

Art Law 2019

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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.



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United States – New York

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BUYING AND SELLING

Passing of title

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

The passage of title to art, antiques and collectibles is generally governed by section 2-401 of the New York Uniform Commercial Code (NY UCC), which applies to sales of goods. Under that statute, title to goods passes from the seller to the buyer in any manner and on any condition explicitly agreed to by the parties (eg, until full payment); however, any reservation by the seller of title in goods shipped or delivered to the buyer is limited to a reservation of a security interest. The statute contains default rules that set the time that title will pass in the absence of an explicit agreement in various scenarios, including when the seller is required to physically deliver the goods, and when delivery is to be made without moving the goods.

Implied warranty of title

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

Yes, under section 2-312 of the NY UCC, the seller of a good such as an artwork warrants good title, and the work shall be delivered free from any security interests or other liens or encumbrances unknown to the buyer. This warranty can be excluded or modified only by specific language or circumstances that give the buyer reason to know that the seller does not claim title himself or herself or that he or she is purporting to sell only the portion that he or she, or a third person, may have. According to section 2-725 of the NY UCC, an action for breach of warranty must be commenced within four years after the cause of action accrues (the parties can, by agreement, reduce the limitations period to not less than one year, but cannot extend it). A claim for breach of warranty generally accrues upon tender of delivery, regardless of whether the buyer lacks knowledge of the breach.

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 registry in New York to record the ownership of art, antiques or collectibles. Apart from the well-known international art loss registers that are typically used by the trade, the Federal Bureau of Investigation maintains the National Stolen Art File (NSAF), a database of stolen art and cultural property. Law enforcement agencies in the United States and abroad report stolen objects to the NSAF, and when objects are recovered they are removed from the database.

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?

New York has long protected the right of the true owner whose property has been stolen to recover the property, even if it is in the possession of a subsequent buyer who is unaware that the property was previously stolen. According to New York law, placing the burden of investigation on the potential purchaser rather than foreclosing the rights of the true owner who failed to locate his or her stolen artwork is the better rule as it does not enable illegal trafficking in stolen art.

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?

Where the work is in the possession of a good-faith purchaser, the true owner may bring a cause of action for replevin, and the statute of limitations for such claim is three years. Under New York's 'demand and refusal' rule, a claim for replevin accrues when the true owner makes a demand for return of the artwork and the possessor refuses to return it. (Until such time, possession of the stolen property by the good-faith possessor is not considered wrongful.) To counterbalance this seemingly generous limitations period, New York law gives defendants a laches defence (an equitable doctrine that bars claims based on the claimant's inexcusable delay, which unfairly prejudices the defendant).

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

Under New York law, a thief cannot pass good title. This means that a stolen work still belongs to the original owner, even if there were several subsequent buyers and even if those buyers were unaware that they were purchasing stolen goods. See *Bakalar v Vavra*, 619 F.3d 136, 140-41 (2d Cir 2010). However, the equitable doctrine of laches (see question 5) can bar a true owner's claim based on inexcusable and prejudicial delay.

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?

The moment that risk of loss passes from the seller to the buyer in the absence of breach is governed by section 2-509 of the NY UCC, and depends upon the particular arrangement reached between the parties as to how the artwork is to be shipped or delivered to the buyer. That statute sets forth default rules that specify when risk of loss shifts where the agreement authorises or requires the seller to ship the goods

by carrier, as well as rules that apply when the goods are to be held by a bailee to be delivered without being moved. In all other cases, the risk of loss passes to the buyer on his or her receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery. The rules set forth in the statute are subject to contrary agreement of the parties.

Due diligence

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

There is no compulsory due diligence that the buyer must conduct, but particularly where the buyer is an art merchant, the failure to conduct appropriate due diligence may limit the claims and remedies available to the buyer. The level of investigation conducted by a purchaser varies, but before making any significant purchase of artwork, a purchaser should consider conducting due diligence regarding authentication, valuation, title, provenance, physical condition and compliance with any legal restrictions such as cultural heritage and animal protection laws.

9 | Must the seller conduct due diligence enquiries?

While the seller is not legally compelled to conduct due diligence, he or she should do so in order to satisfy himself or herself that he or she can meet his or her express and implied warranty obligations under the NY UCC regarding warranting free and clear title, authenticity, etc.

