, such as an exhibition.

#### **Direct and indirect taxation**

#### **15 Outline the main types of tax liability arising from ownership and transfer of art, antiques and collectibles.**

The sale of an artwork by the artist directly or by a gallery or dealer will give rise to a liability to pay income tax or corporation tax. In the UK, income tax is applied at a progressive rate from 20 per cent to 45 per cent. The rate of corporation tax is currently 19 per cent.

The resale of artworks by a private collector will typically result in a liability to pay capital gains tax, which ranges from 18 per cent to 28 per cent. There is an annual exemption for individuals currently set at £11,300.

The beneficiary of a lifetime gift or a legacy involving artworks may be liable to paying inheritance tax at 20 per cent or 40 per cent respectively.

Currently, there is no tax on wealth in the UK.

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

Many art dealers make use of the UK VAT margin scheme, which allows them to reduce the 20 per cent VAT liability on the total price of art, antiques and collectibles to a rate of 16.67 per cent VAT on the difference between the price at which they bought the artwork and the price at which they are selling the artwork (the margin).

Under the Cultural Gifts Scheme, UK taxpayers who make donations to public institutions and registered charities may qualify for a tax reduction calculated with reference to the value of the artwork donated. Similarly, UK taxpayers may use the Acceptance in Lieu scheme to deduct the full market value of artworks transferred to public ownership from their inheritance tax liability. In addition, the rate of the inheritance tax payable can be reduced on estates that leave at least 10 per cent of the assets to a registered charity.

#### **Borrowing against art**

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

If the borrower is an individual, the lender will typically require the borrower to pledge the art, antiques or collectibles by actual or constructive delivery of the collateral to the lender. If the borrower is a corporate entity, the lender will typically require the borrower to grant a chattel mortgage over the art, antiques or collectibles.

#### **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?**

Consumer loans are regulated by the Financial Conduct Authority (FCA). The format and content of consumer loan agreements are prescribed in detail by FCA regulations, and mistakes in drafting consumer loan agreements can render them unenforceable. However, a consumer loan may fall within the scope of an exemption from FCA rules. The two exemptions most often relied upon by lenders against art are the exemption for high-net-worth individuals if the amount of the loan exceeds £60,260, and the exemption where the loan is entered into wholly or predominantly for a business purpose if the amount of the loan exceeds £25,000.

#### **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?**

If the loan is made to a company incorporated in England & Wales, the charge should be registered in the register of charges of the company at Companies House. Registration perfects the lender's security interest and gives the lender priority subject to prior registered charges.

If the loan is made to a private individual by way of a bill of sale, that is, a document creating a charge in the artwork for the benefit of the lender while the borrower retains possession of the artwork, the bill of sale must be registered in the register of bills of sale. If it is not, the charge created by the bill of sale is void against third parties and the borrower. The register of bills of sale is maintained by the High Court. The Bills of Sale Acts (1878 and 1882) are unfit for 21st century lending and a new legislative framework is being considered.

#### **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 loan agreement gives the lender the necessary rights in the event of default, in principle the lender can sell the collateral without permission from the courts. However, situations may arise where the borrower or other creditors object to a sale of the collateral, and they may seek assistance from the court. If an administrator or a liquidator has been appointed, their permission will need to be sought.

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

A creditor that holds a valid fixed charge (provided that it was created as a fixed charge and is not a crystallised floating charge) over a company's asset is entitled to the proceeds of the realisation of that asset in satisfaction of the liability due to it from the company. The holder of such a valid fixed charge will suffer no deductions in an insolvency process from the realisation of property secured by his or her fixed charge other than where there are prior ranking fixed charges over the same property or he or she agrees that disposal costs incurred by the liquidator or administrator may be taken from them. The insolvency practitioner receives his or her fees and the costs incurred in realising the assets subject to a fixed charge from the sale proceeds of the relevant assets, rather than from the assets available to the creditors of the company as a whole. He or she agrees the amount of his or her fees and costs with the holder of the fixed-charge security.

## Intellectual property rights

### 22 Does copyright vest automatically in the creator, or must the creator register copyright to benefit from protection?

