

Crossing boundaries – the art of export controls



Exporters of certain works of art and items of cultural interest need to be aware of the regulations that govern such exports – both the specific and the more general – or they run the risk of breaking the law, write Till Vere-Hodge and Dhvani Patel.

Export controls and sanctions are instruments of foreign policy, sometimes regarded as two sides of the same coin under the rubric of ‘economic statecraft’. Export controls typically allow governments to prevent sensitive material from being made available to unfriendly states or non-state actors. This is to ensure, *inter alia*, that cutting-edge military technology remains within the state imposing the controls. Economic sanctions, on the other hand, are generally used to penalise certain behaviours, such as human rights abuses, by unfriendly states or non-state actors.

Beyond economic statecraft, there are further layers of controls that compliance teams should be aware of. A good starting point is the UK government’s overview of goods which

may require licences. It expressly states that ‘if your business is considering exporting or importing goods, you will need to check if you need a licence. There are controls on exports of military or paramilitary goods, technology, *artworks*, plants and animals, medicines and chemicals’ (emphasis added).¹

One such layer may be termed ‘cultural statecraft’, which encompasses controls on certain cultural goods that are aimed at preserving the cultural heritage of the state imposing the controls. This is to ensure that a specific work that is considered to be of particular cultural value to a nation remains there.

While their respective objectives and effects may therefore represent mirror images of one another, economic and cultural statecraft can

both affect the trade of cultural goods. This article aims to provide a general, non-exhaustive overview of how artworks and cultural objects may be caught by economic and cultural statecraft.

First, transactions involving cultural objects may be subject to the rules of classical economic statecraft (‘classical transactions’). Second, they may involve an overlap between economic statecraft considerations and cultural statecraft considerations (‘overlap transactions’). Third, transactions may fall under the exclusive remit of cultural statecraft rules (‘standalone transactions’).

Classical transactions

Export controls

Most in-house compliance teams will



be very familiar with this set of scenarios. Imagine, for instance, an artwork that incorporates materials included in the EU Common Military List,² the EU Dual-Use List,³ or the UK Strategic Export Control Lists.⁴

The analysis of such a transaction would, as ever, require a case-by-case analysis. This is because even where an item is not itself listed, it may still be controlled under the so-called catch-all provision⁵ of the EU Dual-Use List, where there is reason to believe such an item is intended for use, for example, in violation of an arms embargo.⁶

Traditional artworks may not have an obvious nexus with these control lists, although it is not impossible to imagine that some of the products used for the restoration of oil paintings may include toxic substances. Post-modern

conflict zones. Under the current EU/UK rules, certain objects from Iraq and Syria may not be traded.¹⁰ Generally, 'cultural property and other items/goods of archaeological, historical, cultural, rare scientific and religious importance' from those two countries may not be imported into the EU, exported from the EU, or generally dealt with.¹¹

The prohibitions do not apply to items exported from Iraq before 6 August 1990 and items exported from Syria before 15 March 2011.¹² Specifically, the cultural objects caught by the prohibitions include, *inter alia*:

- archaeological objects over 100 years old;
- pictures and paintings, water-colours, engravings, prints,



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artworks are more likely candidates for such a review. Damien Hirst's shark in formaldehyde springs to mind, although there are unlikely to be any *prima facie* concerns regarding strategic controls in relation to an object made from glass, painted steel, silicone, monofilament, shark and formaldehyde.⁷

Nevertheless, as the scope of possible artworks has become virtually limitless, it has become relatively easy to conceive of cultural objects incorporating materials that are subject to the relevant control lists, incorporating sensitive items, such as explosives or printed circuit boards. In the context of import VAT, this issue of categorisation has already been reviewed by the VAT and Duties Tribunal.⁸

Where there is any doubt as to the end use or end-user of an object, an export licence may be required. If the object is exported for a specific exhibition, for instance, GEA EU004 might be relevant. If the object is exported for repairs or maintenance, GEA EU003 could be used.⁹

