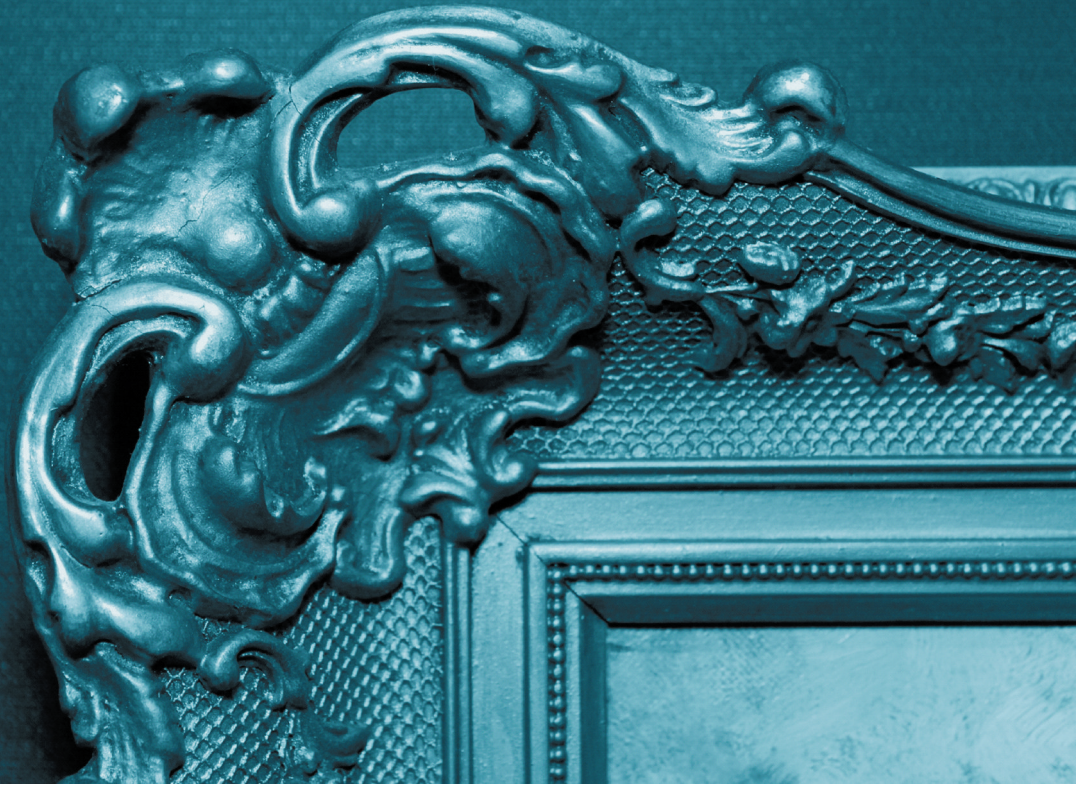




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Welcome to the first edition of our new biannual art law newsletter.

We advise a diverse range of clients on all aspects of art law across many jurisdictions, mainly from our London and Geneva offices. The art world remains largely unregulated and we are keen to highlight the opportunities and pitfalls for those operating in this area, including art collectors, investors, intermediaries supporting clients with art assets and those more generally with an interest in the sector. We are pleased to share with you our legal perspectives and insights, which we hope you will find helpful.

In this edition we look at some topical issues, including artists' resale rights and whether Brexit will have an impact on them; the legal realities around virtual art sales; and Julia Chan from our corporate team discusses her career change from antique violin dealer to City lawyer. We are also delighted to include a guest article from Stonehage Fleming on the practicalities of art collecting.

We would be pleased to hear from you with any feedback on our newsletter, any aspect of the law that you are particularly interested in, or if you would like to contribute a guest article, as we are planning regular updates on legal developments, trends, deals and interesting cases in the art world, especially in the context of Brexit.

Suzanne Marriott, Partner

Artists' resale rights - Brexit's positive impact?

In the aftermath of Brexit, there may well be an opportunity for the UK to repeal the legislation implementing the Artists' Resale Right Directive.

Many felt that when it was implemented into UK law in January 2012, it would herald the demise of London's standing as a leading international art sales centre. We explore the issues here and the potential outcome.

