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Private Clients Commission (PCC)

Working Session on Art Law

THE ART OF DEALING WITH ART

National Report of Brazil

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A. Background

The Private Client Commission's focus this year will be the art market, which has grown at an extraordinarily fast pace in recent years. In January 2015 the world's two largest auction houses Christie's and Sotheby's announced an increase in their quarterly revenue of around 17% year on year, while in February Sotheby's broke the record for the highest sales total at any London auction with a staggering figure of GBP186 million. The art fair Art Basel recently attracted record attendance with 92,000 visitors in 2014. Needless to say, this growing market has led to a growing need for legal advice.

The Private Client session will address some of the most important aspects of the rules governing art assets which we, as private clients lawyers, will need to deal with now and in future. In particular, we will be considering the tax issues which arise in connection with the ownership and acquisition of artworks, and the legal requirements which our clients must consider when buying and selling art (including cultural heritage schemes and the recovery of stolen art). We will also consider succession law and art, bearing in mind that, while artworks can act as a convenient repository for wealth which will appreciate over time, for many families they will have more personal connotations as well, having been passed down through generations or serving as a powerful indicator of individual taste.

B. Introduction

Please return the completed Questionnaire and your answers to the case studies below by **Saturday 28 February 2015**.

Please answer the following questions (including those following the case study), with reference to statute and case law as appropriate. We would be particularly interested in any illustrative examples of case law which may be relevant to the issues raised. Please provide answers which are as detailed as possible, including where relevant explanations of why a particular question or fact pattern does not raise any issues in your country.

Introductory questions

1. In which jurisdiction(s) do you practise art law? Do your answers cover other jurisdictions as well? **Rio de Janeiro. Buying/selling taxation and estate taxation are regulated by the State where the assets are located, or, when it comes to movable assets, by the State where the transaction took place or where the deceased owner was domiciled – article**

155, caput, II and §2 / I and §1 of the Brazilian Constitution –, but as a general principle Brazilian law is applicable countrywide.

2. How long have you been practising in the art law field? **I have never actually practised art law directly and only have one incipient case concerning the sharing of artwork in the context of the dissolution of a civil partnership.**
3. How would you describe the majority of your art law cases:

<input checked="" type="checkbox"/> Inheritance law related	<input type="checkbox"/> Trade law related
<input type="checkbox"/> Tax law related	<input type="checkbox"/> Insurance law related
<input type="checkbox"/> IP law related	<input type="checkbox"/> Litigation
<input type="checkbox"/> Corporate matter of art dealers incl. art dealer/artist relationship	<input checked="" type="checkbox"/> other: Family law related
4. Would you describe Art Law as your main area of practise? How much of your working time do you spend on art law related matters (in %)? **No, I never had any direct contact with that area except for an ongoing case concerning the sharing of artwork in the context of the dissolution of a civil partnership.**
5. What are the major changes and challenges relating to your work on art law related matters in recent years (in a broad sense, eg. acquisition of clients, required expertise, material law questions)? **Required expertise and material law questions.**

Taxation

6. What determines liability to tax of moveable assets for individuals in your country (e.g. habitual residence, domicile)? **Every individual, a Brazilian or a foreigner, resident or non-resident, who has moveable assets officially registered in Brazil (i. e. money in bank accounts, vehicles, boats, airplanes, participation in companies or shares in the stock market) or income in Brazil, has liability to pay taxes in Brazil.**
7. What determines liability to tax for structures holding moveable assets in your country? **The criteria is the same.**
8. Has your country planned or proposed to introduce any new taxes on individuals who are either non-resident or non-domiciled with moveable assets in your country? **No. Non-resident or non-domiciled already pay taxes of 15% of the assets' market value.**
9. Has your country planned or proposed to introduce any new taxes on structures holding moveable assets in your country? **No.**
10. Does your country have any favourable tax schemes in life or on death for people who own items of significant cultural value? If so, is an election required to participate in these? **No.**

Buying and selling art

11. Is there any specific legal basis such as statutory codes or laws, or guidelines or regulations applied by market players or dealers which is applicable to art transactions (whether domestic or foreign¹ dealers are involved) in your jurisdiction (please also indicate, if any legislative procedures are currently planned or ongoing):
- a. Are such requirements applicable to any person trading art? Or does it depend on certain criteria, such as legal entity/private person (i.e. a collector selling one of his pieces of art), size or revenue/profit?
 - b. Are there different requirements for selling, leasing (eg. investment), lending (eg to a museum)? **Museums enrolled in the Brazilian Museums System, coordinated by the Brazilian Museums Institute (Law nr. 11.906 of 20 January 2009), have a right of preference when cultural assets are sold through judicial or private auctions (article 63 of the Museums Act – Law nr. 11.904 of 14 January 2009; article 20 of the regulation Decree nr. 8.124 of 17 October 2013).**
 - c. Are there differences in regard to the type of art (eg. age, origin etc.)? If so, what are the determining factors/definition of such art?
 - d. Are there any other factors that determine the applicability of such requirements/ duties (eg. price, temporary transaction (eg. loan for an exhibition))?
 - e. What, in your jurisdiction, would be defined as a piece of art of national importance? Please provide details, including whether there is legislation in place which governs or imposes restrictions on dealing with art of national importance. **Moveable or immovable cultural assets, material or immaterial, individually or assembled, referring to the natural environment, to the identity, to the culture and to the memory belonging to the different groups composing Brazilian society, can potentially be protected by Brazilian museums and eventually be declared as cultural assets of public interest (article 5 of the Museums Act – Law nr. 11.904 of 14 January 2009; article 2 of the regulation Decree nr. 8.124 of 17 October 2013).**
12. What are the consequences if the requirements referred to in question 11 are not met? To what extent may the art dealer be held liable?

