

Art Law 2019

Contributing editor
Pierre Valentin



Publisher

Tom Barnes

tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall

claire.bagnall@lbresearch.com

Senior business development managers

Adam Sargent

adam.sargent@gettingthedealthrough.com

Dan White

dan.white@gettingthedealthrough.com

Published by

Law Business Research Ltd

87 Lancaster Road

London, W11 1QQ, UK

Tel: +44 20 3780 4147

Fax: +44 20 7229 6910

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between February and March 2019. Be advised that this is a developing area.

© Law Business Research Ltd 2019

No photocopying without a CLA licence.

First published 2018

Second edition

ISBN 978-1-83862-102-5

Printed and distributed by

Encompass Print Solutions

Tel: 0844 2480 112



Art Law

2019

Contributing editor**Pierre Valentin**

Constantine Cannon LLP

Lexology Getting The Deal Through is delighted to publish the second edition of *Art Law*, which is available in print and online at www.lexology.com/gtdt.

Lexology 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 Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Lexology 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.lexology.com/gtdt.

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.

Lexology 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 continued assistance with this volume.



London

March 2019

Reproduced with permission from Law Business Research Ltd

This article was first published in April 2019

For further information please contact editorial@gettingthedealthrough.com

Contents

Introduction	3	Italy	53
Pierre Valentin Constantine Cannon LLP		Giuseppe Calabi CBM & Partners – Studio Legale	
China	5	Spain	62
Angell Xi (Minjie) Jingtian & Gongcheng		Rafael Mateu de Ros and Laura Sánchez Gaona Ramón y Cajal Abogados, SLP	
Czech Republic	18	Sweden	71
Daniela Kozáková and Tereza Ditrychová Havel & Partners		Sverker Bonde and Sofie Haggård Larsson Advokatfirman Delphi	
England & Wales	26	Switzerland	79
Pierre Valentin, Azmina Jasani, Till Vere-Hodge, Rose Guest, Fionnuala Rogers and Emelyne Peticca Constantine Cannon LLP		Anne Laure Bandle and Arnaud Cywie Borel & Barbey	
France	37	Turkey	87
Jean-François Canat, Line-Alexa Glotin, Philippe Hansen and Laure Assumpção UGGC Avocats		Zeynep Hekim Bülbül and Zeynep Ökke Ökke Hekim Law Firm	
Germany	45	United States – California	95
Sebastian Graf von Wallwitz, Ilja Czernik, Dorothee Altenburg, Arndt Tetzlaff, Johannes Schäufele and Heiko Wunderlich SKW Schwarz Rechtsanwälte		Christine Steiner Law Office of Christine Steiner	
		United States – New York	102
		Amelia K Brankov Frankfurt Kurnit Klein & Selz PC	

Spain

Rafael Mateu de Ros and Laura Sánchez Gaona

Ramón y Cajal Abogados, SLP

BUYING AND SELLING

Passing of title

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

In addition to the actual transfer of possession, the Spanish system envisages transfers that are performed as a symbolic delivery with the same effect as a physical delivery. In the case of artwork, the execution of the transfer in the form of a public deed is recommended. Other alternatives, such as the delivery of the keys to the place where the movable property is stored, are discouraged.

The parties may expressly agree the effective transfer of the property upon execution of the sale agreement or upon receipt of payment, even if the delivery of the property has not taken place (articles 609, 1095, 1462 and 1463 of the Spanish Civil Code).

Implied warranty of title

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

Pursuant to articles 1461 and 1474 of the Civil Code, the seller shall be liable to the purchaser for the lawful and peaceable possession of the asset sold (ie, the purchaser will be entitled to compensation in the event of dispossession).

Eviction takes place when the purchaser is deprived, in whole or in part, of the asset purchased by virtue of a final judgment and of a prior right preceding the purchase. The seller shall be liable for the dispossession regardless of whether the parties have expressly agreed to it under the contract. The parties may, however, extend, reduce or cancel the seller's liability. Nevertheless, any agreement that does not hold the seller liable for dispossession will be void if it was done in bad faith.

Where the purchaser waives his or her right to be compensated in the event of dispossession, the seller must pay the purchaser the price of the asset sold at the time of dispossession, unless the purchaser had waived his or her rights with full knowledge of the dispossession risks and the potential consequences.

Where dispossession takes place and the compensation has been stipulated or the parties have failed to agree any provision to that effect, the purchaser is entitled to claim the following from the seller: the price of the object; the seller's income or gains made from the object; the costs of the suit; and other expenses and interest.

The statute of limitations of the purchaser's actions for dispossession against the seller is five years (article 1964 of the Civil Code).

Eviction provisions are applicable to 'civil transactions' (ie, transactions in which both parties are not companies or commercial agents). For other transactions, see question 5.

Registration

- 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 for the ownership of art, antiques or collectibles or a public register or database for the record of stolen or lost artworks, apart from the lists published by Policía Nacional and Guardia Civil.

Good-faith acquisition of stolen art

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

The law prefers the acquirer in good faith. According to the Criminal Code, the purchaser is entitled to initiate a criminal proceeding by filing a complaint against the seller for swindling. In order to succeed, the purchaser must prove the following elements exist in relation to the seller: intention to make a profit; deceit; defective consent; and disposal of property in a manner that is prejudicial to the purchaser or others.