The author of a work made on or after 1 August 1989 is automatically the first owner of any copyright in it (Copyright Designs and Patent Act 1988 (CDPA)). There is no need for registration. The predecessor of the CDPA, the Copyright Act 1956, provided for the same. There are exceptions to the general rule, including literary, dramatic, musical or artistic works made by employees in the course of employment, Crown copyright, parliamentary copyright and copyright owned by certain international organisations.

### 23 What is the duration of copyright protection?

The duration of copyright protection is as follows:

- artistic works: 70 years from the end of the calendar year in which the author dies;
- for works of joint authorship or co-authorship: 70 years from the end of the calendar year in which the last known author dies;
- if the work is of unknown authorship: copyright expires at the end of the period of 70 years from the end of the calendar year in which the work was made; or if, during that period, the work is made available to the public, at the end of the period of 70 years from the end of the calendar year in which it is first so made available; and
- for computer-generated literary, dramatic, musical or artistic works: 50 years from the end of the calendar year in which the work was made.

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

Yes, for paintings, sculptures and other artistic works. However, note that under the CDPA, consent is required for the ability to perform, show or play a literary, dramatic or musical work in public.

### 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?

Under English law, the fair dealing exception permits the use of copyright material without consent from the copyright owner for the purpose of criticism and review. It may be possible to rely upon the fair dealing exception in the case of printed and digital museum catalogues. Much will depend on the context of the catalogue. Factors to be considered are commercial use, quantity and proportionality. For example, a free leaflet or catalogue that includes guidance or commentary on the nature and purpose of the artworks in the exhibition may be regarded as fair. Advertisements, however, are less likely to fall within the scope of this exception.

In general, museums and galleries considering reproducing an artwork protected by copyright in catalogues and advertisements will need to carefully consider the exemptions under English law and the context before reproducing the artwork without consent.

### 26 Are public artworks protected by copyright?

Certain categories of artistic works may be reproduced without the copyright owner's consent if they are permanently situated in a public place or in premises open to the public. These include buildings, sculptures, models for buildings and works of artistic craftsmanship. Copyright in these works is not infringed by making a graphic work representing it, taking a photograph or making a film of it, or broadcasting a visual image of it. This exception does not extend to all forms of public art, such as street art, therefore legal advice should be sought in relation to other artistic works.

### 27 Does the artist's resale right apply?

The artist's resale right (ARR), also known as the *droit de suite*, applies in the UK. The ARR entitles authors of original works of art in which copyright subsists and their successors in title to a royalty each time one of their works is resold through an auction house or an art market professional. The right to this royalty lasts for the same period as copyright in that work of art. There are certain exceptions to the ARR, including where the work being resold was bought directly from the artist less than three years previously and it is being resold for €10,000 or less. In addition, sales between private individuals, without the use of an art market professional, or to public, non-profit making museums do not attract royalty payments.

The ARR only applies when the sale price reaches or exceeds the sterling equivalent of €1,000 and is calculated on a sliding scale as follows:

Royalty	Resale price
4%	up to €50,000
3%	between €50,000.01 and €200,000
1%	between €200,000.01 and €350,000
0.5%	between €350,000.01 and €500,000
0.25%	in excess of €500,000

Royalties are also capped so that the total amount of the royalty paid for any single sale cannot exceed €12,500. ARR is exempt from VAT.

Collective management of ARR is compulsory in the UK. The two main collecting societies are the Artists' Collecting Society and the Design and Artists Copyright Society, which collect and distribute the royalty. Individual artists and estates cannot seek payment directly from art market professionals.

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

Under English law, moral rights for visual artists are personal rights that apply to literary, dramatic, musical or artistic works and also to films. They were introduced by the CDPA and therefore only apply to artists living on or after 1 August 1989. The rights are as follows:

- the paternity right: the right to be identified as the author or director of a copyright work. This right lasts for the life of the author plus 70 years;
- the right of integrity: the right to object to derogatory treatment of a copyright work. This right lasts for the life of the author plus 70 years;
- false attribution: the right not to have a literary, dramatic, musical or artistic work falsely attributed to him or her as author and not to have a film falsely attributed to him or her as director. This right lasts for the life of the author plus 20 years; and
- the right of privacy: the right to privacy of certain films and photographs. This right lasts for the life of the author plus 70 years.

Moral rights can be waived and contracts often seek to do so. If a waiver is agreed, its terms should be specific so as to avoid uncertainty and should include, among other things, a detailed description of the specific work, whether the waiver is subject to conditions or subject to revocation, and whether it extends to licensees and successors in title to the owner (or prospective owner) of the copyright in the work.