Other implied warranties

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

Under section 2-313 of the NY UCC, any affirmation of fact or promise made to the buyer that relates to the work and forms part of the basis of the bargain creates an express warranty that the work conforms to such affirmation or promise, and any description of the goods that is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description. The seller does not need to intend to make a warranty or use any particular words such as 'guarantee' or 'warrant' in order for an express warranty to be made. However, a statement of the value of the work or a mere opinion about the work generally will not create a warranty. Warranties of authenticity are further addressed in response to question 11.

With respect to implied warranties, under section 2-314 of the NY UCC, where the seller is an art merchant, the artwork is sold with an implied warranty of merchantability, unless excluded or modified. Additionally, under section 2-315 of the NY UCC, an implied warranty of fitness for a particular purpose can arise where the seller has reason to know any particular purpose for which the goods are required and the buyer is relying on the seller's skill or judgement to select or furnish suitable goods, unless excluded or modified. Other implied warranties may also arise from the course of dealing or usage of trade, unless excluded or modified. Under section 2-725 of the NY UCC, claims for breach of warranty must be brought within four years of the breach, and are generally deemed to accrue at the time of delivery of the work.

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?

New York has enacted legislation that regulates warranty claims brought by laypersons after purchasing fine art from art merchants. Under section 13.01 of the New York Arts and Cultural Affairs Law (NYACAL), whenever an art merchant furnishes to a non-art merchant purchaser a

certificate of authenticity or any similar written instrument, it creates an express warranty for the material facts stated. Thus, where the written instrument states that the work is by a named author without any limiting words, the seller expressly warrants that the work unequivocally has such authorship. By contrast, under the NY UCC, whether the seller's statement of authorship constitutes an express warranty and therefore a basis of the bargain, or merely an expression of opinion, which would not give rise to a warranty, is a fact-based enquiry, but a dealer's attribution of a work on an invoice is generally deemed to be a warranty that the work is by that artist, even if given to another art merchant. In a breach of warranty of authenticity claim, the purchaser bears the burden to establish that the seller lacked a reasonable basis in fact at the time the representation was made, as measured by expert opinion testimony.

An art purchaser may also seek to rescind a sale on the ground that the parties were mistaken as to the authenticity of the work at the time of the transaction. However, at least one court in New York has rejected such a claim by an art merchant purchaser, holding that the buyer's failure to investigate the work's authenticity before purchase constituted negligence sufficient to bar the application of the mutual mistake doctrine. See *ACA Galleries Inc v Kinney*, 928 F. Supp. 2d 699, 702 (SDNY 2013).

Purchasers of artwork later proven to be forged have brought fraud claims, but such claims require the purchaser to prove that the defendant made a material misrepresentation of fact or omission of fact for the purpose of inducing the plaintiff's reliance, and justifiable reliance on the part of the purchaser. Claims for negligent misrepresentation have also been brought by injured purchasers, but such claims require that a 'special relationship' exist between the parties such that a duty of care is imposed on the defendant to accurately convey information; no 'special relationship' will be found where the transaction was negotiated at arm's length, even where the defendant has superior knowledge. See, for example, *Arthur Properties SA v ABA Gallery Inc*, No. 11-Civ. 4409 (LAK), 2011 WL 5910192 (SDNY 28 November 2011).

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?

Although New York case law does not include a case exactly on this point, looking to mutual mistake cases involving other types of property, courts have denied rescission to a seller where, before the sale, the seller could have discovered the quality of the property that made it more valuable than initially believed. See, for example, *PK Dev Inc v Elvem Dev Corp*, 226 A.D.2d 200, 201 (1st Dep't 1996) (barring rescission of a real property sale where the seller could have discovered that the apartment was vacant, and therefore more valuable); and *ACA Galleries Inc*, 928 F. Supp. 2d 699, 701-02 (barring a mutual mistake claim of a merchant buyer where the buyer proceeded with a sale without submitting work for authentication). Thus, it seems unlikely that a court would allow a claim based on mistake or error where the seller could have, but did not, discover that the work was by a famous master before the sale.

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?

While the United States has adopted regulations restricting the import of cultural property of other nations, its laws generally do not regulate the export of cultural property, with the exception of

restrictions on archaeological resources removed from federal or Native American lands.

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?

While certain bilateral agreements and state emergency actions restrict the importation of certain cultural property (see question 44), the United States does not have a general import licence process.