The absence of an express warranty of authenticity is not required to succeed in the criminal claim, but it could help to prove that the seller acted for his or her own benefit. Contrarily, according to precedents, the absence of a warranty of authenticity could also be an obstacle to prove that the purchaser had been led into error, particularly if he or she is an expert in art transactions.

Additionally, pursuant to the Criminal Code, the party that suffers from the perpetration of the crime is entitled to sue for civil liability, which includes restitution, damage repair, and compensation for material and moral damage.

Acquiring title to stolen art through prescription

- 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?

Pursuant to article 1955 of the Civil Code, ownership of movable property may be vested in the new acquirer after three years of uninterrupted possession in good faith. Similarly, ownership of movable property may also be vested in the new acquirer after six years of uninterrupted possession, without any other condition. With regard to the owner's right to claim title to the movable property that has been lost or of which he or she has been unlawfully deprived, the above provisions shall apply.

With regard to movable property acquired from registered markets or dealers engaged in the trade of similar items on a regular basis, the Code of Commerce (article 85) provides that the purchase of merchandise in stores or shops open to the public shall cause the rights of the owner to vest in the purchaser with regard to the merchandise acquired, except for the right, if applicable, of the owner to lodge the relevant

civil or criminal complaint to which he or she may be entitled against whoever sells them unduly. This rule applies exclusively when both the seller and purchaser are dealers (ie, not if the purchaser is a consumer). See questions 50 and 51.

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

Yes, ownership in movable property vests in the acquirer after six years of uninterrupted possession without any other condition (ie, regardless of the fact that the acquirer acted in bad faith).

Risk of loss or damage

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

Pursuant to articles 1096, 1182 and 1452 of the Civil Code, damage or improvements to the item sold upon the execution of the contract shall be governed by the following rules:

- The purchaser is entitled to claim delivery of the property from the seller. If the seller falls into arrears or he or she has agreed the delivery of the property with two or more parties, he or she will be responsible for any event that occurs until the property is delivered to the purchaser.
- The obligation to deliver the property is removed where the property is lost or destroyed through no fault of the seller and before he or she has fallen into arrears.

Due diligence

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

The buyer is not obliged to conduct due diligence enquiries. Two different types of due diligence are usually performed: legal (regarding ownership and freedom of charges); and artistic (regarding authenticity, provenance, etc).

The agreement traditionally provides warranty and indemnity clauses.

9 | Must the seller conduct due diligence enquiries?

The seller does not have to conduct due diligence enquiries, provided that he or she complies with the legal obligations and regulations with regard to anti-money laundering, consumer protection and other standards.

Other implied warranties

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

The seller is responsible for compensation in the event of hidden defects of the item sold, if the defects render it unsuitable for its intended use or if they compromise its intended use in such a way that, if the purchaser had known of them, he or she would not have acquired it or would have paid a lower price for it; however, the seller is not liable for patent defects or those that are in plain sight, or are latent, if the purchaser is an expert who, as a result of his or her trade or profession, ought to have become aware of them easily (article 1484 of the Civil Code).

The seller is liable to the purchaser for the warranty for hidden defects or flaws of the asset sold, even if it would not have been possible for him or her to know about them. This provision does not apply when it has been stipulated otherwise (article 1485 of the Civil Code).

The purchaser may opt to withdraw from the contract and be reimbursed for any expenses he or she has paid, or benefit from a proportional reduction in the price, as determined by an expert. If the seller should have been aware of the hidden defects or flaws of the asset sold and failed to disclose them to the purchaser, the latter will have the same option, and will further be compensated for any damages if he or she should opt to terminate the contract (article 1486 of the Civil Code).

The actions outlined in the above provisions will cease to apply within six months of the sold asset being delivered (article 1490 of the Civil Code).

Voiding purchases of forgeries

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

Pursuant to article 1266 of the Civil Code, the purchaser of a forgery or of an artwork whose provenance or value, etc, has been falsely determined can contest or void the sale if he or she produces evidence of the following: first, that he or she has been falsely misled with regard to the authenticity or the features of the artwork; secondly, that his or her defective consent was crucial to the acquisition, because, if he or she had been aware of the forgery, he or she would not have entered into the contract; and, lastly, that his or her lack of awareness of the forgery is excusable, because even through diligent actions – for instance, requesting an expert opinion – the forgery could not have been identified. If this evidence can be produced, the contract may be rendered null and void if challenged within four years from its execution, and the parties must reciprocally return to one another the assets that constituted the subject matter of the contract, including refunding the price to the purchaser (article 1303 of the Civil Code).

However, the courts usually adopt a strict approach to determine the satisfaction of the requirements for granting nullity, namely with regard to the excusable nature of the error. Therefore, although in theory civil laws protect the purchaser, judicial practice fails to grant such protection.

If the contract is governed by commercial laws – for instance, when it is entered into by dealers or art galleries – the solution is different. The agreement must be interpreted in accordance with the 'custom of trade', which focuses on the protection of the seller, to the detriment of the purchaser.

In view of the above, the purchaser of a forgery or of an artwork whose features have been erroneously determined can only be effectively protected against such eventualities when it has been so agreed, which is usually the case for artworks acquired in auction where the auction house guarantees the authenticity of the work.