Economic sanctions

The trade in artworks and cultural objects may also be restricted where it pertains to goods originating from

serigraphs, lithographs and sculpture and statuary of the same description, as well as photographs, films, negatives, manuscripts, maps and musical scores, which are more than 50 years old and do not belong to their originators;

- books more than 100 years old, printed maps more than 200 years old, vehicles more than 75 years old;
- toys, games, glassware, goldsmiths' or silversmiths' wares, furniture, musical instruments, clocks and watches, pottery, carpets, arms between 50 and 100 years old; and
- anything else more than 100 years old.¹³

As the Iraq restrictions give effect to a United Nations Security Council Resolution¹⁴ and the Syria restrictions do not,¹⁵ the UK penalties for breach of the respective rules differ: any person guilty of an offence by breaching the Iraq-related restrictions set out above is liable to imprisonment of up to seven years.¹⁶ Conversely, any person guilty of an offence by breaching the Syria-related restrictions set out above is liable to imprisonment of up to two years.¹⁷

For completeness, transactions with persons listed on the relevant consolidated sanctions lists are, of

course, also prohibited where they relate to cultural objects.¹⁸ This is particularly so where the artworks may be used as surrogate currency for the circumvention of asset freezes.¹⁹ As a result, the usual screening checks should be run, be it in relation to an art transaction or any other transaction.

Until recently, certain luxury and cultural goods have been subjected to sanctions imposed by the United States in escalation of political tensions. In 1962, President Kennedy announced a total embargo on Cuban cigars, citing 'the subversive offensive of Sino-Soviet Communism with which the government of Cuba is publicly aligned.'²⁰ It was not until the Obama administration moved to restore economic relations with Havana in 2016 that US import restrictions on Cuban cigars were finally lifted.²¹ Similarly, a US ban on all Persian rugs (whether antique or brand new, and regardless of how long the rug had circulated outside Iran) imposed in 2010 to curb Iranian nuclear ambitions remained in force until 2016, when President Obama signed an executive order reversing the sanctions.²² For the duration of the embargo, however, those who violated the law faced a fine of up to USD 1 million and 20 years' imprisonment.²³ Finally, 2016 also marked the end of the eight-year embargo on Burmese rubies stipulated by the JADE Act of 2008, which was enacted by the United States Congress in response to human rights abuses in Burma (now Myanmar).²⁴

Overlap transactions

Next, imagine a UK defence company wishes to purchase an antique cannon from a 17th Century British warship and a 16th Century Ottoman volley gun, say for permanent exhibition in the reception area of its new overseas office. How would its internal compliance team deal with this scenario?

Volley guns are generally controlled.²⁵ However, this control does not extend to volley guns manufactured earlier than 1890. Similarly, cannons are also generally controlled.²⁶ Again, the relevant entry excludes cannons manufactured earlier than 1890 from the scope of the controls.

On that basis, these two antique items do not constitute controlled items. Does this mean the defence company's compliance team can sign

off on the planned purchase? Not quite yet.

Under EU rules, Regulation 116/2009 of 18 December 2010 (the ‘Cultural Goods Regulation’) makes any export of cultural goods from an

EU Member State to a territory located outside of the EU subject to a valid export licence.²⁷ Cultural goods are defined as those items listed in Annex I to the Cultural Goods Regulation. These items are substantively similar to

those described as ‘cultural objects’ in the context of the Iraq and Syria trade restrictions (see above). In addition, the Cultural Goods Regulation introduces value thresholds in relation to these objects.

Arms older than 50 years and valued at more than EUR 50,000 are caught as a cultural good for the purposes of the Cultural Goods Regulation.²⁸ The antique cannon and the volley gun clearly fulfil the age thresholds. Whether or not a licence will be required under the Cultural Goods Regulation will now depend on whether (i) the proposed export is bound for a country outside of the EU and (ii) whether the object in question is worth more than the relevant value threshold. Assuming both are affirmative, an EU export licence will be required.

