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The Art of Dealing with Art

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General Reporters/Rapporteurs généraux

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Introduction

"Picasso painting smashes auction record – 'Les femmes d'Alger' sells for \$179m"¹

"Christie's beats the annual arts sales record for the fifth consecutive year, clocking up \$8.4 billion during 2014"²

The Private Client Commission's focus this year is the art market, which (as the headlines above show) has grown at an extraordinarily fast pace in recent years. This growing market has led to a growing need for legal advice.

In this report 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.

To prepare this report, a questionnaire was circulated to six practitioners, and five completed reports were received from the following jurisdictions: Brazil, France, Sri Lanka, United Kingdom and Hungary.

The case study involving an international couple, Frederick and Suzanne, was designed to tease out suggestions for the private client practitioner for particular planning opportunities involving art. The questionnaire as a whole aimed to identify the differences and similarities in the law of different jurisdictions in the following areas: a) succession; b) buying and selling art; c) title issues and stolen art; and d) taxation.

We are grateful to our National Reporters for their hard work, and have as far as possible quoted directly from their reports. Where appropriate, we have also drawn on practitioners' textbooks, journal articles, news reports and other secondary sources.

¹ <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/11598764/Picasso-painting-smashes-auction-record.html> (accessed on 30 June 2015)

² <http://www.telegraph.co.uk/luxury/art/58901/art-sales-christie%E2%80%99s-beats-annual-art-sales-record.html> (accessed on 30 June 2015)

1. Succession

The questions in this section focused on succession to moveable assets. By the time this report is published (from 17 August 2015), the EU Succession Regulation No. 650/2012 ("Brussels IV") will be in force which will impact on succession regimes across Europe.

(a) *Intestacy and succession*

The case study asked National Reporters to consider issues of succession and intestacy in relation to the English husband Frederick and his Argentinian wife Suzanne, and their children Alberto and Victoria. Broadly speaking, intestacy rules tended to divide property equally between the surviving spouse and the children. **Sri Lanka** and **England and Wales** stood out as jurisdictions with testamentary freedom, meaning that the deceased could choose to disinherit his surviving spouse and children.

Reporters were also asked to consider an alternative scenario in which Frederick and Suzanne were not married, and it was noted in several jurisdictions that the provision made for the survivor of an unmarried couple would leave him or her in a significantly worse position than if the couple were married. In **Sri Lanka**, it was highlighted that having unmarried parents also affects a child's right to inherit.

(b) *Inheriting works of national importance*

None of the jurisdictions noted restrictions on who can inherit works of national importance, although there may be restrictions on whether an heir can deal freely with those works.

In **France**, if the heir would like to remove the work from France he will need to obtain an exit planning permission from the Ministère de la Culture (which could be refused if the work is of national interest). In **Hungary** all changes relating to the owner (including inheritance) shall be reported and registered within 8 days of the change.

(c) *Rules of inheritance*

In **France**, for any active succession before 17 August 2015, the applicable law is that of the last domicile of the deceased and that of the ground law for buildings. After Brussels IV is in force this will allow any EU citizens except those from the UK, Ireland and Denmark to choose the law to apply to their succession: this can either be the law of their last residence or the law of their nationality.

If Frederick or Suzanne died intestate with his or her last residence in Paris leaving a spouse and children then they would be the heirs; if he or she left only children then those would be his or her heirs.

In **Brazil**, if a person has legitimate heirs, all of his assets will be inherited by them. If a person does not have any legitimate heirs and does not leave a will, all of his assets will be inherited by the State (i.e. the city where the deceased was domiciled).

If either Suzanne or Frederick died, their children Alberto and Victoria, who are their legitimate heirs would inherit, as well as the surviving spouse, depending on the matrimonial property regime of Frederick and Suzanne.

If a couple is not married, then the Brazilian Civil Code recognises the civil partners' rights to inherit along with the deceased's children, as legitimate heirs. However 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 the Brazilian Superior Court (which is competent for analysing violations of law, although the ruling is enforceable only among the concerned parties) and in the Brazilian Supreme Court (which is competent for analysing the violation of the Constitution, and whose ruling is enforceable countrywide), mainly because the unequal treatment between these two categories would violate principles from the Brazilian Constitution.

The succession of all assets located in **Hungary** takes place within the inheritance proceedings conducted by the public notary. If the public notary is made aware of a private will, then this will prevails. If there was a public will, the notary will ex officio apply it. If there is no will (an intestacy), the rules of the Civil Code on inheritance are applicable.

If there is no will, all assets located in Hungary will be the subject of an inheritance proceeding. The substantive law will be the rules relating to the statutory inheritance set forth in the Civil Code. According to this rule, all movable assets will be inherited in a 50-50 ratio by the children and Frederick/Suzanne.

According to the rules of Civil Code, if the couple is not married, their position will be not the same as if they were married, and they will be not entitled to statutory rights of inheritance. In other words, if they are not married, they can only inherit anything if the deceased had a will. Our Hungarian National Reporter noted that this reflects the current government's very conservative way of thinking of families, as the new Civil Code was adopted in 2013 and contains many new rules which are not in favour of those who are not married.