What is droit de suite?

The artists' resale right (ARR), sometimes referred to as droit de suite, provides that a royalty is payable to visual artists or their heirs whenever an original work of art is resold on the secondary market in the European Economic Area in transactions involving art dealers and auctioneers. The rule applies until 75 years after the artist's death. The royalty is calculated as a percentage of the sale price up to 4% (and subject to a cap and applicable exemptions). The primary liability for the payment of the royalty lies with the seller and the art market professional or auction house who was involved in the transaction.

The royalty is thought to have first originated in France in the 1920s following the sale of Millet's 1859 painting, *L'Angélu*, in 1889. *L'Angélu* was sold by Millet for £ 1,000 in 1860, but just 14 years after Millet's death in 1889 the sale price reached £ 553,000 while the artist's impoverished family gained nothing. Unlike musicians, screenwriters, and authors, artists make money only from the initial sale of their artwork, when their artworks will often increase in value over time on subsequent sales.

The introduction of the ARR

Although a number of European jurisdictions have granted artists a resale right for some time, the right did not exist in the UK until 2006 pursuant to The Artists' Resale Right Regulations 2006 which implemented the Directive. It sought to harmonise the position across Europe and ensure that all qualifying sales within the EU were subject to the resale right. This was to avoid distortions of competition by displacement of sales to countries where the royalty did not have to be paid. However, other countries with substantial art markets including the USA and Switzerland, have no such right.

Up until January 2012, in the UK the resale right applied only to sales of works by living artists. This followed from a hard-fought derogation from the Directive by Tony Blair in 2006 which allowed member states without a domestic resale right on the entry into force of the Directive, to exclude ARR from the heirs or the estates of artists deceased within 70 years of the date of sale up until 1 January 2012.



Is ARR detrimental for the UK Market?

ARR sought to harmonise art markets across Europe - but with London as the main Post War & Contemporary European capital, with 28.6% of the auction market share in 2015¹ (and with Post War & Contemporary art accounting for 45% of the art market globally by value), the UK is at risk of being disproportionately affected by the ARR regime. Post War & Contemporary is defined by artists born after 1910 and includes artists such as Damien Hirst, David Hockney and Francis Bacon.

Since the ARR regime has been introduced, many leading economists felt that the UK art market has suffered, particularly since the end of the derogation in January 2012.

Auction sales in Post War & Contemporary art in the UK dropped 12% by value year-on-year in 2013, in contrast to the 11%² increase by value in the Post War & Contemporary art market globally.

Will we see a change to ARR following Brexit?

In the wake of Brexit, many artists and curators who favoured "Remain" like many others will be dismayed by the potential lack of EU funding for exhibitions and projects. Other commentators are likely to hope to see a repeal of droit de suite and are of the view that the international art market is highly competitive and transactions might be increasingly shifted to countries without an ARR regime in place, such as the US and Hong Kong.

Brexit may present the opportunity for a permanent relaxation of the ARR Directive to transactions within 75 years of the relevant artist's death, or further still a repeal of the legislation in the UK altogether.

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¹ Deloitte 2016 art market report

² ARR sector report 2014 Dr. Clare McAndrew, Arts Economics

The legal reality of virtual art sales

Online art sales are being billed as a fast-growing section of the art market with commentators reporting that the online art market grew by an estimated 24% last year to \$3.27 billion, fuelled by strong growth among a number of online art platforms.

But where the sale moves from a traditional auction house to the virtual one there are a number of additional considerations arising under consumer and distance selling laws which online sellers need to be alert to.

The most significant area of legislation impacting this area is *The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013*. The Regulations apply to all "distance contracts" and "off-premises" contracts with consumers, except for certain specific exemptions (such as gambling, banking or credit services), and so are key for online businesses. They set out the information which must be provided to consumers before a contract for the sale of goods can be said to be binding with the consumer as well as any mandatory cancellation rights.

Under the hammer

The usual principle at auction is that once the hammer falls you are bound to buy the item you bid on and any cancellation rights arising out of consumer law do not apply. However, this is not the case for most online auctions due the fact that there is no possibility for the consumer to attend the sale in person.