Moral rights cannot be assigned; they will remain with the creator of the work, and pass to the artist's estate on death.



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**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?**

Yes. As a matter of English law, an agent owes a number of fiduciary duties to his or her principal. These are implied duties in addition to any duties that may have been agreed between the principal and the agent.

One such implied fiduciary duty is a duty to account for any commission, benefit or profit made or received by the agent when conducting the principal's business. The commission, benefit or profit belongs to the principal, and the agent can keep it for his or her own account only with the principal's consent.

**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 agent will generally be able to retain his or her commission where he or she has disclosed to the principal (i) that he or she will receive a commission and (ii) the amount of the commission. Ideally, (iii) the principal then gives his or her express consent to the agent retaining the commission for his or her own account.

If there is no disclosure at all, the commission retained by the agent amounts to a secret commission. The courts have held that taking a secret commission is tantamount to fraud on the principal, and the agent must account for it in full. By taking a secret commission, the agent may find that he or she must pay over to the principal all remuneration received by him or her in the course of conducting the principal's business, not just the commission. If there is a degree of disclosure but the principal has not given informed consent, the commission is not secret; however, the principal may still be entitled to the commission.

The question as to what constitutes informed consent is a question of fact. English judges have held that 'there is no precise formula which will determine all cases'. It may be sufficient for the agent to disclose to the principal that he or she will receive a sum of money from a third party, leaving it to the principal to enquire as to the amount. However, informed consent typically requires not just disclosure that a commission will be paid, but also of its amount.

**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?**

Yes. Upon discovery that a third party paid a secret commission to his or her agent, the principal can claim the commission either from the agent or from the third party. If the third party is held liable to pay the commission to the principal, it will have paid the commission twice, leaving it with a claim against the agent for the return of the commission paid to him or her.

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

The entry of a company into a formal insolvency process does not defeat the proprietary interest of a third party in assets held by the company. A creditor who can show that it (rather than the insolvent company) has beneficial title to an asset is entitled to have the asset transferred to it. If the liquidator sells the asset, the creditor is entitled to an account of the realisations made in respect of the asset.

To protect their interest and to avoid any dispute with the liquidator or other creditors over the basis upon which the dealer is in possession of the artwork, consignors ought to record the terms of the consignment in writing.

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

There is no government-appointed regulator in charge of regulating auctioneers of art, antiques and collectibles.

No general trading licence is required from auctioneers selling art, antiques and collectibles, except in relation to certain categories of collectibles such as wine, spirits and tobacco. However, certain local

councils, including Westminster City Council, require auction houses to register with the council.

Regulations applicable to auction sales are found in different statutes. These regulations have not been consolidated. For example, in live auctions, the name of the auctioneer must be publicly displayed throughout the course of the auction (Auctioneers Act 1845), bid rigging is prohibited (Auctions Bidding Agreements Acts 1927 and 1969; Enterprise Act 2002), and where a sale by auction is not notified to be subject to a right to bid by or on behalf of the seller, the seller cannot bid himself or herself or employ any person to bid at the sale (section 57(4), Sale of Goods Act 1979).

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**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?**

Auctioneers are given wide discretion to provide other services to sellers and buyers beyond auction services. The larger auction houses offer sellers the opportunity to sell their artworks privately as opposed to at auction. Moreover, auction houses routinely sell artworks that did not sell at the auction privately, after the auction. Some auction houses offer seller advances over sale proceeds, or loans secured against artworks that are not consigned for sale. Auction guarantees can be available for higher value lots.

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**Spoliation during the Nazi era**
**35 In your jurisdiction, in what circumstances would the heirs of the party wrongly dispossessed typically prevail over the current possessor, if a court accepts jurisdiction and applied the local law to a claim to art lost during the Nazi era?**

To find in favour of a claimant, an English judge needs to be satisfied as a matter of English law that:

- ownership of the artwork remains with the party that was wrongly dispossessed between 1933 and 1945; and
- the claim to the artwork is not time-barred under the applicable statute of limitation.