In **England and Wales**, succession to moveable assets is determined by domicile. A person has testamentary freedom so in his will can leave his estate to whomever he chooses. If Frederick did not leave a will, as Frederick is UK domiciled, the UK intestacy

rules would apply so that, from 1 October 2014, the first £250,000 would go to Suzanne together with half the balance of his estate outright, and the children would take the other half of Frederick's estate above £250,000 on statutory trusts. Potentially Suzanne and the children (or any other person financially dependent upon Frederick) could also make a claim under the Inheritance (Provision for Family and Dependents) Act 1975 ("the 1975 Act"). For Suzanne, the 1975 Act would not apply to her estate as it appears she is non-UK domiciled and advice on the Argentinian rules would be needed.

If Frederick and Suzanne were unmarried, only the children would inherit Frederick's estate under the intestacy rules. If Suzanne cohabited with Frederick as his spouse in the same house for the whole period of 2 years before the date of death then she would be able to make a claim under the 1975 Act. For Suzanne, Argentina advice, would, again, need to be sought.

In the case of testate succession, **Sri Lankan** law allows almost complete testamentary freedom. The principle of freedom of testation is enshrined in section 2 of the Wills Ordinance. In terms of section 2 of the Wills Ordinance the testator has the freedom to dispose of his/her movable or immovable property in Sri Lanka in his/her last will as he/she chooses. Therefore Suzanne's extensive art collection which she holds in Sri Lanka could pass to whomever she chooses.

If Suzanne/Frederick died intestate, section 21(2) of the Matrimonial Rights and Inheritance Ordinance ("the Ordinance") would apply and the (intestate) succession to the artworks, which are movable property, would be governed and regulated by the law of the country in which he/she had his/her domicile at the time of his/her death. There is a rebuttable presumption that if a person dies leaving movable property in Sri Lanka, succession to those assets is governed by the Ordinance. In most circumstances, a Sri Lankan Court, following the judgment in the case of *Ratnasingham v. Tikiribanda Dassanaike and Others* would consider that it does not have jurisdiction over movable property situated outside of Sri Lanka. There may therefore be a claim pursuant to any forced heirship provisions in respect of artworks situated outside Sri Lanka.

For the assets over which Sri Lanka does have jurisdiction, the Ordinance dictates that the surviving spouse would be entitled to half of the share of the movable property and the children would be entitled to the other half in equal portions.

If Frederick dies intestate and is not married to Suzanne, Alberto and Victoria could not inherit from their father. Section 33 of the Ordinance specifically provides that: "*Illegitimate children inherit the property of their intestate mother, but not that of their father or that of the relatives of their mother.*" The artworks would therefore pass to the other categories of interstate heirs of Frederick provided for in the terms of the Ordinance, namely the parents of Frederick,

and/or as the case may be the siblings of Frederick (if there were no heirs the estate would escheat to the State).

In the case of Suzanne, the principle of *“the mother makes no bastard”* means that the artworks would devolve on Alberto and Victoria by virtue of section 33 of the Ordinance.

(d) *Making a “gift”?*

The case study queried whether the father Frederick could leave a Rembrandt to his three-year old son Alberto simply by affixing a label reading “For Alberto” to the back of the painting. Broadly speaking, this raised practical and evidential issues in all jurisdictions.

In **England and Wales** to be valid the gift must be “overt and unequivocal”. A declaration of trust or deed would suffice, but otherwise spoken or written words by themselves are not sufficient: in addition, some non-verbal behaviour must be demonstrated by the parties. Typical actions which would suffice to show delivery of the gift would be Frederick touching/labelling/listing the painting as being for Alberto in the presence of an independent third party who would then prepare a statutory declaration – although as our national reporter rightly highlights, the fact that Alberto is only 3 years old makes the evidential requirement a little tricky!

In **Brazil**, the gift would not be valid because no formal mention was made in a certificate of authenticity nor in the concerned tax statements, nor was a donation deed notarised and the donation tax (which is the same as the estate tax) paid. If the gift had been effective, it would be deducted from the portion Alberto would be entitled to from his father’s estate, and his sister and his mother (depending on the matrimonial property regime) would be proportionally compensated in the sharing of the estate assets.

In **Sri Lanka**, transfers of movables require either a bill of sale³ (which may or may not apply to a gift) or a deed of gift. Case law suggests that a gift requires acceptance by a competent person to be fully completed, which is based on the principle that a donation is a contract to which there must be two parties. A father making a donation cannot accept it on his child’s behalf.⁴

Under Roman Dutch law, in the case of a donation/gift to a minor, the law requires that a present is accepted by the natural or legal guardian of the minor (which would include his parents), or by the minor himself, after he has attained majority. Therefore although the Rembrandt is not in the possession of Alberto, who is a three year old child, it may be

³ Section 16 of the Registration of Documents Ordinance provides that - "bill of sale" includes any assignment, transfer, declaration of trust without transfer, and any other assurance of movable property, whether absolute or by way of mortgage....