Under UK rules, the Export of Objects of Cultural Interest (Control) Order 2003 (the ‘Objects of Cultural Interest Order’) generally prohibits, except under the authority of a licence granted by the Secretary of State, the export of ‘any objects of cultural interest manufactured or produced more than 50 years before the date of exportation [...]’.²⁹

The order goes on to specify that this refers to ‘any objects of cultural interest manufactured or produced more than 50 years before the date of exportation’, except for certain excluded items (such as stamps, documents relating to and letters written by the exporter or their spouse).³⁰

Given the age of the cannon and the volley gun, and given that they are clearly caught under EU rules, it seems very likely that they would be caught under the UK rules, too (in addition to the licence requirements under the Cultural Goods Regulation set out above).

It may be possible to rely on an Open General Export Licence (Objects of Cultural Interest). This licence permits the exportation from the UK, to any destination except for an embargoed destination, ‘any firearms manufactured or produced more than 100 years before the date of exportation, and any other arms or armour manufactured or produced more than 50 years before the date of exportation, the value of which is less than £35,000’.³¹

An ‘embargoed destination’ is defined as a destination to which ‘an

Links and notes

- See Business Tax – Guidance Import and Export Licences, available at www.gov.uk/guidance/export-and-import-licences-for-controlled-goods-and-trading-with-certain-countries.
- See Common Military List of the European Union – Equipment covered by Council Common Position 2008/944/CFSP, available at [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XG0409\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XG0409(01)&from=EN).
- See Council Regulation 428/2009 of 5 May 2009 (as amended), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:134:0001:0269:en:PDF>.
- See consolidated UK Strategic Export Control List, available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/488993/controllist20151225.pdf.
- See Art 4 of Regulation 428/2009 of 5 May 2009.
- Ibid.*, Art 4(2).
- Damien Hirst, *The Physical Impossibility of Death in the Mind of Someone Living* (1991), glass, painted steel, silicone, monofilament, shark and formaldehyde, see www.damienhirst.com/the-physical-impossibility-of-death-in-the-mind-of-someone-living.
- In December 2008, the VAT and Duties Tribunal (London) held that video installations by Bill Viola and a light sculpture by Dan Flavin could be imported into the UK as ‘original sculptures and statuary, in any material’ under the Combined Nomenclature (Works of Art, Collectors’ Pieces and Antiques) in Council Regulation 2658/87/EEC. This meant that the artworks would not be subject to customs duty and subject to import VAT at a reduced rate of 5% instead of the standard rate (then 15%).
- See Regulation (EU) No 1232/2011 of 16 November 2011, Annex I(c) and I(d), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:326:0026:0044:EN:PDF>.
- See Regulation 1210/2003 of 7 July 2003 (Iraq) and Regulation 36/2012 of 18 January 2012 (Syria), consolidated versions are available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52003R1210-20140724&from=EN> and <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012R0036-20151218&from=EN>.
- See Regulation 1210/2003 of 7 July 2003, Art 3 (Iraq) and Regulation 36/2012 of 18 January 2012 (as amended by Regulation 1332/2013 of 14 December 2013), Art 11(c) (Syria).
- See Regulation 1210/2003 of 7 July 2003, Art 3(2)(a) (Iraq) and Regulation 36/2012 of 18 January 2012, Art 11(c)(2).
- See Regulation 1210/2003 of 7 July 2003, Annex II (Iraq) and Regulation 36/2012 of 18 January 2012, Annex XI (Syria).
- See UNSCR 1483 (2003) of 22 May 2003, available at <http://unsct.org/en/resolutions/doc/1483>.