Voiding inadvertent sales of works by masters

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 of an artwork of uncertain attribution that is subsequently proved to be an autograph work by a famous master may contest or void the sale if they produce the evidence outlined in question 11. The provisions applicable to the buyer also apply to the seller.

If the contract is governed by commercial laws – for instance, when it is entered into by dealers or art galleries – the solution is different. The agreement must be construed in accordance with the 'custom of trade', which focuses on the protection of the seller, to the detriment of the purchaser. In this instance, the seller is effectively protected against such eventualities when it has been so agreed.

EXPORT AND IMPORT CONTROLS

Export controls

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

European Union treaties allow member states to grant exceptions to the free movement of goods across the EU with regard to their artistic heritage (article 36 of the Treaty on the Functioning of the European Union). However, the Maastricht Treaty (1992) introduced the notion of common cultural heritage (of the EU) and the compatibility of national laws and EU law should be questioned in each particular case. Non-EU exports are governed by Council Regulation (EC) No. 116/2009 on the export of cultural goods illicitly exported from their country of origin.

According to Law No. 16/1985 of 25 June on Spanish Historical Heritage, buildings and movable objects of artistic, historical, palaeontological, archaeological, ethnographic, scientific or technical interest form part of the Spanish historical heritage, and as such are subject to export controls. Documentary and bibliographic heritage, archaeological sites and areas, and natural sites, gardens and parks of artistic, historical or anthropological value are also considered part of the historical heritage.

Similarly, intangible assets that are considered to be culturally significant also form part of the Spanish historical heritage, in accordance with the specific legislation relating to them.

The most significant assets of the Spanish historical heritage are inventoried or are declared to be of cultural interest, and they are nonexportable unless a temporary export licence is granted.

The export licence for cultural property that is more than 100 years old should be approved by the Ministry of Culture and Sport. The Ministry has a preferential right to acquire the cultural property in the event that the export licence is not approved.

Current legislation states that the unauthorised export of a movable asset that forms part of the Spanish historical heritage will constitute a smuggling offence or infringement

Import controls

14 | Other than in relation to endangered species, are there any import controls for cultural property in your jurisdiction? What are the consequences of failing to comply with import controls?

The import of cultural property occurs when goods classed as having Spanish historical heritage (see question 13), including those coming from other member states of the European Union, are brought into Spanish territory. There are two categories of cultural property imports: temporary and definitive.

The proceedings for temporary imports are usually carried out by Customs and Police Officers. Temporary imports coming from third countries require an administrative document (DUA-Unique Customs Document), and those coming from within the European Union require proof of their entry and exit dates into the country. There is also an 'extraordinary' proceeding, involving the Ministry of Culture and Sport. The General Department of Fine Arts and Cultural Assets and Archives and Libraries will issue a certificate of 'no confiscation' or 'anti-seizure', showing the commitment of the government of Spain to give back temporary imports. These certificates are often required as an additional guarantee mechanism by the majority of large museums in the United States, Russia and Switzerland before lending any piece.

With regard to the definitive import regime, the person or entity concerned may opt for either the special import regime (the most advisable), allowing further exports during a renewable 10-year term, which is set forth in article 32 of the Law No. 16/1985 of 25 June on Spanish

Historical Heritage; or the definitive import regime, under which the pieces are to remain in Spain.

As to the special import regime allowing further exports, within a maximum period of three months from the date of importation, the owner may submit (in duplicate) to the General Department of Fine Arts and Cultural Assets and Archives and Libraries an import declaration according to the official model. This declaration must be accompanied by:

- assets coming from outside of the European Union: documentation proving the ownership of the assets (such as receipt of purchase) and the import DUA (Unique Customs Document); and
- assets coming from European Union member states: documentation proving ownership of the assets (such as receipt of purchase) and documentation accrediting the date on which the assets entered the country (such as a receipt from the haulage company).

Presentation of this declaration to the Ministry gives rise to a 10-year special scheme (which may be extended by a further 10 years if the interested party wishes), which gives a series of advantages should the owner subsequently wish to export said assets from Spain.

The filing of the official form comprises a 10-year special regime (which may be renewed for another 10 years upon request of the parties concerned) with a series of advantages in the event that the owner will be willing to export the pieces again outside Spain.

Regarding the definitive import regime, once it has been duly carried out and documented, the owner must request from the relevant Autonomous Community the inclusion of the pieces in the General Inventory of Goods and Chattels or for them to be declared an Asset of Cultural Interest.

Export and import taxes

15 | Does any liability to pay tax arise upon exporting or importing art, antiques or collectibles?

Value added tax (VAT) is triggered at a rate of 10 per cent upon importing art.

Imports of collectors' items or art of an educational, scientific or cultural nature, which are not intended for sale and that are imported by museums, galleries or other authorised establishments, are exempt. The exemption is based on the condition that the objects are imported for free or, if not, that they are delivered by people who are not professionals.

The authorisation for the export of any movable property that is part of the Spanish historical heritage will be subject to a progressive rate (from 5 per cent to 30 per cent depending on the value of the property), with the following exemptions: certain exports that take place during the 10 years following their importation; temporary exports; all goods that are under 50 years of age; and certain goods that are between 50 and 100 years old.

These provisions do not apply to imports and exports within the European Union.