⁴ Wellappu v. Mudalihami D.C., Chilaw, 2,275.

argued that possession of the painting is held by Frederick on behalf of Alberto in his capacity as the natural guardian of Alberto.

2. Buying and selling art

The approach of looking at all the areas of law addressing any legal aspects of art as an area of law of its own is still rather young. Accordingly, specific and separate codes on art law, and in particular on art dealing are still an exception. Unlike in New York, where there is such a separate code regarding Arts and Cultural Affairs, which also contains a comprehensive set of rules on trading art, all the national reports stated that the jurisdictions they cover do not have any such specific code regarding transactions with art or the art trade in general.

However, all the national reports mentioned special rules addressing specific aspects of the art trade. In particular, all jurisdictions have introduced special regulations to govern dealing with and the recovery of stolen, illicitly exported or looted art. In **France**, art dealers and auctioneers only need to keep a record book based on such regulations on stolen art and anti-money laundering and in **Hungary**, a government decree on the operation and registration of art dealers is currently being drafted.

In **France** and **Sri Lanka** there are special laws regarding art auctions. In France, an auctioneer needs to be licensed in law, have a two-year degree in art, and he has to pass a national exam. **Sri Lanka** has a licence requirement for auctioneers as well. In addition, special rules apply in case the transaction involves a seller or buyer who is deemed to be a non-resident.

The national reports for **England & Wales** and **Hungary** mention that their jurisdictions grant the so called "droit de suite" to artists. The droit de suite or "right to follow" entitles an artist to a royalty on any resale of his work subsequent to the first transaction, if he has taken a copyright over that work of art. This is applicable until the copyright expires. In this context, it is interesting that the Hungarian code that stipulates the droit de suite contains a definition of what shall be considered to be an "original work of art"⁵.

In the absence of specific acts and regulations, the general rules, such as are stipulated in the civil code or the respective country's export regulation, apply. With regard to export regulations, the regulations in **Sri Lanka** provide for a specific rule by prohibiting the import of any art, painting or drawing that ridicules any religious belief system or any ethnicity.

⁵ Original works of art means creations of fine art (e.g. pictures, collages, paintings, drawings, engravings, prints, lithographs, and sculptures), creations of applied art (e.g. tapestries, ceramics, glassware) and photographic works, provided they are made by the author himself or are copies considered to be original works of art. Copies of works of art shall be considered to be original works if they have been made in limited number by the author himself or under his direction. Copies of works of art which are numbered, signed or otherwise appropriately marked by the author shall be considered to be such copies.

In addition to the statutory laws, in **Hungary**, several non-governmental lobby groups exist. The Association of Hungarian Antique & Art dealers has produced a Code of Ethics to be applied by market players in all transactions.

The national reporters were asked to point out different requirements for dealing with art in regard to different legal acts, namely lending (eg. between museums), leasing (eg. as an investment) or selling of art, as well as in regard to the specifics of the respective object of art, in particular in case the object qualifies as a pieces of art of national importance (see also further below).

(a) *Requirements in regard to the legal act, i.e. lending (to a museum), leasing or selling*

Brazil and **France** have preemptive rights when cultural assets are being sold by museums which are part of the Brazilian Museum System or the French Administration, respectively. Auctioneers must provide 15 days' notice prior to any sale of artworks proposed for sale to the Ministère de la Culture.

In regard to the lending of artworks, in **Hungary** the government has introduced detailed rules on lending art works from a museum operated by the state or a local municipality. As a mandatory rule, for example, all costs of the lending have to be borne by the lender (though when both parties are state owned museums, no lending fee is payable).

In addition, **Hungarian** museums are obliged to take artworks for a maximum period of five years as a deposit regulated under the Civil Code.

(b) *Requirements in regard to the art as object and other factors*

All the countries for which a national report was submitted have special, protective regulations regarding antiques and cultural objects. Based on the national reports, it can be said that only age and origin are determining factors for the applicability of such special regulation.

The legislation in **Sri Lanka** differentiates between antiques and cultural property. Antiquities are any ancient monuments or objects lying or being or being found in Sri Lanka which date or may reasonably be believed to date from a period prior to 2 March 1815. Cultural property includes property which on religious or secular grounds is specifically designated by the Minister with the approval of the Cabinet as being of importance for archaeology, ancient history, literature, art or science.

In **Hungary**, the export of any work of art, which is more than 50 years old (regardless of its value) has to be reported to the authorities, no matter if it is transported to a country within the EU or any other country.