The important point to note here is that the cancellation right is not applicable where the sale can be said to fall within the definition of a public auction.

A public auction is defined as a method of sale where:

- goods or services are offered by a trader to consumers through a transparent, competitive bidding procedure run by an auctioneer
- the consumers attend or are given the possibility to attend in person
- the successful bidder is bound to purchase the goods or services.

The difficulty, of course, for online auctions is that by their very nature purchasers will not usually attend the auction in person (unless run as an add-on to a physical auction). This means that the cancellation right would apply.

Stand or deliver - expectations

In those cases where there is no public auction, the buyer must be given a cooling-off period during which they can cancel the sale contract of the lot up to 14 days after they or a person they authorise (other than the carrier) take physical possession of it. The cancellation could be for any reason and there would be no liability incurred for doing so.

There are some welcome exceptions here, for example, the seller has no obligation to refund premium delivery charges if the consumer chose a more than standard delivery method.

A couple of other points to watch out for include the fact that the Regulations also provide a long list of the information that must be provided to the consumer on or before delivery, including details of cancellation rights and returns and a mandatory cancellation form which the consumer may use to cancel the contract.

In summary

The mandatory cancellation right clearly presents challenges for auctioneers and is highly disruptive to the traditional business model.

As the online presence from galleries and auctioneers increases this may cause some to consider alternative methods by which they can adapt to the online environment.

This may include the option to 'buy now', a move towards a fixed price strategy, or attempting to circumvent the Regulations by allowing purchasers to theoretically attend an auction space in person. This could perhaps be achieved with some form of 'live-streaming', but how this will play out in practice is yet to be seen.

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My journey from antique violins to corporate law

Before changing my career to practise law, I was a successful antique violin dealer for over ten years.

Now, as an associate solicitor in the corporate team at Charles Russell Speechlys, my day to day work includes mergers and acquisitions, private equity, corporate reorganisations, joint ventures, initial public offerings and secondary fundraisings. With my in-depth knowledge and experience of the art market from my previous career, I am also developing a specialism in art law.

The antique violin business

As an antique violin dealer, I specialised in the finest violins, violas, cellos and their bows. I worked both independently and at the world-respected dealer J & A Beare, where I had the opportunity to study the greatest examples of old master stringed instruments, such as Amati, Stradivari, Guarneri, Guadagnini, and to deal with clients who are the world's top musicians, orchestras, collectors, trusts, museums and foundations.

Trained as a violinist, violist and singer in Hong Kong before moving to London to study my Masters in arts management, I speak Cantonese and Mandarin at native level and understand the market and culture of the Far East very well. Shortly after joining J & A Beare, I was in charge of business in the Far East which involved frequent travel to Hong Kong, Taiwan and mainland China as well as Europe and the US to advise potential sellers and buyers. I also managed business between London and the branch in Seoul, South Korea. There are many high net worth families in the Far East who are willing to spend hundreds of thousands to millions of dollars on an instrument for their musical children. This is not as common in the West.



This photo has kindly been provided by Beare Violins Limited

Understanding the market

Fine antique violins are very limited in supply. I could be sourcing them from the older generation of musicians looking for a new home for their instruments which accompanied their entire musical careers, or from collectors who have to dispose of collections treasured by them for a lifetime. Sometimes it involves sellers making very difficult and emotional decisions which might have had a great impact on their lives and their families.

On the other hand, it was tremendously rewarding to find the right instrument for a client, whether a talented musician who needs it for the next stage of their career, a foundation building up a valuable collection, parents buying for their musical children or an investor sponsoring musicians.

Sponsorship matters

Antique violins command extremely high prices beyond the reach of most musicians, so matching sponsors with up and coming musicians can be mutually beneficial.

Sponsors enjoy interacting with the musicians, going to their concerts and socialising in the circles of great talents and culture. They may also benefit from an increase in the value of their investment, or allow the musicians to gradually buy into the instruments.

The costs of keeping antique violins, such as restoration, maintenance and insurance can be very significant. The vibrant violin market helps these works of art to be preserved and appreciated by future generations of musicians and audiences.