Export and import taxes

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

Regarding customs duties, art, antiques and certain other collectibles are covered under Chapter 97 of the Harmonized Tariff Schedule, available at www.usitc.gov/tata/hts/archive/8900/890c97.pdf. Generally, original paintings, drawings and pastels executed entirely by hand are exempt from any customs duty, as are original engravings, prints and lithographs, and original sculptures as well as a limited number of castings, replicas and reproductions. Duty does apply where the work is a mass-produced reproduction or a work of conventional craftsmanship of a commercial character.

DIRECT AND INDIRECT TAXATION

Taxes

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

At the time of the sale, there is an obligation on the part of the New York seller to collect sales tax for the sale of a collectible (including artworks and antiques) to a New York purchaser unless an exemption applies (eg, resale by a dealer). If a New Yorker purchases a collectible out of state, he or she may be required to pay use tax when the work is brought into New York. There are no tax consequences to mere ownership of collectibles in New York, but upon the sale of a collectible, the seller will be liable to pay tax on the gain he or she recognises on the sale of the item, either as ordinary income (for dealer inventory) or capital gains. Collectibles that are gifted inter vivos may be subject to federal gift tax, and may be subject to federal and state estate tax if included in the decedent's estate.

Tax exemptions

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

A special rate of tax applies to capital gains for collectibles. Additionally, donations of artwork to tax-exempt organisations can afford the donor the opportunity to receive a charitable income, gift or estate tax deduction. The availability and allowable amount of the charitable deduction depends upon the circumstances, including the type of charity that the donee is, the type of property donated and whether the use of the artwork is related to the charity's purposes.

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 lender commonly perfects a security interest in artwork that the borrower pledges as collateral by filing a UCC-1 financing statement with the applicable governmental authority, which in New York is the New York Department of State's Division of Corporations.

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?

Not applicable.

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, see question 18. Perfection by filing allows the borrower to retain possession of the work while the loan is outstanding. Financing statements are registered listing the secured party, the debtor (the borrower that pledges the collateral) and the collateral. The New York Department of State's Division of Corporations maintains a database of financing statements that may be searched by the name of the debtor, the name of the secured party or the filing number.

Non-possessory security interests

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

Yes, see questions 18 and 20.

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?

The terms of the loan agreement typically set forth the rights and remedies that the lender has in the event of default and should be considered in the first instance. However, under section 9-610 of the NY UCC, after default, a secured party such as a lender may sell the collateral under commercially reasonable circumstances so long as the sale or disposition is in compliance with the notice provisions codified in section 9-611 of the NY UCC.

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?

A security interest can be subordinate to the rights of a person who became a lien creditor before the security interest was perfected. Under the NY UCC, the general rule is that the first to perfect a security interest has priority over other security interests. Certain exceptions exist; for example, a purchase money security interest can take priority over a

conflicting perfected security interest on the ground that the person who provided the credit that makes the purchase of the good possible ought to have the first claim to that good. The rights of a secured lender under the NY UCC are complicated and a comprehensive statement regarding priority of creditors is beyond the scope of this survey; an attorney should be consulted regarding any questions about a particular lender-creditor scenario.

INTELLECTUAL PROPERTY RIGHTS

Creator copyright

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

For works created on or after 1 January 1978, copyright vests in the author once the work is fixed in a tangible form. Works in existence but not published or copyrighted before 1 January 1978 are also given automatic copyright protection. (Before 1 January 1978, copyright protection was contingent upon registration or publication with notice, and renewal registrations.)

Although copyright registration is not mandatory under current US copyright law, registration is required for US owners to commence litigation for copyright infringement. Further, where an author registers a work before the infringement or within three months after publication of the work, the copyright owner may be eligible for an award of statutory damages or attorneys' fees. Additionally, a registration made within five years after first publication of the work constitutes prima facie evidence of the validity of the copyright and the facts stated in the certificate.

Copyright duration

25 | What is the duration of copyright protection?

For works created on or after 1 January 1978, in general, the term of the copyright is the life of the author plus 70 years. For joint works, the copyright term is the life of the last surviving author plus 70 years. For works made for hire or anonymous or pseudonymous works, the copyright term lasts for the shorter of: 95 years from publication; or 120 years from creation. For works created before 1 January 1978 that were neither published nor registered as of that date, the term of copyright protection is generally the same as work created on or after 1 January 1978, except that the term would not be deemed to have expired before 31 December 2002, and if the work was published on or before that date, the term shall not expire before 1 December 2047.