DIRECT AND INDIRECT TAXATION

Taxes

16 | Outline the main types of tax liability arising from ownership and transfer of art, antiques and collectibles.

The main types of liability that arise from transfer are VAT, inheritance and donation tax, and property transfer tax.

Wealth tax arises from ownership.

The gain obtained from the transfer of art could also trigger corporate or personal income tax.

Tax exemptions

17 | Outline any tax exemptions or special conditions applicable to art, antiques and collectibles.

In addition to the exemption referred to in question 13, there is a special VAT scheme. The scheme is applicable to deliveries made by resellers of used goods, movable property that is considered art, antiques and collectibles, provided that in the prior acquisition by the reseller certain requirements are met. In this scheme, the tax base will be determined according to the profit margin of each operation.

BORROWING AGAINST ART

Types of security interest

18 | In your jurisdiction what is the usual type of security interest taken against art, antiques and collectibles?

A non-possessory pledge is the usual type of security interest. Its regulation expressly contemplates its use for art, antiques and collectibles. It is a security that is granted over movable property, where the collateral continues to be in possession of the owner (debtor) as a deposit. It requires execution in a public deed and must be registered in the Chattel Registry.

Consumer loans

19 | 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?

If the debtor qualifies as a consumer, the loan will automatically qualify as a consumer loan, because this kind of financial instrument (a loan secured by a non-possessory pledge) is not included in the list of exceptions in Law No. 16/2011.

Register of security interests

20 | 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?

Yes, the Chattel Registry. The registration of the public deed secured by a non-possessory pledge in the Registry establishes the date for the purposes of credit preference, constitutes evidence against third parties, prevents fraud invalidating the transmission of the asset to the detriment of the lender, and qualifies the credit as privileged and preferential in cases of insolvency of the borrower.

The security is registered against the art, but it is linked to the information pertaining to the borrower and his or her credit.

Non-possessory security interests

21 | Can the lender against art collateral perfect its security interest without taking physical possession of the art?

It would be feasible for the lender against art collateral to enforce it without taking physical possession, if the non-possessory pledge has been validly granted according to the Movable Mortgage Law requirements, which are the following:

- the pledge must be granted in a public notarial document, which expressly has to cover specific mentions of the Law, such as the right of the lender to identify the art collateral; and

- the pledge must be registered within the correspondent Registry of Movable Property.

In such cases, the debtor does not transfer personal property to the lender, as the asset (work of art) remains in possession of the debtor.

Sale of collateral on default

22 | 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?

Pledge regulations allow for an extrajudicial procedure before a public notary. However, if the debtor fails to collaborate in the delivery of the collateral, the lender will have no other recourse but to initiate judicial procedures.

With regard to the general enforcement of securities, the Civil Procedure Act sets forth the so-called 'executive procedure' to enforce securities that are considered as executive titles. Otherwise, enforcement of securities would follow the ordinary civil procedure. The two basic advantages of the executive procedure are its expediency and the fact that the debtor has limited causes of opposition. If the creditor is compelled to follow an ordinary civil procedure, it will be handled as an ordinary adversary proceeding (with the corresponding delay) and an executive procedure will not be initiated until a judgment is rendered (the executive procedure would then be that of enforcement of the said judgment).

Ranking of creditors

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

Claims of secured creditors will qualify as privileged claims up to the value of the collateral on which they fall; any excess will qualify as an ordinary claim or, in the case of interest claims, as a subordinated claim. As a general rule, no third parties may benefit from the value of the secured assets insofar as the secured creditor has not been paid. In this regard, secured creditors will not be affected by the contents of the creditors' composition agreement unless they agree otherwise.

It is possible to challenge security created 'to the detriment of the insolvency estate' within the two-year period preceding the declaration of insolvency, even in the absence of fraudulent intent. In particular, there is a presumption of prejudice to the insolvency estate in the event: (i) that the security was granted for pre-existing debts or for new debt incurred to cancel pre-existing and unsecured debt; or (ii) of any payments or other acts of early cancellation of secured payment obligations.

INTELLECTUAL PROPERTY RIGHTS

Creator copyright

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

Copyright vests in the author by virtue of its creation. Registration is not required.

Drafts or sketches of sculptures and paintings, drawings, engravings and lithographs, picture stories, cartoons or comics and other works of three-dimensional art are also protected (in any form, not just the final version of the work).

Copyright duration

25 | What is the duration of copyright protection?

Moral rights are recognised without any time limitation.

Regarding the author's exploitation rights, as a general rule protection shall run for the author's life plus 70 years from his or her actual or declared death. However, there are exceptions, including the following:

- in the case of works created by authors who died before 7 December 1987, copyright shall be protected for 80 years from his or her death, instead of 70 years;
- in the case of anonymous or pseudonymous works, the term of 70 years commences from the date on which the work is lawfully made available to the public; however, if the authorship becomes known, this period expires, and the term shall be 70 years from his or her death;
- in the case of works of joint authorship, copyright protection shall run for the lifetime of the co-authors and for 70 years from the death of the last surviving co-author;
- in the case of collective works, copyright shall be protected for 70 years from the date on which the work was lawfully made available to the public; and
- in the case of works made available to the public in parts, volumes, instalments or separate issues that are not independent, copyright protection shall run for 70 years after each separate component is lawfully made available to the public.