13. If an expert makes an error (e.g. attributing a painting incorrectly) under what circumstances would he be liable?
14. From a practice point of view, what are the major legal challenges in relation to trading art in your jurisdiction and what advice do you give clients with respect to art transactions? **The lack of general knowledge and legal control. Clients have to be careful as to the origins of artwork they intend to buy, because not only many people do not include them in their tax statements but also many criminals use the art market for money laundering.**

Title issues and recovering stolen art

15. How does one establish title to art in your jurisdiction? We would be particularly interested in relevant case examples involving modern forms of art such as graffiti.
16. What principles or rules apply to the recovery of stolen, illicitly exported or looted art?
17. Does your jurisdiction participate in any international restitution schemes to assist in the recovery of stolen, illicitly exported or looted art? **Brazil is a contracting party to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Decree nr. 72.312 of 31 May 1973).**

Succession

18. What determines succession to moveable assets in your country? **There is no particular rule which distinguishes moveable assets succession in Brazil from succession in general. If a person has legitimate heirs, all of its assets will be inherited by them. If a person does not have any legitimate heirs and does not leave a will, all of its assets will be inherited by the State (i. e. the city where the deceased was domiciled) (Civil Code, articles 1.829 *et seq* and 1.844).**
19. Are there any restrictions as to who can inherit artworks of national importance? **No.**
20. How would an individual donate artworks to an institution or charity during his/her lifetime or on death? **During his/her lifetime, he or she can make a donation by a public or private deed to whomever he or she wants, presuming the assets' high value. On death, the intended donation will actually turn into transmission of assets and the institution or charity must be contemplated in the individual's will.**

¹ Foreign art dealers, who for example sell at an art fair in your country.

Case study

You are very pleased to receive a referral of two new clients from one of the many charming AIJA members you met at the London Congress 2015. Suzanne is Argentinian and Frederick is English, and they married in a lavish ceremony in Venice in 2011, attended by many celebrities and paparazzi. The couple have two children: Alberto (born in 2012) and Victoria (born in 2014).

Frederick comes from a wealthy family and has inherited many artworks which are kept at his family's rural mansion. Last time Frederick visited his family home, he decided to give Alberto a painting for his third birthday so he put a label reading "For Alberto" on the back of his favourite Rembrandt.

Suzanne also has a keen interest in art, and has built up her own extensive collection. Suzanne and Frederick currently travel the world, going to galleries and attending auctions to find pieces to add to Suzanne's collection. They are considering moving to your country and living there until the children go to university. Suzanne would like to bring her collection with her, initially to hang in their new home but she is also considering selling some pieces through auction houses.

21. What pre-arrival tax planning opportunities in relation to Suzanne's artworks would you advise?
22. Once they have moved to your country, what estate and tax planning opportunities should Frederick and Suzanne consider in relation to their artworks?
23. Who will have a financial claim to the artworks if either Frederick or Suzanne dies without leaving a Will? **Their children, Alberto and Victoria, who are their legitimate heirs, as well as the other spouse, depending on their matrimonial property regime (Civil Code, article 1.829, I).**
24. In relation to question 23, would the position be different if Frederick and Suzanne were not married? **It depends. Brazilian Civil Code recognises the civil partners' rights to inherit along with their children, as legitimate heirs (article 1.790), but the particular rules which govern the spouses and the civil partners' succession are not the same and the distinctions made by the law are currently being discussed both in Brazilian Superior Court (competent for analysing violation of law – ruling enforceable only among the concerned parties) and in Brazilian Supreme Court (competent for analysing violation of the Constitution – ruling enforceable countrywide) (Extraordinary Appeal nr.**

878.694), mainly because the unequal treatment between these two categories would violate principles from the Brazilian Constitution.

25. When either Suzanne or Frederick dies, what estate tax will be payable on the artworks? **Their heirs will pay estate taxes set by the State where they were last domiciled on the artwork located in Brazil – in Rio de Janeiro the percentage would be 4%.**
26. Has Frederick made an effective gift of the Rembrandt to Alberto for succession and for tax purposes? **No, because no formal mention was made in the certificate of authenticity nor in the concerned tax statements, nor was a donation deed notarised and the donation tax (same as the estate tax) paid. If so had been the case, the gift would be deducted from the portion Alberto would be entitled to as to his father's succession, and his sister and his mother (depending on the matrimonial property regime) would be proportionally compensated in the sharing of the estate assets.**