For works created and either published or registered before 1 January 1978, the initial term of copyright protection was 28 years from the date of registration or publication with notice, and at the end of the initial term, according to a 1998 amendment to the US Copyright Act, the copyright could be renewed for an additional 67 years (for a total of 95 years of copyright protection). Before the 1998 amendment, the total protection possible was 75 years, so that any pre-1923 work fell into the public domain. Whether a work is protected by copyright is complicated (eg, foreign owners, termination of transfers), and an attorney should be consulted with any questions about a specific 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 first-sale doctrine (codified in section 109 of the US Copyright Act) provides a limited exception to the copyright owner's exclusive right of public display. Under section 109(c), the owner of the artwork or anyone authorised by such owner may display the work publicly to viewers present at the place where the work is located.

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?

Generally speaking, no. Included among the copyright owner's exclusive rights is the right to authorise the reproduction of copies of the copyrighted work, and to distribute copies of the work to the public by sale or other transfer of ownership. Therefore, absent a fair use, an artist's consent should be (and typically is) sought by museums for reproductions of artworks in connection with the promotion of an exhibition.

Copyright in public artworks

28 | Are public artworks protected by copyright?

Yes, public artwork can be protected by copyright, as long as it is not a work of the US government (ie, a work prepared by an officer or employee of the federal government as part of that person's official duties), for which copyright protection is unavailable. Although some commentators have suggested that illegal street art may not be protectable, the Copyright Act does not contain any exclusion for protection on the basis of illegality of fixation.

Artist's resale right

29 | Does the artist's resale right apply?

New York does not have a law affording artists royalties on the resale of a work. Additionally, although federal legislation has been introduced at various points over the years regarding a federal resale royalty, no such legislation has been passed into law.

Moral rights

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

Under section 106A of the Copyright Act, an author of a 'work of visual art' (as that term is defined) has certain rights of attribution and integrity. Under that statute, the artist has the right to claim authorship of his or her work, and to prevent the use of his or her name as the author of any artwork that he or she did not create. The artist also has the right to prevent the use of his or her name as the author of an artwork 'in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to [his or her] honour or reputation'. Additionally, the artist shall have the right to prevent any such intentional distortion, mutilation or other modification of his or her work that would be prejudicial to his or her honour or reputation, and to prevent any destruction of a work of 'recognised stature'. For works created on or after the effective date of the statute (1 June 1991), these moral rights endure through the end of the calendar year in which the artist dies, and for works created before 1 June 1991, but to which title had not by that time been transferred from the artist, the rights endure through the calendar year of the work's copyright term. In the case of a joint work, moral rights endure through the end of the calendar year of the death of the last surviving author. These rights can be waived by written instrument signed by the artist, but may not be transferred.

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?

Under New York law, an agent owes fiduciary duties of honesty, loyalty and disclosure of all material facts relating to the subject of the agency to his or her principal. An agent may not obtain any advantage from transactions made on behalf of his or her principal without the knowledge and consent of the principal. Absent an agreement by the principal to allow the agent to retain any such undisclosed commission or other compensation, the agent is vulnerable to a claim for breach of fiduciary duty. In the art advisory context, courts in New York will look at the particular circumstances of the relationship at hand to determine whether a fiduciary relationship exists between an art adviser and a collector, or whether the relationship is at arm's length, and no fiduciary duties are owed. See, for example, *Saul v Cahan*, 153 A.D.3d 947, 949 (2d Dep't 2017), which found that no fiduciary duty was owed by the purported art adviser to the collector concerning acquisition of artwork; and *Mueller v Michael Janssen Gallery Pte Ltd*, 225 F Supp 3d 201, 205 (SDNY 2016), which found that the independent art adviser owed no fiduciary duty to the collector.

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?

New York courts have made clear that parties can modify their obligations to each other by contract, such that an art merchant can limit fiduciary obligations it might otherwise have to its principal. See, for example, *Sveaas v Christie's Inc*, 452 Fed Appx 63, 66-67 (SDNY 2011). However, it is hornbook law that agents may retain benefits received during the course of performing duties on behalf of their principal only with the 'full knowledge and consent of the principal'. See *Am Assur Underwriters Group Inc v MetLife Gen Ins Agency Inc*, 154 A.D.2d 206, 208 (1st Dep't 1990); NY Jur 2d Agency section 230. Disclosure sufficient to give the principal adequate information to be able to provide informed consent will allow an agent to retain a commission from a third party. The level of disclosure necessary would be determined under all the facts and circumstances of the case, but a precautionary agent should consider disclosing the amount of the commission or a range of acceptable commission in addition to the fact that a commission will be paid.