The terms of protection are calculated from the first day of the year following that of the author's death or that of the lawful communication of the work, as appropriate.

Exploitation rights vested in performers will expire 50 years after 1 January of the year following that of the performance or, if applicable, after the lawful publication of the recording of the performance.

Producers of phonograms and audiovisual recordings also enjoy copyright protection for 50 years after the completion of the recording or, where applicable, after the lawful publication of the recording.

The same 50-year copyright protection is applicable to broadcasting organisations (from the first broadcast or transmission) and database manufacturers (from the date on which the process of making the database is deemed completed or, if applicable, from the date on which the database was first made available to the public).

Copyright protection of ordinary photographs and publishers of unprotected works lasts for 25 years from the 1 January of the year following the creation of the photograph or the lawful communication of the work.

Display without right holder's consent

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

The owner of an original three-dimensional artwork or photograph is entitled to exhibit the work in public (even if it has not been made available to the public before) without the consent of the copyright owner, except where the author has expressly provided to the contrary in the sale agreement.

In any event, the author may object to the public exhibition if the work is displayed in a manner that is detrimental to his or her honour or professional reputation.

Reproduction of copyright works in catalogues and adverts

27 | Can artworks protected by copyright be reproduced in printed and digital museum catalogues or in advertisements for exhibitions without the copyright owner's consent?

Where the museum is a non-profit institution or where the reproductions in printed and digital museum catalogues or in advertisements for exhibitions are made without the intention of generating a profit, artworks protected by copyright can be reproduced without the copyright owner's consent.

Copyright in public artworks

28 | Are public artworks protected by copyright?

Public artworks are protected by copyright in the same way as other artworks except that they may be freely reproduced, distributed and communicated by painting, drawing, photography and audiovisual processes.

Artist's resale right

29 | Does the artist's resale right apply?

The artist's resale right will apply whenever there is a transfer for consideration after a first sale (if the purchase price exceeds €1,200) and whenever 'art market professionals' participate in the resale. In other words, private sales are excluded (because they are difficult to control) and resales are also excluded by the art galleries that had, in turn, directly purchased from the author, provided that no more than three years have elapsed and the resale price does not exceed €10,000.

The duration of the artist's resale right is 70 years after the author's death.

The person liable to pay is the seller (art market professionals involved in the resale are jointly responsible) and the beneficiary of the artist's resale right is the author during his or her lifetime and, after his or her death, the person to whom the author has expressly entrusted it in his or her last will and testament. In the absence of such provision, the beneficiaries of the artist's resale right will be his or her heirs.

The artist's resale royalty depends on the purchase price. For €50,000, the royalty is 4 per cent; and for over €500,000, the royalty is 0.25 per cent. There are also three further ranges of 3 per cent, 1 per cent and 0.5 per cent. However, the artist's resale right will never exceed €12,500.

Beneficiaries can collect the artist's resale royalty directly or entrust a collective management company to collect it, for instance the Visual Management Entity of Plastic Artists.

Moral rights

30 | What are the moral rights for visual artists? Can they be waived or assigned?

Moral rights for visual artists are:

- the right to decide whether a work is to be made available to the public and, if so, in what form;
- the right to determine whether the work should be released under the author's name, under a pseudonym, a sign or anonymously;
- the right to claim authorship of the work;
- the right to demand respect for the integrity of the work and to object to any distortion, modification or alteration of it or any act in relation to it that may be detrimental to the artist's legitimate interests or to his or her reputation;
- the right to alter the work subject to respect for the acquired rights of third parties and the protection requirements of goods of cultural interest;

- the right to withdraw the work from circulation owing to changes in his or her intellectual or ethical convictions, after paying damages to the holders of the exploitation rights;
- if the author later decides to resume exploitation of his or her work, he or she shall grant preference, when offering the relevant rights, to the previous holder thereof, and shall offer terms reasonably similar to the original terms; and
- the right of access to the sole or a rare copy of the work, when it is in another person's possession, with the intention to exercise his or her right of communication or any other applicable right. In addition, this right prevents the author from demanding that the work be moved, and access to it must be facilitated in a manner that causes the least possible inconvenience to the holder thereof, who shall be indemnified, where appropriate, for any damages caused to him or her.

These rights are recognised without any time limitation and cannot be waived or assigned.

AGENCY

Accounting to the principal

- 31 | 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?

The payment of commission to a commercial agent is regulated under the Agency Act. Although the specific amounts are freely agreed upon by the parties, the payment of any remuneration is regulated by and is compulsory under the Agency Act. The commission for the agent's activity may be established as a percentage of sales, as a fixed amount or as a combination of both systems. Where the parties cannot agree on a commission amount, the agent will be remunerated according to the business customs habitually present in the place where the agent conducts his or her activities.

The Agency Act also regulates the instances in which the agent has the right to receive this commission. In essence, the agent can request commission when the transaction has been agreed with a client within the territory (in the case of exclusive territories) or with clients with whom the agent has an exclusive relationship.

Disclosed agent commission

- 32 | 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 must look after the interests of the principal on whose behalf he or she operates, conducting his or her professional activity loyally and in good faith. In particular, the agent is subject to a non-competition obligation, which entails not conducting an identical or similar professional activity involving the same assets and services that he or she is contracted to promote, either on his or her own behalf or on behalf of another business owner (ie, not competing with the principal business owner). This obligation may be waived if such a clause is agreed in the contract.