(c) *Requirements when dealing with pieces of art of national importance*

The national reports submitted different definitions of a piece of national importance (as shown by the letter (D) in the table below) and the procedures and authorities that assess

and determine which works of art are considered pieces of national importance (as shown by the letter (A) in the table below):

Brazil	<p>D: Moveable or immovable cultural assets, material or immaterial, individual 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.</p> <p>A: Protected by Brazilian museums. Such objects may eventually be declared as cultural assets of public interest.</p>
England & Wales	<p>D: An object, or collection of objects, of national scientific, historic or artistic interest, either in its own right or due to a connection with historical buildings.</p> <p>A: Assessment of whether or not a piece of art is a National Heritage Asset is made by the UK tax authorities (HM Revenue & Customs), taking advice from the Museums, Libraries and Archives Council.</p>
France	<p>A: Rules are provided by the “Ministère de la culture” (Public Administration) in association with public services like the “conservatoire des musées”. There are different types of regulation by law with notices, directives, and other legislation.</p>
Hungary	<p>D: The Act on cultural inheritance defines what shall be considered as a “national legacy” with respect to art. The notion of "cultural goods" ("Cultural assets") is defined by the Act as follows: “outstanding and typical objects, images, sound recordings and written memories and other proof of the origin and development of lifeless and live nature, mankind, the Hungarian nation and the history of Hungary, as well as pieces of art”.</p> <p>A: The competent authority (the National Office of Cultural Heritage) has the right to declare that certain goods which have national importance are protected. The National Office of Cultural Heritage may declare protection for cultural goods, which are irreplaceable and of outstanding significance. The Office will register such goods and the owner of cultural assets for which protection has been declared is obliged to make arrangements for their safeguarding, and must allow scientific research to be carried out on them.</p>
Sri Lanka	<p>A: The Ministry of Cultural Affairs in consultation with Cultural Property Board and Cabinet publish the categories of cultural property which has to be registered.</p> <p>Whether an antiquity or cultural property is deemed to be of national importance may be determined by the Archaeological Commissioner.</p>

In relation to the art trade, **France, Hungary and Sri Lanka** dictate that the export of any work of art of national importance is subject to a licence/authorisation.

In **France**, besides the age (100 years for archeological pieces and 50 years for paintings, sculptures etc.), the price of the respective work of art is relevant for determining whether a permit to export is required or not. In addition, there are different types of export permits for exports to a country within the EU and outside of the EU. When a work of art of national importance is intended for export outside the EU, the Ministère de la Culture gives an export license and the owner must make a customs declaration (although there is an exception for work carried by its author). Interestingly, the export of a work of art of national importance is strict and works cannot be exported only temporarily for restoration, research, participation in a cultural event, etc.

In **Hungary** on the other hand, the permanent exportation of protected cultural goods is prohibited. Protected works of art of national importance may only be taken out of Hungary temporarily and under the condition that a temporary export licence setting out the conditions of return has been issued. Unprotected cultural goods may be transported out of Hungary if there is an accompanying certificate relating to that cultural good. The export of any cultural good, which is more than 50 years old, requires a licence. In regard to the sale of protected works, the state has a pre-emptive right. Accordingly, such sale is subject to the approval of the competent authority. The state has a right to step into the contract with the previously negotiated price and conditions within 15 days of conclusion of the contract. In case of an auction sale, the competent authority must declare the exercise of its right immediately after the bid was accepted and the award granted. In either case the contract will only be effective with the declaration of the national office of cultural heritage.

In **Sri Lanka**, cultural property determined by the Archaeological Commissioner to be of national importance will be registered and legal title may only be obtained with a certificate of registration. If such a work of art is defined as an antique according to the antiquities ordinance, its export requires a permit from the director general of archaeology.

(d) *Liability of dealer if requirements are not met*

According to the national reports, the consequences the art dealer or other persons involved in the art trade may face in case the transaction is not compliant are quite similar.. They include:

- A lawsuit initiated by the administration and being forced to have the transaction canceled by the court and all suspicious transactions retained by order (**France**).
- Fine or imprisonment of any person who owns or has the custody or possession of any cultural property, and who fails to make an application, or transfers the ownership or custody or possession of any cultural property and fails to notify such transfer to the registering office (**Sri Lanka**).

- Conviction under the charge of "illegal use of cultural goods" (a criminal offence), with a sentence of up to three years' imprisonment, in case of an export of a cultural object without the necessary licence or deviating from the licence;
- Conviction for compound smuggling in case of an import of cultural goods in violation of the import regulations; and
- Fine imposed by the National Office of Cultural Heritage in case of violation of the provisions of the Act on cultural inheritance (all **Hungary**).

(e) *Liability of an expert*

In times of ultra-high prices on the art market, there is a strong demand for experts who analyse and attribute a work of art to a particular artist, and to confirm its originality, origin, age as well as in some cases estimate the price. Considering the high price range, their expertise is an important factor when determining or negotiating the ultimate price, or deciding whether to place a bid at an auction. Just recently, an expert was sued and asked to pay damages in the amount of \$8.6 million for confirming the originality of painting by Rothko, which turned out to be a fake.⁶

According to the national reports,, in all the jurisdictions covered, the expert may be held liable based on the general civil law (eg. negligence). The national reporters also flagged that an insurance company may also be involved, if that specific expert had liability insurance.

(f) *Major challenges in relation to trading art*

In 2014 the global art market reached its highest ever-recorded value, a total of just over €51 billion worldwide (an increase of 7% over 2013) and the highest level ever recorded.⁷ Higher estimates, of up to \$70 billion, can be found.