Following the legal path

I developed an interest in law while I was in the violin business, as I was keen to understand the legal aspects of the art market.

Having spoken to a few art law specialists, I decided to embark on the Graduate Diploma in Law part-time while continuing to work full-time at J & A Beare. Carrying law books and instruments worth millions of dollars on the plane became a regular part of my life for a couple of years, with dinner sometimes offered to my travel companion, "Mr Cello"! I always had to purchase an additional seat when travelling with cellos.

J & A Beare went through many changes over the years and an opportunity at a magic circle law firm came up. I did my training contract there, working on major deals, but decided that my interests lay in entrepreneurial business and the art market. This is why I joined the corporate team at Charles Russell Speechlys, where I can work on deals which are closer to businesses and their owners, as well as get involved in the firm's well-established arts and heritage group. I have also recently completed an art law course at Sotheby's Institute of Art which further enhanced my understanding of the field.

With the combination of skills and experience in the violin business, corporate and art law, I can understand the needs of clients in the art market and offer them tailored advice on both legal and business issues, whether they are dealers, auction houses, high net worth families/individuals, museums and galleries, or anyone else who has an interest in collecting art. The art world is fascinating and I am very glad to have found my way in the artistic, legal and business sides of it.



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From hobby to enduring legacy: the practicalities of art collecting

The first step to building a serious collection may not be deliberate. Often the initial purchase is on impulse. Having dipped your toe in the water, it is almost inevitable that you take a greater interest in the intoxicating world of art, but very few give enough consideration to the practicalities of owning an art collection.

These range from initial due diligence to the ownership structures, succession planning, lending to museums, maintaining a catalogue, transport, storage, insurance, conservation and valuations, all of which require specialist knowledge and skills.

Ownership of vehicles

Will the art be in the name of the individual or held through a trust, company or foundation? This decision begs numerous questions, starting with the purpose and objectives of the collection, which are quite likely to change over time. If, as is possible, a fiduciary structure is used, it is vital that the trustee has a good understanding of the practicalities of art management. They have a responsibility to see that the collection is expertly managed.

Purpose of trusts

The settlor may wish to keep the collection for personal use in their own lifetime, but must address what the future holds for the collection after they die. If the family are to be involved in the future, they should be involved now, so that they have a good grasp of the philosophies and intentions. Depending on the significance and content of the collection, they may wish the art to be available to a wider public, for educational purposes, or create their own museum. Clarification of the purpose of a collection helps avoid disputes amongst the next generation.



Due diligence or provenance

How do you make sure you are buying exactly what you think you are buying? Through tracing the work back to the artist in an unbroken chain, with proper documentation for each stage. The quality of the evidence will not only ensure you avoid the classic mistake of acquiring paintings looted in World War II, it will significantly affect the value if and when you try to re-sell. Obviously such due diligence requires an expert eye, independent from the auction houses.

Storage

Storage conditions are vital to the preservation of artwork. Whether it is stored in a private home, storage facility or museum, are suitable and reliable temperature and humidity controls in place? These factors could alter the condition of the work and ultimate value.

Taxation and paperwork

Correct advice and paperwork is especially relevant when moving artwork across borders; oversights could result in very costly penalties. Import and export licences, as well as cultural licences must be completed according to the shipment.

There are significant tax consequences depending on whether it is owned in a personal name, by a trust, foundation or company. Furthermore, not only must you think of who owns it, but of who enjoys it. The art may be owned by a trust but on the walls of a beneficiary, which could trigger tax issues. This may be managed by having the correct agreements in place.

Insurance

Appropriate insurance for art and jewellery is key. Insurers must be kept up to date on movement of the works, especially if they are on loan or in transit. Artworks should be labeled with the correct ownership details and the insurance policies must be in accordance with these.

Conclusion

Owning and managing an art collection is a complex business requiring frequent advice from a variety of different experts.

Unlike investment management, the art world is almost entirely unregulated. This is a sobering thought when one considers the immense nature of the assets in question, potential conflicts of interest and the consequences of 'getting the tax wrong'.

Independent strategic advice is not easy to find.

This article was written by Georgina Hepburne-Scott, Director - Head of Art Management at Stonehage Fleming.



Who to contact

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