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?

Provided that the third party owes no duties to the principal, the principal's claim would ordinarily lie against the agent to recoup the unauthorised commission. But, where the facts of the particular case would support it, the principal could conceivably have a claim for fraud, or aiding and abetting fraud, if the third party was engaged in a pattern of conduct on the part of the agent to deceive the principal.

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?

Section 12.01 of the NYACAL provides special protection for artists and their successors who consign a work of fine art, craft or print for exhibition or commission to art merchants. Under that statute, the work and any sales proceeds derived from the sale thereof constitute trust property and trust funds, and may never become the property of the consignee or be subject or subordinate to any claims, liens or security interests of the consignee's creditors. For consignments that do not fall within this statutory protection, such as consignments by collectors, consignors should provide notice to potential creditors of their interest in the consigned property by filing a UCC-1 financing statement (see question 18).

AUCTIONS**Regulation**

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

Yes, any business that engages in auctioneering must have an auction house licence, and if a person plans to sell merchandise by public auction, he or she must also obtain an auctioneer licence. The New York City Department of Consumer Affairs has promulgated regulations that govern the business practices of auctioneers. These rules regulate the conduct of an auction and also require, among other things, that the auctioneer has a written agreement with the consignor of personal property that contains certain disclosures to the consignor regarding commissions and charges, and certain warranties and indemnities regarding the goods by the consignor, and certain disclosure to prospective bidders. The regulations can be found at www1.nyc.gov/assets/dca/downloads/pdf/about/auctioneer_law_rules.pdf.

- 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?

Yes to all of the above.

SPOILIATION DURING THE NAZI ERA**Claims to Nazi-looted art**

- 37 | In what circumstances would the heirs of the party wrongfully 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?

Under New York law, in a title action, the good-faith purchaser of an artwork bears the burden of proving that the work was not stolen. See *Bakalar v Vavra*, 500 Fed Appx 6, 7 (2d Cir 2012). Despite the burden of proof resting with the possessor, state laws governing the timeliness of Holocaust recovery claims (see question 5) presented a significant obstacle in the way of the claimants' ability to vindicate their claims. In December 2016, a new federal law was enacted that established a uniform, federal statute of limitations for claims seeking the recovery of artwork and certain other objects that were confiscated by the Nazis. Now, such claims may be brought within six years of the claimant's discovery of facts giving rise to the claim (including the whereabouts of the object).

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

No, the United States has no such body.

LENDING TO MUSEUMS

Responsibility for insurance

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

Under the Arts and Artifacts Indemnity Program, the federal government makes indemnity agreements with US not-for-profit, tax-exempt organisations and government entities for coverage of eligible objects (artwork and other cultural objects) for both domestic and international exhibitions. More information about the Arts and Artifacts Indemnity Program, including eligibility and application requirements can be found at www.arts.gov/artistic-fields/museums/arts-and-artifacts-indemnity-program-international-indemnity; and at www.arts.gov/artistic-fields/museums/arts-and-artifacts-indemnity-program-domestic-indemnity. For loans that do not qualify for this programme, the responsibility for insuring artwork is determined by agreement between the lender and the borrowing institution, but it is common for the borrowing institution to supply fine art insurance coverage for the work while on loan.

Immunity from seizure

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

The federal Immunity from Seizure Act protects the custody of artwork loaned from a foreign owner to a not-for-profit US museum. To take advantage of the statute, a US institution applies to the US Department of State for a determination that the work is of cultural significance and its exhibition is in the national interest. If the Department of State grants the application, the work is immune from seizure while on loan. In 2016, the government amended the Foreign Sovereign Immunities Act to grant foreign states and carriers that transport the loaned work immunity from suit in the US for any activity associated with certain art loans (no such immunity exists in the case of Nazi-era claims or claims based on other systemic campaigns of coercive confiscation that occurred after 1900).

Additionally, New York has an exemption from seizure statute prohibiting any kind of seizure of a work of fine art by any non-resident exhibitor at New York institutions including museums, universities and not-for-profit art galleries. (See section 12.03 of the NYACAL.)

CULTURAL PATRIMONY

National treasures

41 | Is there a list of national treasures?

The United States does not have a list of artworks it considers as national treasures that are prohibited from leaving its borders in the way that other countries do. However, federal law protects historical and archaeological sites and their treasures. More information about these laws can be found at www.nps.gov/archeology/tools/laws/index.htm.