As a general rule, the possessor of an artwork cannot transfer title to it that he or she himself or herself does not have (also known as the 'nemo dat quod non habet' rule; see question 4). This means that, in principle, anyone deriving possession from the thief cannot claim good title. If this were the only rule, the victim of a wrongful dispossession would have a good claim against the current possessor for the return of the artwork. However, by application of the Limitation Act 1980, a claim to a stolen artwork must be made within six years from the date of the first acquisition in good faith. The Limitation Act goes further: if more than six years have passed, the claim is barred and the victim's ownership is extinguished. In practice, this means that if English law applies, and if the current possessor can show that more than six years have passed since the first acquisition in good faith, any legal claim brought against the possessor will fail.

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

In the UK, the Spoliation Advisory Panel was established in 2000 as an alternative dispute resolution process for claims from persons dispossessed by the Nazis whose artworks are today held in UK national collections, museums or galleries 'for the public benefit'. Recommendations by the Spoliation Advisory Panel are not legally enforceable, but both sides are expected to accept them. The Panel may recommend the return of an artwork to the claimant, a compensatory or ex gratia payment, or other 'fair and just solutions' (such as the attachment of plaques next to exhibits explaining the history of the artwork in question and providing details on the dispossessed person and his or her fate during the Nazi era).

In making its recommendations, the Spoliation Advisory Panel's remit is not restricted to the technical legal entitlements of claimants, as discussed in relation to question 35, but takes into account moral considerations as well. The Panel may also be called upon to make a recommendation about a claim for an artwork in a private collection, where both claimant and current possessor jointly request it to do so. However, this has not happened thus far.

**Update and trends**

Brexit is expected to have a direct or indirect impact on the areas of art law detailed in this chapter. For more information, see the memoranda published on [www.paiam.org](http://www.paiam.org).

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

In England and Wales, art on loan to a public museum is typically insured under the Government Indemnity Scheme. In effect, the government covers the risk of loss or damage to the art on loan. The Government Indemnity Scheme is an alternative to commercial insurance. It allows art and cultural objects to be shown publicly in the UK that might not have been otherwise because the cost of insurance would have been prohibitively high. In England, the scheme is administered by the Arts Council England. Note that under the Government Indemnity Scheme, certain risks are excluded. These exclusions are non-negotiable.

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

Cultural objects in England and Wales are protected from seizure by the Tribunals, Courts and Enforcement Act 2007. In order to benefit from immunity from seizure, the following conditions must be met:

- the object is usually kept outside the UK;
- the object is not owned by a person who is resident in the UK;
- the import of the object does not contravene any law;
- the object is brought into the UK for the purpose of a temporary public exhibition at an approved museum or gallery; and
- the museum or gallery has published information about the object where required to do so by regulations.

A list of approved museums and galleries can be found on the website of Arts Council England. In order to obtain approved status, the museum or gallery must submit a completed questionnaire to the Secretary of State for Digital, Culture, Media and Sport, demonstrating that it has satisfactory due diligence processes in place for examining the history of loans and for provenance research. It should also demonstrate that it will not borrow objects if there is any suspicion that they were stolen, looted or illegally obtained.

Once approved status has been granted, the museum or gallery is required to list the works that are immune from seizure on its website, providing details of the loan and of the exhibition. Immunity is then automatic.

**Cultural patrimony****39 Is there a list of national treasures?**

There is no list of national treasures in England and Wales.

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

There is no right of pre-emption in England and Wales. However, when an export licence is requested and the Secretary of State decides that an artwork meets one or more of the Waverley criteria, the export licence application will be suspended to allow public museums to make an offer to buy it (see questions 13 and 39).

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

Ownership of cultural property can automatically vest in the Crown when, for instance, it qualifies as a 'treasure' within the meaning of the Treasure Act 1996 (as amended by the Treasure (Designation) Order 2002).

The Act designates several categories of object that are considered treasure. These categories include objects that are at least 300 years old that meet the following criteria:

- not a coin but containing at least 10 per cent precious metal;

- one of at least two coins in the same find containing at least 10 per cent precious metal; or
- one of a group of at least 10 coins in the same find.

Alternatively, objects at least 200 years old and designated by the Secretary of State as objects of outstanding historical, archaeological or cultural importance can also qualify as treasure.