Undisclosed agent commission

- 33 | 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?

No.

CONSIGNING ITEMS

Protection of interests in consigned works

- 34 | How can consignors of artworks to dealers protect their interest in the artwork if the dealer goes into liquidation?

In the event that the dealer or auction house goes into liquidation, their contracts would be automatically resolved and the dealer would be obliged to restore the work of art to the consignor. Consequently, unless there has been an irregularity, the consignor does not need to take any specific measure to protect the artwork, and the dealer's creditors don't have any action against the consignor.

Once the dealer has been declared insolvent, the consignor can ask for the work of art to be returned at any time, and the dealer is obliged to do so.

There is no specific register where consignors can register interest in consigned artworks. However, there is a Registry of Intellectual Property in which the owners can register works of art.

AUCTIONS

Regulation

- 35 | Are auctions of art, antiques or collectibles subject to specific regulation in your jurisdiction?

No specific legislation covering art auction houses exists in Spain. However, article 58 of the Law on Regulation of the Retail Commerce Sector makes reference to auction houses handling valuable or artistic items, and establishes special rules (see question 51).

- 36 | May auctioneers in your country sell art, antiques or collectibles privately; offer advances or loans against art, antiques or collectibles; and offer auction guarantees?

The main auction houses offer a post-auction private sales service. Only some offer items for sale privately and independently of the auction house.

Auction houses in Spain do not currently offer advances, loans or guarantees on artworks.

SPOLIATION DURING THE NAZI ERA

Claims to Nazi-looted art

- 37 | In what circumstances would the heirs of the party wrongly dispossessed typically prevail over the current possessor, if a court in your country accepted jurisdiction and applied its own law to a claim to art lost during the Nazi era?

There are no specific rules within the Spanish legal system regarding this matter. The general rules of the Spanish Civil Code are to be applied, construed depending on what can be proved before the judge.

The circumstances in which the new purchaser should be protected from any claim coming from the victim of a theft after a certain period of time have been explained in question 5. If we assimilate the Nazi plunder to a robbery or theft with regard to the Spanish legal system, article 1962 of the Spanish Civil Code is to be considered. Article 1962 states: '[a]ctions in rem relating to moveable goods are time-barred after six years from the loss of possession thereof, unless the possessor has acquired absolute title thereon before then', pursuant to article 1955 and except in cases of misplacement, public sale, theft or robbery. And pursuant to article 1956:

Moveable goods purloined or stolen shall not be subject to acquisition by means of statute of limitations in the possession of those

who purloined or stole it, or their accomplices or accessories, unless the crime or misdemeanour or its sentence, and the action to claim civil liability arising therefrom have become barred by statute of limitations.

Article 444 of the Spanish Civil Code states that “[a]cts which are merely tolerated, and those which are performed in a clandestine fashion and without the possessor of the thing being aware of them, or with violence, shall not affect possession”; that is, that possession cannot be considered effective.

Consequently, the three to six-year term – depending on whether there is good or bad faith, of public (not clandestine), pacific (without violence) and uninterrupted possession – for the possessor to acquire the ownership of a good, does not begin counting if that good was obtained by means of a robbery or theft, or was clandestinely possessed. In the event of a robbery or theft, the action to claim the good (or substitutive damages), shall be performed insofar as the action to claim civil liability, arisen from a crime or misdemeanour – robbery or theft – by the wrongly dispossessed party, has not been extinguished. In the case of clandestine possession (*de factum possession*), the term to perform the actions shall begin when the legitimate owner has known the situation or when the *de factum* possessor disseminates its possession.

Therefore, for the heirs of the legitimate owner to perform the action to claim the ownership of the good (its term being six years), the judge should consider that they have not had any chance to claim the robbed, stolen or hidden good until the moment they have been able to locate and identify, without any doubt, the cultural good and its illegitimate possessor, the principle of action not being applicable.

Exceptions are:

- Statutory limitations cannot be applied to the crimes qualified by the Spanish Criminal Code as: genocide; against humanity; against protected persons and assets in the event of armed conflict; piracy; or having statutory limitations that are of an exceptionally long term.
- International treaties or agreements declaring or recommending non-applicability of statutory limitations or establishing exceptionally long terms for statutory limitations.

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

No.

LENDING TO MUSEUMS

Responsibility for insurance

39 | Who is responsible for insuring art, antiques or collectibles loaned to a public museum in your jurisdiction?

The state guarantee is a legal mechanism by which Spain commits to providing compensation in the event of destruction, loss, theft or damage to works of cultural interest that are temporarily loaned for public exhibitions in museums, libraries or state-owned archives under the exclusive jurisdiction of the Ministry of Culture and Sport.

This must be combined with a private insurance policy, as the state guarantee does not cover the total amount.

Immunity from seizure

40 | Are artworks, antiques or collectibles loaned to a public museum in your country immune from seizure?

No.

CULTURAL PATRIMONY

National treasures

41 | Is there a list of national treasures?

No. Subject to the judgement of the Ministry of Culture and Sport, any cultural property that is over 100 years old and has historical or artistic value may be listed in the General Register of Assets of Cultural Interest, and may qualify as cultural property and, consequently, may be subject to an export ban.

Autonomous communities are competent to determine what qualifies as cultural property.