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?

There is no right of pre-emption in New York law for buying an artwork for public collections. There is also no federal right under US law.

Automatic vesting in the state

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

Ownership of cultural property does not automatically vest in the government unless the property is found on federal or state land, with the exception of ownership of Native American cultural items excavated or discovered on federal or tribal lands, which is governed by the Native American Graves Protection and Repatriation Act.

Illegally exported property claimed by foreign states

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

The United States ratified the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property in 1972, and in 1983 it enacted the Cultural Property Implementation Act (CPIA), implementing the following portions of the UNESCO Convention: article 7(b)(1), which requires parties to undertake to prohibit the import of documented cultural property stolen from a museum or other institution located in another state party; and article 9, which allows state parties whose cultural patrimony is in jeopardy from pillage to request assistance to implement measures, such as the control of exports, imports and international commerce. Notably, the CPIA does not implement the portion of the UNESCO Convention that obliges parties to take necessary measures to prevent museums and other institutions from acquiring cultural property that has been illegally exported. Any material imported into the United States in violation of the CPIA is subject to seizure and forfeiture, and section 2609 of the CPIA sets forth the procedures whereby works may be seized and forfeited, and offered to be returned to the state party, and whether just compensation must be paid to a claimant with title to the object. The United States has bilateral agreements regarding import restrictions with Belize, Bolivia, Bulgaria, Cambodia, China, Colombia, Cyprus, Egypt, El Salvador, Greece, Guatemala, Honduras, Italy, Mali, Nicaragua and Peru, and it additionally imposes import restrictions on cultural property from Iraq and Syria.

ANTI-MONEY LAUNDERING

Compliance

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

Art vendors, like other businesses in the United States, must report to the Internal Revenue Service any transaction (or two or more related transactions) in which they receive more than US\$10,000 in cash (see 26 USC section 6050I). Additionally, regarding the art trade, dealers in precious metals, precious stones or jewels are required to develop and implement anti-money laundering programmes (see 31 CFR section 1027.210).

ENDANGERED SPECIES**CITES**

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

Yes, CITES is codified in the federal Endangered Species Act (ESA). The US Fish and Wildlife Service implements the provisions of the ESA, and serves as the management and scientific authorities as required by CITES. As such, the Fish and Wildlife Service monitors trade through a standardised permit system and facilitates the collection of species-specific trade data.

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

See question 48.

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

Under the 'antiques exemption' to the ESA, the sale of items that are at least 100 years old, are comprised in whole or in part of any ESA-listed species, have not been repaired or modified with an ESA-listed species since 27 December 1973, and are imported through a designated port are exempt from ESA prohibitions. If the item was imported before 22 September 1982 or was created in the United States and never imported, the item is exempt from the importation port requirement. Additional restrictions exist with regard to certain animal products, as specified in question 49.

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?

In 2016, a near total ban on commercial trade in African elephant ivory went into effect in the United States. More information about these restrictions can be found at: www.federalregister.gov/documents/2016/06/06/2016-13173/endangered-and-threatened-wildlife-and-plants-revision-of-the-section-4d-rule-for-the-african?utm_campaign=subscription+mailing+list&utm_medium=email&utm_source=federalregister.gov. In 2014, New York enacted legislation prohibiting trade and other distribution of antiques containing ivory and rhino horn, except under very limited circumstances. Unless an exception applies, the law prohibits any person from trading or distributing any 'ivory article' (defined as any item containing worked or raw ivory from any species of elephant or mammoth) or rhino horn. (See section 11-0535-a of the New York Environmental Conservation Law.) Additionally, there are laws that regulate trade in the skin or bodies of wild and exotic animals, and the possession and trade of bald eagles or golden eagles, but a comprehensive review of those laws is beyond the scope of this chapter.

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CONSUMER PROTECTION**Cancelling purchases**

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

Under New York's Door-to-Door Sales Protection Act, the buyer has up to three business days to cancel a door-to-door sale, as the term is defined in the act. In this kind of sale, the seller must provide the buyer with a receipt or contract disclosing to the purchaser his or her right to cancel the transaction and provide a notice of cancellation form and explanation of the right.

Duties of businesses selling to consumers

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

In addition to the regulation of door-to-door sales (see question 50), the New York City Department of Consumer Affairs has issued citations to galleries under truth-in-pricing law for failing to conspicuously display price listings for artworks for sale.

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