Together with the rising numbers of sales, the still largely unregulated art market provides a fertile ground for legal issues. Economist Nouriel Roubini, known for predicting the financial crash in 2008, said at the 2015 World Economic Forum in Davos that "whether we like it or not, art is used for tax avoidance and evasion"⁸. On the other hand, one art forgery scandal follows another, which is not surprising considering how lucrative it can be, and that the regulations on looted art and restitution have become more and more strict.

This combination can be a challenge for lawyers: trying to satisfy clients who wish to proceed quickly and at the same time ensuring compliance with the applicable regulations. This challenge has been confirmed by the national reports from **Brazil** and **France**, where

⁶ <https://news.artnet.com/in-brief/new-knoedler-lawsuit-targets-art-historian-for-selling-rothko-forgery-8479>.

⁷ Cf. TEFAF Art Market Report 2015.

⁸ <http://www.ft.com/cms/s/0/992dcf86-a250-11e4-aba2-00144feab7de.html#axzz3g48WPgtt> (accessed on 16 July 2015)

lawyers must thoroughly know the origin of an artwork, its traceability, and appraise its value with a judicial expert and a high level “commissaire priseur”.

In **England & Wales**, the ability of the Reviewing Committee on the Export of Works of Art (“RCEWA”) to put a temporary block on the export of the work of art, if it is of cultural importance, giving purchasers in the UK the opportunity to match the purchase price and keep the work in the country, was named as a challenge.⁹

3. Title issues and recovering stolen art

(a) *Establishing title to art*

In times of rocketing prices, there is a real risk of being forced to return a work of art because of rules applying to the recovery of stolen, illicitly exported or looted art as well as the possibility of reproduction using new technologies.

The national reporters were asked how, in their jurisdiction, title to art is established, including in cases involving modern forms of art such as graffiti.

Primarily, civil law applies in all the jurisdictions, i.e. possession is prima facie evidence of the possessor (**Sri Lanka**) and being able to provide evidence for the provenance (chain of title) is required to establish title to art (**England & Wales**).

In terms of the intellectual property (**IP**) rights deviating from the work of art, the most important one is the author's right.¹⁰ An artist or any other person claiming title of the author's right may establish such by demonstrating that it is an intellectual work in declining the novelty, originality and creativity compared to other creations. This rule applies to any form of art, such as graffiti, and also digital art work. It ultimately depends on the success of this proof, based on analysis of comparisons and also the acuity of the judge (**France**). In **Hungary**, the author may request that the author's capacity shall not be called into question.

⁹ Where an export licence is objected to by an expert advisor it is referred to the RCEWA to ascertain whether it meets the Waverley criteria. If the committee finds that the criteria are met it recommends to the Secretary of State that a decision on a licence application should be deferred for a specified period to enable an offer to purchase to be made at or above the fair market price, which will also be recommended by the committee. To avoid unfairness a bid from within the UK must constitute “a matching offer”. To this end RCEWA, under its published guidance, recommends a “fair market price”. The applicant need not accept less (or indeed an offer at any level) but refusal may result in a decision by the Secretary of State to refuse to grant a licence. The fair market price will commonly include not only the applicants successful bid but also elements normally excluded when calculating a douceur.

¹⁰ An author of an original artistic creation has certain economic and moral rights in respect of his work of art, applying to both, the entire work and a (substantial) part of thereof. Such economical rights include any decision on whether and in what form the work or art may be made available to public and whether and in what form the work may be reproduced (incl. adapted, arranged, or transformed). In most jurisdictions, the author's right is not transmissible during the lifetime of the author or on the death of the author; the right to exercise any of those rights is transmissible by testamentary disposition or by operation of law only.

(b) *Rules applying to the recovery of stolen, illicitly exported or looted art*

All states for which a national report has been submitted, as well as almost all other states in Europe¹¹ and the rest of the world, have such rules. **Sri Lanka** is, in addition, a member of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation.¹² However its term expires at the 39th General Conference of UNESCO in 2017. The Commission's mission is the support and facilitation of bilateral negotiations for the restitution or return of cultural property.

In 1970, member states of UNESCO created the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and transfer of Ownership of Cultural Property, which most of the UNESCO member states ratified or accepted. The 1970 Convention imposes the following three main duties on any state parties:

- i. Taking preventive measures: keeping inventories, introduction of export certificates, monitoring of the trade, introduction and imposition of penal or administrative sanction, running educational campaigns, etc.
- ii. Restitution: As per the Convention, state parties undertake, at the request of the state party "of origin", to take appropriate steps to recover and return any such cultural property imported after the entry into force of this convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property.
- iii. International cooperation framework: Strengthening cooperation among and between states parties is a main idea and goal of the convention. For cases in which cultural patrimony is in jeopardy from pillage, the convention provides a possibility for more specific undertakings such as a call for import and export controls.

Some state parties have introduced a specific act or specific provisions implementing the convention. However, not all state parties have done so (so far). In **Sri Lanka**, for example, in the absence of a specific law regarding the recovery of stolen, illicitly exported or looted art, the provisions of the Antiquities Ordinance may be applicable if the work of art is deemed to be an antiquity as defined under and in terms of the Antiquities Ordinance.¹³

¹¹ The Principality of Liechtenstein is not a member of the UNESCO and the Holy See has permanent observer status.