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

If the foreign state is a member of the European Union, it can seek the return of cultural property illegally exported, by relying on Directive 2014/60/EU of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a member state as implemented in the UK by the Return of Cultural Objects (Amendment) Regulations 2015. The Directive requires the member state in which the cultural property is found to apply the export laws of the country of origin, and if the cultural property is found to have been illegally exported, to order its return. The competent court may award the possessor 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 item of cultural property.

If the foreign state is not a member of the European Union, the options are limited for cultural property that was illegally exported but not stolen. The UK does not have bilateral treaties with other countries designed to facilitate the return of illegally exported property. While the UK has ratified the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the Convention does not require the English courts to apply the export laws of non-EU countries. The UK has not ratified the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects that could, in theory, pave the way for the return of illegally exported cultural property to the country of origin. If the English courts found that English law was violated, for example English customs laws, this could lead to the court ordering the seizure or confiscation of the illegally exported cultural property, and its possible repatriation to the country of origin.

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

The main anti-money laundering legislation in the UK lies in the Proceeds of Crime Act 2002, the Money Laundering Regulations 2017 and the Terrorism Act 2006. While the Proceeds of Crime Act 2002 (POCA) concerns anyone doing business in the UK, the Money Laundering Regulations 2017 only concern individuals and businesses in the 'regulated sector'.

In the UK, art market professionals and businesses fall within the regulated sector only if they qualify as high-value dealers, or if they provide financial-type services such as loans or advances secured by art, antiques or collectible items. A high-value dealer is defined in the Money Laundering Regulations 2017 as any business or sole trader that accepts or makes high-value cash payments of €10,000 or more (or its equivalent in any currency) in exchange for goods. The Money Laundering Regulations 2017 impose significant obligations on high-value dealers, including registering with Her Majesty's Revenue and Customs for supervision, determining and verifying clients' identities, and training employees to isolate suspicious transactions.

All art market professionals and businesses, including those that do not fall within the scope of the Money Laundering Regulations 2017, must comply with the POCA. The POCA establishes a series of criminal offences in relation to money laundering, including:

- concealing, disguising, converting, transferring or removing criminal property from the UK;
- entering into or becoming involved in an arrangement that facilitates the acquisition, retention, use or control of criminal property by or on behalf of another person; or
- acquiring, using or having possession of criminal property.

A person convicted of a substantive offence under the POCA is liable to imprisonment for up to 14 years or a fine or both. The main defence against committing a primary money laundering offence under the POCA is to seek consent from the National Crime Agency prior to

concluding the transaction in relation to which there is knowledge or suspicion of money laundering.

The Terrorism Act 2006 sets out a series of offences relating to the funding of terrorism. If you sell cultural property from countries occupied by terrorists, you are at great risk of committing an offence under the Terrorism Act, the most relevant offence being the retention or control of (or facilitation of the retention or control of) terrorist property.

### Endangered species

#### 44 Is jurisdiction a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)?

The UK implements CITES through the European Union Wildlife Trade Regulations (Council Regulation (EC) No. 338/97). Typically, the EU adopts more stringent restrictions than those required by CITES and these stricter rules apply in the UK.

In England and Wales, CITES licensing is operated by the Department of Environment, Food and Rural Affairs (DEFRA) and has a designated management authority in charge of administering its licensing system.

The UK has enacted national criminal legislation (Control of Trade in Endangered Species (Enforcement) Regulations 1997) that creates criminal offences in relation to breach of the EU CITES Regulations, attracting a maximum conviction of a five-year custodial sentence, a fine or both. The Wildlife Crime Unit is responsible for enforcement.

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

Trade, import and export between EU countries are not considered 'international' for the purposes of CITES, and therefore there are different restrictions and licensing requirements that apply in the UK for intra-EU trade or import and export, and international trade or import and export. Trade with countries that are not party to CITES and do not issue comparable documentation is not permitted.

Currently, many artworks containing CITES-listed species (both pre- and post-1947) can move freely within the EU without import and export licences. However, some artworks require licences before they can be advertised or sold. The decision on whether to issue a licence is based on the guidance set out in the EU CITES Regulations. Alterations to the Annexes are adopted in the EU following each conference of the parties, which typically take place every two or three years between all parties to CITES. It is therefore important to check the current restrictions and requirements regularly.