- Attempts at finding broad-based international support for ‘the safe return to their legitimate owners of goods constituting Syrian cultural heritage which have been illegally removed from Syria’ (Regulation 1332/2013 of 13 December 2013, Preamble para. 3) did not materialise, as Russia vetoed any measures aimed at the Assad regime in the United Nations Security Council.
- See UK Statutory Instrument 2003/1519, Article 20, available at <http://www.legislation.gov.uk/ukSI/2003/1519/made/data.pdf>.
- See UK Export Control (Syria Sanctions) Order 2013, Article 17(3), available at <http://www.legislation.gov.uk/ukSI/2013/2012/made/data.pdf>.
- See, e.g., EU Consolidated List of Persons Subject to Economic Sanctions at http://eeas.europa.eu/cfsp/sanctions/consolidated/index_en.htm and HM Treasury’s Consolidated List of Targets, available at <https://www.gov.uk/government/publications/financial-sanctions-consolidated-list-of-targets>.
- See EU Council, Update of the EU Best Practices for the effective implementation of restrictive measures, 24 June 2015, para. 53, available at <http://data.consilium.europa.eu/doc/document/ST-10254-2015-INIT/en/pdf>.
- See ‘50 Years After Kennedy’s Ban, Embargo on Cuba Remains’, available at <http://www.nytimes.com/2012/02/08/world/americas/american-embargo-on-cuba-has-50th-anniversary.html>.
- See Patrick Oppmann, ‘US lifts import limits on Cuban cigars, alcohol’, available at <https://edition.cnn.com/2016/10/14/americas/cuba-cigars-us-embargo-lifted/index.html>. Since his election in 2016, however, President Trump has sought to reverse the Obama-era reconciliation; thus far, cigars have not been affected.
- See Leah McGrath Goodman, ‘The Persian Rug Trade is Back in Business’, available at <http://www.newsweek.com/2016/03/04/persian-rugs-iran-sanctions-428789.html>. A prior ban lasted until 2000; see Alexandra Hudson, ‘Sanctions pull rug from under Persian carpet trade’, available at <https://uk.reuters.com/article/uk-germany-iran-carpets/sanctions-pull-rug-from-under-persian-carpet-trade-idUKBRE83NOIN20120424>.
- See Josh Levs, ‘A summary of sanctions against Iran’, available at <https://edition.cnn.com/2012/01/23/world/meast/iran-sanctions-facts/index.html>.
- See Michael T. Gersberg, Tobias Casparly & Justin A. Schenck, ‘United States Formally Lifts All Economic Sanctions on Burma’, available at <https://www.lexology.com/library/detail.aspx?g=c47f4b91-57ae-4e59-8048-5229f9794beb>; see also JADE Act of 2008, available at www.treasury.gov/resource-center/sanctions/Documents/pl110_286_jade_act.pdf.
- See, for example, entry ML1.a of the UK Strategic Export Control List.
- See, for example, entry ML2.a of the UK Strategic Export Control List.
- See Cultural Goods Regulation, Art 2, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009R0116&from=EN>.
- Ibid.*, Annex 1, Section A, para. 15a and Section B.
- S.I. 2003/2759, Art 2, available at <http://www.legislation.gov.uk/ukSI/2003/2759/made/data.pdf>.
- Ibid.*, Schedule 1, Art 1.
- See Open General Export Licence (Objects of Cultural Interest), clause 1(f), available at www.artscouncil.org.uk/sites/default/files/download-file/Open_general_export_licence_March_2015.pdf.
- Ibid.*, clause 6.
- See www.artscouncil.org.uk/sites/default/files/download-file/Guidance_for_exporters_2015_issue_3.pdf, p. 28.
- See UK Export Licensing for Cultural Goods – Arts Council England Notice (2015), para. 38, available at www.artscouncil.org.uk/sites/default/files/download-file/Guidance_for_exporters_2015_issue_3.pdf.
- See Department for Culture, Media & Sport, ‘£35 million Rembrandt painting at risk of leaving the UK’, available at <https://www.gov.uk/government/news/35-million-rembrandt-painting-at-risk-of-leaving-the-uk>.
- See Dr Stephen Deuchar, ‘Rembrandt: The campaign that never was’, available at <http://www.artfund.org/news/2015/12/03/rembrandt-the-campaign-that-never-was>.

export ban applies by virtue of a prohibition contained in legislation implementing European Union obligations or United Nations sanctions', thus linking back to economic statecraft considerations.³²

Where the above does not cover the prospective transaction, an Individual Export Licence may be requested from the Secretary of State.