¹² One of the commission's main mission is to provide support and facilitate bilateral negotiations and co-operation for the restitution or return of cultural property to its countries of origin (http://www.unesco.org/eri/committees/Committees_and_Organs_GC.asp?code=+1+8&language=E).

¹³ "Antiquity" means any ancient monument, as well as any of the following objects lying or being or being found in Sri Lanka which date or may reasonably be believed to date from a period prior to the 2nd day of March, 1815: statues, sculptured or dressed stone and marbles of all descriptions, engravings, etc., and all other objects of art which are movables proper.

In terms of preventive steps, most of the national reports mention that licences for either the export of goods of cultural heritage/antiquity or/and of the dealing with such goods (**Sri Lanka, Hungary, France**) are required. In addition, the authorities that issue such licences work closely with other authorities, such as the French Ministère de la Culture and the customer administration, which has a special task force (**France**) or the national office of cultural heritage and the customs authority in **Hungary**, to ensure compliance.

4. Taxation

(a) *Imposing taxes*

The location of the artwork is likely to be key, whether considering tax on individuals or on legal structures: all jurisdictions considered will claim taxing rights over a moveable asset which is physically present in that jurisdiction. However, the extent of the taxation which those rights impose varies greatly between jurisdictions. This in turn affects whether individuals moving to that jurisdiction should consider how to structure their affairs both before they arrive and once they have settled there.

Brazil taxes both individuals and legal structures on all moveable assets officially registered in Brazil and all income in Brazil. Non-resident or non-domiciled persons pay taxes at a rate of 15% of the asset's market value. Estate tax is charged on artwork located in Brazil, and is imposed on the heirs by the State in which the deceased was last domiciled; e.g. in Rio de Janeiro, the percentage would be 4%.

Sri Lanka imposes income tax on the worldwide profit and income of individuals who are resident in Sri Lanka, and otherwise on profit and income arising in or derived from Sri Lanka (which would include from property in Sri Lanka). However, there is no gift tax, wealth tax, inheritance (estate) tax and broadly speaking no capital gains tax. Similarly, legal structures are taxed according to their residence status and where and how their profits or income arise.

In **Hungary** tax is imposed at both a local and at a national level. Local municipalities have the right to impose property tax on real estate situated in their territory, and since 1st January 2015 have had the additional right to impose local taxes on any tax object that is not already burdened by any kind of taxes.

National tax is not payable on the basis of possession, but rather upon the acquisition of a movable asset. Depending on the circumstances of the transaction, (i) personal income tax; (ii) inheritance tax; (iii) gift tax; and/or (iv) tax on "acquisition for consideration" might be payable by the recipient of movable assets.

In relation to (i), personal income tax, an individual who is resident (present for more than 183 days) in Hungary pays tax on every type of income received by him.

The acquisition tax (referred to in points (ii)-(iv) above) is payable in respect of inheritance, on receipt of a gift, and on the acquisition for consideration of real estates and certain kinds of movable assets, as set out in the Act. It is payable if the inherited property is situated in Hungary and is borne by the successor (regardless of his nationality). Similarly if the transfer of a gift is realized in Hungary then gift tax is payable by recipient. There are double taxation provisions in place to avoid dual charges to personal income tax and to acquisition tax.

In **England and Wales**, liability to tax on moveable assets is determined by residence and domicile, as well as by where it was purchased, with what and where it was moved from/to. For structures, there are a wide variety of factors: the domicile and residence of the settlor/transferor and beneficiaries/participants, whether the settlor/transferor is excluded from benefit, the residence of the structure, whether or not clean funds were used to fund the structure, the nature of the assets held and how it is structured.

There is relief from inheritance tax (on death and from the ten-yearly charge for settlements) on foreign-owned works of art where the work of art is physically situated in the United Kingdom solely for the purpose of public display, cleaning or restoration. "Foreign-owned" is defined as property to which a person domiciled outside the United Kingdom is beneficially entitled, or if the property is comprised in a settlement, where the settlor was domiciled outside the United Kingdom when the property became comprised in the settlement.¹⁴

In **France**, an individual is liable to tax on his moveable assets once he is domiciled for 6 months and a day in a given year in France. A structure will be liable if it has its head office or its effective activities in France. On death, tax can be imposed either using a complete inventory of personal property to obtain an estimation of taxable assets, or at a rate of 5%.

(b) *Pre-arrival and ongoing planning opportunities*

The case study dealt with an English husband Frederick and his Argentinian wife Suzanne who were moving to the national reporters' jurisdiction with their two young children, bringing Suzanne's collection of art to hang in their new home or potentially to sell at auction.

The **Sri Lankan** report highlighted that customs import duty would be applicable to paintings and drawings imported for commercial purposes (as well as other levies/charges at the point of importation). The rate of duty is 15%. However, if the artworks are Suzanne's personal effects, then no custom duty is payable.