Classified cultural property is subject to certain restriction and certain tax advantages.

Right of pre-emption

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

The state’s pre-emption rights are first refusal, withdrawal and irrevocable sale offer.

Regarding the right of first refusal, owners must notify the public administration of their intention to sell the artwork, specifying the price and conditions of the transaction. Within a maximum period of two months after the notification, the public administration must inform the seller about whether the right of pre-emption will be exercised.

In case of sale at auction, the auctioneers must notify, in four to six weeks, to the competent administrations the auctions in which they intend to sell any object belonging to the Spanish historical heritage, and send the data that will appear in the auction catalogues. The public administration may exercise the right of first refusal by the appearance of a representative of the Ministry of Culture and Sport in the auction.

The right of withdrawal can be exercised when the private sale of any object belonging to the Spanish historical heritage has not been correctly communicated to the state. This right must be exercised within six months from the date the sale is officially announced.

Finally, the submission of a request for temporary export with the possibility of a sale or definitive export is considered an irrevocable sale offer in favour of the public administration, at the same value indicated in the export request. The Administration will have a period of six months to expressly accept or reject the offer of irrevocable sale, and, if it accepts it, it has one year to pay for the object.

Automatic vesting in the state

43 | In what circumstances does ownership in cultural property automatically vest in the state?

Assets of cultural interest established by the law include buildings housing state-owned archives, libraries and museums, as well as the movable assets stored within them. This category also covers caves, shelters and places that contain cave art, castles, insignia, boundary crosses and other similar items, and the ancient granaries.

Illegally exported property claimed by foreign states

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

Within the framework of the European Union, Spain applies Law No. 1/2017 of 18 April on the Restitution of Cultural Assets Illegally Removed from Spanish Territory or from Another European Union Member State, which incorporates Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 into Spanish law.

As the requesting party, the state may initiate restitution proceedings against the possessor, and, failing this, against the holder of the cultural asset that has illegally been removed from its territory, before the competent courts in the requested member state. The proceedings will make sole reference to the restitution of the cultural asset, and this may not extend to matters that may be contested by means of civil or penal claims, or any other type of claim that may be relevant in the Spanish legal system.

Spain is also a party to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, signed in Paris on 17 November 1970, and has an instrument of accession to the UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, signed in Rome on 24 June 1995.

ANTI-MONEY LAUNDERING

Compliance

45 | What are the anti-money laundering compliance obligations placed on the art trade?

People who trade professionally in objects of art or antiques have certain obligations as to the prevention of money laundering. Among other things, they must approve in writing and implement appropriate policies and procedures in matters of due diligence, information, preservation of documents, internal control, risk assessment and management, guarantee of compliance with the relevant provisions, and communication, to prevent money laundering-related operations.

Law No. 10/2010 of 28 April is entirely devoted to the prevention of money laundering and terrorist financing, and the obligations of the obliged subjects are very extensive and change depending on the situation.

ENDANGERED SPECIES

CITES

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

Spain became a party to the CITES Convention on 16 May 1986. The Directorate-General of Commercial Policy and Competitiveness has been designated as the principal management authority within the remit of the European Union for the purposes of article 13(1)(a) of Council Regulation (EC) No. 338/97 of 9 December 1996.

The duties of the management authority are designated by the Secretary of State Secretariat of Commerce of the Ministry of Economy and Business.

Controls and checks over CITES goods are entrusted to 12 units within the network of SOIVRE Export Inspection Service managed by the district and provincial chambers of commerce.

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

Worked specimens of elephant ivory and of other endangered species are included in Annex A of Regulation (EC) No. 338/97, which prohibits, in article 8, their purchase, offer to purchase, acquisition for commercial purposes, display to the public for commercial purposes, use for commercial gain and sale, keeping for sale, offering for sale or transporting for sale.

With regard to antiques, there is an exemption from the above prohibition that applies to worked specimens that were acquired more

than 50 years before the entry into force of the Regulation (ie, before 1 June 1947).

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

See question 47.

Specific endangered animal products

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

As mentioned in question 47, elephant ivory and rhino horn are listed in Annex A of Regulation (EC) No. 338/97. Therefore, their import requires an import permit issued by the management authority of the destination state, and their export or re-export will require the issuance of an export permit or re-export certificate by the management authority.

An export permit may be issued only if the specimens have been obtained in accordance with the legislation in force, if the trade will not have a harmful effect on the conservation status of the species, and if an import permit had been previously issued.

A re-export certificate may be issued only if the specimens were imported in accordance with the provisions of the Regulation and, in the case of live specimens of animals or plants, if an import permit had been previously issued.

CONSUMER PROTECTION

Cancelling purchases

50 | In what circumstances may consumers cancel the sale of art, antiques or collectibles?

The right of withdrawal from the contract is the consumer's right to terminate a contract by informing the other party within the specified withdrawal period, without giving any reason to justify their decision, without incurring any costs and without any penalty whatsoever. Any contractual provisions imposing a penalty on the consumer in the event that the right of withdrawal is exercised shall be null and void. The withdrawal right applies in retail contracts, in distance and off-premises contracts and in instalment sales of movable goods.