Licences are required for artworks containing CITES-listed species for:

- import into and export from the EU;
- commercial use of any artwork containing a CITES-listed species on Annex A in the EU CITES Regulations (equivalent to CITES Appendix I); and

- the movement of artworks containing CITES-listed species within the EU where there has been a previous restriction.

Unlike much of the EU, the common licence issued in the UK is an Article 10 Transaction Specific Licence rather than a licence specific to that artwork (similar to a passport).

When applying for a licence to import an artwork containing a CITES-listed specimen into or from the UK, the Animal and Plant Health Agency's Centre for International Trade (which is the part of the UK's management authority that deals with licence applications) will require the corresponding export permit from the exporting country or the application will be refused. The management authority currently aims to decide on each application within two weeks, but for an international export that requires a corresponding import permit from the intended country, the whole process may take much longer.

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

The UK (and the EU) allows certain exemptions for 'antique' artworks, which exempt these artworks from certain restrictions and conditions that would otherwise be required for import, export and trade. However, as with non-antique artworks, there are still distinctions between intra-EU and international import, export and trade.

An artwork is considered antique if it was acquired before 3 March 1947 in its worked state. An object is considered worked if it has been significantly altered from its natural state (eg, fashioned into jewellery, musical instruments or furniture), provided that it was worked before 3 March 1947. Items that were worked before this date but have been reworked after it (eg, if an ivory sculpture carved before 1947 is reworked into a piece of jewellery after 1947), will no longer be considered antique, and will not benefit from the exemptions.

Subject to any enhanced restrictions for a particular species (see question 47), antique artworks can generally be traded within the EU.

In the UK, there is currently no requirement to demonstrate that an artwork is antique. The provenance stated on the licence application is generally accepted without investigation, provided the other conditions are met.

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

Subject to exceptional circumstances, the international trade in ivory listed in Appendix I to CITES has been banned since 1989 and this ban is recognised in the UK. This did not affect intra-EU trade. However, trade in raw ivory is completely prohibited in the UK regardless of its age.

In October 2016, the UK signed a non-binding resolution to phase out domestic ivory markets.

Following this resolution, the UK government announced a total ban on trade in post-1947 ivory. However, in 2017 the government announced plans to widen the ban to include pre-1947 worked ivory

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resulting in a near total ban. At the time of writing, the UK government is considering feedback following a 12-week consultation on the proposed near total ban on trade in ivory. The proposed ban contains only narrow exemptions for the most culturally significant works. If implemented as currently proposed, the ban would prevent trade in all ivory (other than those covered by the exemptions), but would not affect ownership, import and export, or sales of ivory works to museums.

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### Consumer protection

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

Pursuant to the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, consumer-buyers have the right to cancel distance and off-premises sales at any time during the statutory cancellation period – 14 calendar days from the day on which the consumer or their agent takes possession of the artwork – without giving any reason and without incurring any liability, except in limited circumstances. The Regulations have carved out an exemption for property offered for sale in public auctions where the consumer is able to attend in person; in these instances, traders need not offer the right to cancel.

Where the right to cancel is exercised by the consumer within the statutory period, the trader must reimburse the consumer. Where the right to cancel applies and the trader fails to inform the consumer of this right, the Regulations automatically extend the cancellation period by 12 months.

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

Schedule I of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 sets out mandatory information to be provided to consumers for sales made on-premises. Schedule II of the Regulations sets out mandatory information to be provided in the context of distance and off-premises sales, including but not limited to the identity of the seller if he or she is acting on behalf of another trader.

For distance contracts concluded by electronic means, the trader must ensure that the consumer, when placing the order, explicitly acknowledges that the order implies an obligation to pay. If placing an order entails activating a button or a similar function, the trader must ensure that the button or similar function is labelled in an easily legible manner only with the words 'order with obligation to pay' or a corresponding unambiguous formulation indicating that placing the order entails an obligation to pay the trader. The trader must also ensure that any trading website through which the contract is concluded indicates clearly and legibly, at the latest at the beginning of the ordering process, whether any delivery restrictions apply and which means of payment are accepted.

The Consumer Rights Act 2015 applies alongside the Regulations. The Act sets out the remedies available to consumers for breach of their statutory rights, including but not limited to the right to reject the goods for a full refund or to obtain a price reduction. The Act further consolidates the law on unfair contract terms in consumer contracts and introduces the right for consumers to bring competition infringement proceedings against traders in the courts.

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