¹⁴ 32-46, *McCutcheon on Inheritance Tax*, Sixth ed

The fact that there is no estate tax in Sri Lanka means there is less necessity for tax planning. However, if she was moving to Sri Lanka and was going to be regularly selling art, Suzanne was advised that due to exchange control provisions she would be sensible to establish a company. This is because if Suzanne is deemed to be a non-resident for the purposes of the Sri Lankan Exchange Control Act, then any person who is resident for the purposes of the Exchange Control Act cannot make a payment to her and permission would have to be obtained by the Controller of Exchange each and every time a payment is made from a resident of Sri Lanka to Suzanne. Therefore, to avoid this complication Suzanne could incorporate a Sri Lankan company for this purpose. An investment of USD 1 million would likely be required if her sales fell to be considered as a retail activity.

England & Wales offered several opportunities for planning. Assuming Suzanne is not domiciled or deemed domiciled in the UK, one opportunity would be for her to settle the art (before it comes to the UK) onto an offshore trust which then holds the art in an offshore company, with some form of licence to allow her to hang the art in her house. This would avoid capital gains tax on a sale and be outside her estate for inheritance tax purposes. As she has young children and wishes to complete their education in the UK, Suzanne would want to be aware that once she has been resident in the UK for 17 of the last 20 tax years she will be deemed domiciled in the UK for inheritance tax purposes. If inheritance tax was not a concern then some form of leasing arrangement with an offshore company holding the art might be attractive to avoid capital gains tax.

Assuming Frederick is UK domiciled, he was advised to give art away during his lifetime (e.g. to his children) so that it falls outside his estate for inheritance tax purposes after 7 years. He could consider taking out term assurance (written into trust) over that period. Such art could stay in the rural mansion provided a proper chattels lease were put in place (otherwise it would be a gift with reservation of benefit and therefore remain within his estate for inheritance tax purposes). The cultural heritage schemes outlined at 4(c) below might also be helpful.

In **France**, Frederick and Suzanne would be liable to VAT and profit taxes. It would be more tax efficient for them to be non-resident tax payers in Paris. In general, it was noted that France does have favourable tax schemes, but they are limited to the family sphere (real estate, family office, fiducial) rather than property asset management.

If Frederick and Suzanne moved to **Hungary**, they would not have to consider property tax because (as outlined above) it does not exist in this jurisdiction. However, having moved to Hungary, when Suzanne decided to sell her artworks she would find that it would be more tax efficient to sell via a company, as selling them as a private person would be likely to result in a higher tax obligation.

In addition, Hungary operates a special VAT regime for the distributors of artistic products, although it is restricted to the purchase by distributors of artistic products from non-taxable persons or other distributors. It was also noted that Hungary's film industry has a very favourable taxation scheme.

In three countries, relief from inheritance tax is applicable if assets are left on death to certain family members: **France, England & Wales** and **Hungary**. In **Sri Lanka**, as outlined above there is no inheritance tax (and therefore no relief).

In **Hungary**, if Suzanne and Frederick leave their artworks to their straight line dependents or spouse then there would be no inheritance (estate) tax or duty to pay. In **France**, the surviving spouse is exempt from inheritance tax, with the portion shared between the spouse and children benefiting from an abatement of €100,000. In **England & Wales**, if both spouses are either domiciled or non-domiciled in the UK then there is a full exemption from inheritance (estate) tax. If the domiciled spouse dies leaving assets to the non-domiciled spouse then the spouse exemption is limited to £325,000, unless the non-domiciled spouse makes an election to be UK domiciled; if so she would have to be outside the UK for 4 successive tax years to lose this status.

(c) *Cultural heritage relief schemes*

Of the five jurisdictions considered, two do not provide favourable tax schemes for people who own items of significant cultural value and pass them to the nation (**Brazil** and **Sri Lanka**) and three do (**England and Wales, France** and **Hungary**).

England and Wales operates several beneficial tax schemes for cultural property:

- i. Gifts for national purposes/public benefit: this is a scheme which allows heritage property to be given for national purposes or for the public benefit without inheritance (estate) tax or capital gains tax arising. This includes transfers under the Cultural Gifts Scheme. The list of bodies can be found includes most public museums, galleries and archives in the United Kingdom (Schedule 3 of the Inheritance Tax Act 1984). This exemption is extended to gifts of national property outside any special scheme (for example a gift to a relative) which were potentially exempt transfers (or "PETs") when made, and where the property is subsequently donated for national purposes or sold by private treaty to a national body by the recipient or accepted in lieu of tax. In each case the subsequent donation, sale or offer in lieu must have taken place before the original PET became a chargeable transfer.
- ii. Conditional exemption: in certain circumstances an application can be made to postpone the payment of inheritance tax on transfers of value of heritage property made available to the public. A claim must be made within 2 years of the transfer

of value or within a longer period as the UK tax authorities may allow. Liability can be deferred indefinitely but may subsequently become chargeable. Various undertakings have to be given: to look after the property, make it available for the general public to view and keep it in the UK. Derogation from any of these points will cause the art to lose its National Heritage Asset status and become subject to taxation.