The right of withdrawal in retail contracts is subject to the general rules through the express reference made by the Retail Trade Act (article 10) to the Consumer Defence Act and to other supplemental statutes (articles 68–79 and 102–108). The consumer shall have a period of at least 14 calendar days counted from the date of delivery of the goods to withdraw from the contract. This is applicable to any kind of retail contracts provided that the buyer is a consumer.

In distance and off-premises contracts, with the exception of contracts concluded at a public auction, there is a special regulation: the consumer will have the right to withdraw from the contract within a period of 14 calendar days without giving any reason and without incurring any costs other than as specified below. The withdrawal period shall expire after 14 calendar days from the date on which the consumer, or a third party other than the carrier and indicated by the consumer, acquires physical possession of the goods.

Duties of businesses selling to consumers

51 | Are there any other obligations for art businesses selling to consumers?

Public auctions are regulated in articles 56 to 61 of the Retail Trade Act, setting out the obligations of the auctioneer or auction house, the

obligations of the owner of the goods being auctioned, the formal obligations, the relationship between the auction house and the bidders, the non-recoverability of any movable goods acquired in the public auction, and the joint and several liability of the auctioneer and the owner of the goods in the event of breach of the applicable disclosure obligations and in the event of defects in the goods (either as (i) misrepresentation of the auctioneer; (ii) error in the description of the features and characteristics of the good; or (iii) error in not noticing the defects).

There are special rules applicable to public auctions in venues specialised in precious objects or works of art (article 58 of the Retail Trade Act). The offer for sale in public auction must include an accurate description of the relevant goods, including a reference to whether the specified features are certain or merely estimated or assessed by an expert. In particular, where the object for sale in a public auction is an imitation, or an object that appears to be a precious object but in reality is not, the fact must be expressly disclosed in any notices and advertising published, as well as in any invitations to make bids. This obligation will also apply to the sale of precious objects or works of art that are offered to the public otherwise than in public auction.

A special statute, Law No. 43/2007 of 13 December 2007, will apply to the legal relations between the consumers and the businesses or professionals engaging in the sale of stamps, works of art, antiques, jewels and other goods, with the offer to return at a later stage, in one or several instalments, all or part of the purchase price settled by the consumer or an equivalent sum, with or without a provision for the appreciation of the amounts involved.

Lastly, distance and off-premises sales, where the purchaser is a consumer, are regulated by the applicable provisions of the Consumer Defence Act (articles 92–113). Contracts concluded by electronic means are governed by the rules on distance contracts and by Law No. 34/2002, on information society services and electronic commerce (article 23).



Ramón y Cajal
ABOGADOS

Rafael Mateu de Ros

rmateu@ramoncajal.com

Laura Sánchez Gaona

lsanchezg@ramoncajal.com

Calle Almagro 16–18

28010 Madrid

Spain

Tel: +34 91 576 19 00 / +34 91 781 20 25

Fax: +34 91 575 86 78

www.ramonycajalabogados.com

Other titles available in this series

Acquisition Finance	Distribution & Agency	Islamic Finance & Markets	Real Estate M&A
Advertising & Marketing	Domains & Domain Names	Joint Ventures	Renewable Energy
Agribusiness	Dominance	Labour & Employment	Restructuring & Insolvency
Air Transport	e-Commerce	Legal Privilege & Professional Secrecy	Right of Publicity
Anti-Corruption Regulation	Electricity Regulation	Licensing	Risk & Compliance Management
Anti-Money Laundering	Energy Disputes	Life Sciences	Securities Finance
Appeals	Enforcement of Foreign Judgments	Litigation Funding	Securities Litigation
Arbitration	Environment & Climate Regulation	Loans & Secured Financing	Shareholder Activism & Engagement
Art Law	Equity Derivatives	M&A Litigation	Ship Finance
Asset Recovery	Executive Compensation & Employee Benefits	Mediation	Shipbuilding
Automotive	Financial Services Compliance	Merger Control	Shipping
Aviation Finance & Leasing	Financial Services Litigation	Mining	Sovereign Immunity
Aviation Liability	Fintech	Oil Regulation	Sports Law
Banking Regulation	Franchise	Patents	State Aid
Cartel Regulation	Fund Management	Pensions & Retirement Plans	Structured Finance & Securitisation
Class Actions	Gaming	Pharmaceutical Antitrust	Tax Controversy
Cloud Computing	Gas Regulation	Ports & Terminals	Tax on Inbound Investment
Commercial Contracts	Government Investigations	Private Antitrust Litigation	Technology M&A
Competition Compliance	Government Relations	Private Banking & Wealth Management	Telecoms & Media
Complex Commercial Litigation	Healthcare Enforcement & Litigation	Private Client	Trade & Customs
Construction	High-Yield Debt	Private Equity	Trademarks
Copyright	Initial Public Offerings	Private M&A	Transfer Pricing
Corporate Governance	Insurance & Reinsurance	Product Liability	Vertical Agreements
Corporate Immigration	Insurance Litigation	Product Recall	
Corporate Reorganisations	Intellectual Property & Antitrust	Project Finance	
Cybersecurity	Investment Treaty Arbitration	Public M&A	
Data Protection & Privacy		Public Procurement	
Debt Capital Markets		Public-Private Partnerships	
Defence & Security		Rail Transport	
Procurement		Real Estate	
Dispute Resolution			

Also available digitally

[lexology.com/gtdt](https://www.lexology.com/gtdt)