Assuming the cannon and the volley gun are considered not to qualify under any of the so-called Waverley criteria (see 'Standalone transactions' below), our two objects should be capable of being cleared for export.

Standalone transactions

Imagine now an international bank acquires at auction in the UK a painting by one of the leading Dutch old masters and wants to transfer the painting to the vault in its headquarters based outside the EU.

The old master painting is, *prima facie*, not subject to any strategic export controls in the context of military or dual-use items. As discussed above, however, subject to certain age and value thresholds being met, it may require an export licence.

Our Dutch old master will require a licence for export if its value exceeds the relevant value threshold, which currently stands at £117,657.³³ When the application for a licence under the UK regime is filed, it may be referred to expert advisers drawn from the UK's national museums and galleries. These expert advisers may, in turn, refer the matter to the Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest (the 'Reviewing Committee'), a 'non-statutory independent body set up to advise the Secretary of State on whether a cultural object that is the subject of an application for an export licence is a national treasure in the context of the Waverley criteria'.³⁴

The three criteria (named after Viscount Waverley, who presided over the relevant commission that established the current UK system in the 1950s) are as follows:

- Is the object so closely associated with UK history and national life that its departure would be a misfortune?
- Is it of outstanding aesthetic importance?
- Is it of outstanding significance for the study of some particular branch of art, learning, or history?

The Reviewing Committee then makes the final judgement as to whether our old master painting meets one or more Waverley Criteria. Assuming it is considered to be of Waverley standard, the Reviewing Committee will then evaluate evidence to arrive at a 'fair price' for the object. It will then recommend a length of time (typically between 2-6 months), for which the decision on the export application will be deferred. In the meantime, UK institutions and/or private individuals have the opportunity to raise the fair price set by the Reviewing Committee.

If the fair price can be raised, an offer is typically made to the applicant exporter to buy the artwork from him/her at that price. If not, the export application will generally be granted. The system has been much criticised, however, partly because there have been a number of instances in which prospective exporters have withdrawn their licence applications at the last minute. This strategy is typically employed to thwart attempts by public institutions to raise sufficient funds to buy a particular artwork. In these cases, the process is aborted in the hope that a subsequent effort to export will result in a valuation that proves prohibitive for any public institution to match.

By way of illustrative example, in October 2015, the UK Minister of State for Culture placed a temporary export bar on a Rembrandt painting that had been in the UK for more than 250 years and had been sold at auction to a foreign buyer, who had then applied for an export licence.³⁵ However, when the unnamed buyer became aware that the Art Fund was hopeful to raise sufficient funds, the licence application was withdrawn.

As the Art Fund noted, '[T]he new owner would need to keep the work in the UK for the foreseeable future, but presumably calculated that a new export application would almost inevitably succeed in the longer term,

given that [...] the eventual price (£35m plus inflation plus any appreciation in value over time) would all but certainly lie beyond the means of the Art Fund and its supporters.'³⁶

Conclusion

Where cultural objects and artworks collide with export controls, this can result in a maze of requirements that can look confusing and intimidating. It is important to stress that it is not only museums, galleries, auction houses, artists and art dealers who need to bear these different requirements in mind. The intersection between art and export controls equally applies to private collectors of art, investors, art funds, wealthy private individuals and companies holding art collections, including law firms. In addition, exporters, freight forwarders, consignors and insurers should be cognisant of the various different rules and know how to navigate them. It is all too easy for a non-specialist exporter who is unfamiliar with the nuances of art and cultural property to overlook the relevant rules governing this unique sector, thereby exposing both the owner and the exporter to considerable compliance risk.

When carrying out due diligence, any evidence of the unlawful export of an artwork can cause irreparable damage to the proposed transaction and undermine the long-term saleability of the asset. After all, once unlawfully exported, always unlawfully exported.

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