- iii. Private Treaty Sale: items which have been granted conditional exemption from inheritance tax or capital gains tax can be purchased by private treaty by specified bodies at a price which is beneficial to both the purchaser and private vendor. This is known as a Private Treaty Sale. Such a sale will not give rise to a charge to inheritance tax or capital gains tax. For example when an item that has been granted conditional exemption from inheritance tax (which would have been payable at 40% but for the exemption) is sold to a specified body, the purchasing body will usually only pay about 70% of the item's agreed open market value. This means that an item valued at £100,000 can be acquired for £70,000. This is made possible under an arrangement known as the "douceur". It involves sharing the benefit of exemption between the vendor (typically 25%) and the purchaser (typically 75%).
- iv. Offer in lieu of inheritance tax: An asset can be offered to the UK tax authority in lieu of inheritance tax. The Secretary of State has to agree to accept such assets. The standard of objects which can be accepted is very much higher than that required for the conditional exemption.
- v. Cultural Gift Scheme: The Cultural Gift Scheme was introduced in 2013 and allows the donor to reduce their tax bill with a pre-eminent work of art, archive or other cultural item. Anyone donating such an item in their lifetime will be able to claim a tax reduction equal to 30% of its value against their income or capital gains tax bill, or a combination of the two. The object must be pre-eminent or currently or formerly kept in a significant building. The individual must have a tax liability in the UK and wholly own the object(s). In order to make full use of the tax reduction, it can be spread over 5 years. There is no minimum period of ownership.

In **France**, donation of an artwork to a charitable organisation (public utilities association, cultural, charitable, medical or scientific research organisations) would be deductible from the taxable income of the donor, at a rate of up to 60% of the value of the work. A donation to charity must be authenticated by deed (by a notaire) and only public utilities associations, or cultural, charitable, medical or scientific research organisations can receive donations and legacies. It should be noted that, as dealt with further under "Succession", the donor cannot give all of his property to charity as his heirs will have a reserved portion.

In addition, estate tax can be paid by a donation of artwork in compensation for the administration (technically termed “dation”). An example of this was seen with Anne Sinclair and the Picasso estate¹⁵.

Under **Hungary’s** Act on Acquisition Taxes, no inheritance tax or gift tax is payable if the property in question is granted for scientific, artistic or cultural education purposes. If property of a high artistic value is inherited by an individual and then transferred to the state, a local municipality or a higher education institution then that individual receive relief from inheritance tax.

(d) *Making a “gift”?*

The case study also dealt with a gift being ostensibly made by a father to his son, but with the donor retaining it in his possession (a picture which remained hanging on his wall). One might expect to find anti-avoidance provisions in place to ensure that tax is payable in these circumstances, but this did not prove to be the case uniformly.

In **England and Wales** this would be a “gift with reservation of benefit” meaning that it would remain in the donor’s estate for inheritance tax (estate tax) purposes. It was highlighted that in **France** the maximum donation which can be made is €100,000 per child every 15 years, and that above this threshold the donation will be taxed at the high rate of 45%. There was no issue in **Hungary**, and it was again highlighted that there is no inheritance tax between close family members.

(e) *Future developments?*

The national reporters were unanimous in their view that there are no upcoming changes to the taxation regimes in their jurisdictions for moveable assets, either for international individuals (non-resident or non-domiciled) or for wealth-holding structures. Therefore at least in the short term it appears that private client practitioners can advise clients that the above potential forms of tax planning are reasonably “future proof.”

5. Conclusion

Art law is an extremely broad and fascinating area. The scope of this general report has only allowed a brief overview of the issues a wealthy international client might face in owning and buying or selling artworks during his lifetime, and in bequeathing his art collection after his death.

Moveable assets by their very nature are liable to engender difficult questions of conflicts of law in the context of succession and tax planning. Local laws may also mean that these assets are less flexible and portable than they at first appear: many jurisdictions are loathe

¹⁵ See further: <http://www.museepicassoparis.fr/en/collections-2/the-collection/>

to allow works of national importance to leave their shores – although they may be willing to reward those who leave such works to the nation on death with favourable tax breaks.

The private client practitioner needs to be aware of the personal ties his client may have to particular assets. The consequences of buying forged or stolen artwork, dying intestate or making a gift of a treasured artwork which is ineffective can lead to emotional upset as well as legal difficulties. As private client lawyers we need an international outlook to navigate the global art market to the benefit of our clients, to work through the myriad and complicated issues and to reach sensible solutions.

BIBLIOGRAPHY

- Lemos, Marika and Nathan, Aparna *McCutcheon on Inheritance Tax*, Sixth ed., London, Thomson Reuters (Legal) Limited, 2013
- <http://www.museepicassoparis.fr/en/collections-2/the-collection/>
- <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/11598764/Picasso-painting-smashes-auction-record.html>
- <http://www.telegraph.co.uk/luxury/art/58901/art-sales-christie%E2%80%99s-beats-annual-art-sales-record.html>