

THE ART LAW
REVIEW

SECOND EDITION

Editors

Lawrence M Kaye and Howard N Spiegel

THE LAWREVIEWS

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PREFACE

We are thrilled to present the second edition of *The Art Law Review*. The response from around the world to the first edition was extremely positive, for which we are very grateful. We have again invited leading practitioners in the art law field from around the world to update the key developments in their respective countries and the most significant issues in this important area of law. We trust that you will find them equally informative, instructive and interesting.

We thought that it would be appropriate in this edition to begin with a review of the effect of covid-19 on the art world during this past year and a half. The pandemic of course upended every aspect of life, and the art market was no exception. But there were some surprising developments in the midst of the difficult period we all experienced.

First some numbers. In 2020, global online sales reached a record high, but overall sales experienced a decline.¹ Online sales of art and antiquities accounted for 25 per cent of the market's value.² Overall ancillary spending was down, due mainly to the lack of art fairs, while funding went instead to IT resources of new online platforms. Of the various art sectors, auctions were most successful during this period, while galleries were hardest hit.³

In human terms, many galleries had to furlough or permanently lay off staff in 2020. Support came mostly from virtual programming and assistance from the federal government.⁴ For example, Hauser & Wirth never held online shows before 2020 but quickly developed a platform with its own virtual reality technology.⁵

1 Clare McAndrew, *The Art Market 2020*, Art Basel & UBS Report, at 28, available for download at https://d2u3kfw92fzu7.cloudfront.net/The-Art-Market_2021.pdf.

2 id. at 331.

3 id. at 240–245.

4 Daniel Cassidy, 'US galleries survive: despite a stark decline in revenue in 2020, many galleries have a positive post-pandemic outlook, report says', *The Art Newspaper* (20 July 2020), www.theartnewspaper.com/2021/07/20/us-galleries-survive-despite-a-stark-decline-in-revenue-in-2020-many-galleries-have-a-positive-post-pandemic-outlook-report-says.

5 Justin Kamo, 'Hauser & Wirth will launch a virtual-reality exhibition platform', *Artsy* (9 April 2020), www.artsy.net/news/artsy-editorial-hauser-wirth-will-launch-virtual-reality-exhibition-platform.

Similarly, Sotheby's, Christie's and Phillips all enacted an accelerated digital shift, adding hundreds of online-only sales. They still suffered, however, with Sotheby's US\$5 billion in sales representing a 12 per cent drop from 2019. Sales at Christie's fell 22 per cent to US\$4.5 billion and at Phillips they were down 11 per cent to \$646 million.⁶

But prospects are vastly improving this year. Global sales in the first six months of 2021 have more than rebounded and exceeded pre-pandemic levels at all three auction houses. For example, Sotheby's and Phillips' 2021 sales have so far exceeded those in 2019 by 13 per cent and 8 per cent, respectively.⁷

From a global perspective, the pandemic effected a significant change in the prevalence of Asian collectors. For the first time in Christie's history, Asian collectors outspent US collectors in 2020. Similarly, Asian collectors accounted for more than a third of the buyers at Sotheby's worldwide auctions last year.⁸

Now let's dig down a little deeper to discover some interesting trends during the pandemic and a few far-reaching effects for the art market's future.

I AUCTION HOUSES

The prevalence of online buying during the pandemic caused many collectors to spend large sums on works they had not seen in person, relying on condition reports, provenance and high-resolution photographs. Asian collectors seemed particularly interested in online purchases, sight unseen, and their interest in Western art grew accordingly.⁹ Indeed, due largely to a shift to online sales brought on by pandemic lockdowns, the contemporary art market surged from June 2020 to June 2021, recording US\$2.7 billion in sales.¹⁰ A portion of this increase was also due to the popularity of non-fungible tokens (NFTs) resulting from the surge of young crypto-millionaires suddenly eager to invest in art. The new generation of millennial collectors purchased art on an average of US\$378,000 per item, much higher than other generations.¹¹

6 Kelly Crow, 'Millennial Buyers Help Global Art Market Survive the Covid Pandemic', *Wall Street Journal* (4 January 2021), www.wsj.com/articles/millennial-buyers-help-global-art-market-survive-the-covid-pandemic-11609779511.

7 Lindsay Dewar, 'The Art Market 2020 – A Year in Review', *ArtTactic*, available for download at <https://int.nyt.com/data/documenttools/20solowpdf2/5d9d84ff385ca83b/full.pdf>.

8 See Kelly Crow, footnote 6.

9 Naomi Rea, 'Art-Market Dynamos Amy Cappellazzo, Yuki Terase, and Adam Chinn Are Betting on Asia With a New Advisory Venture', *Artnet* (14 October 2021), <https://news.artnet.com/market/art-intelligence-global-2020377>.

10 'The Contemporary Art Market report in 2021', *artprice.com*, available for download at <https://imgpublic.artprice.com/pdf/the-contemporary-art-market-report-2021.pdf>.

11 Ollie A Williams, 'Art Market Goes Into Overdrive As Wealthy Up Their Spending By 42%', *Forbes* (9 September 2021), www.forbes.com/sites/oliverwilliams1/2021/09/09/art-market-goes-into-overdrive-as-wealthy-up-theirspending-by-42/?sh=55adf4ea694c.

II ART FAIRS

The attendance at recently renewed art fairs during the pandemic has become smaller, younger and more local. The number of exhibitors was one-third less than pre-pandemic, but the presence of local contemporary art galleries increased.¹² For example, sales at Art Basel in September 2021 were strong despite the absence of the usual US clientele.¹³ As another example, at the Contemporary African Art Fair in London in October 2021, a record number of galleries from Africa – 20 out of a total of 47 – participated.¹⁴ And the pace of sales at Basel in general demonstrated that the pandemic has done little to dissuade wealthy art collectors.

III GALLERIES

For some galleries, the increase in online viewing rooms is an exciting development and may offer an alternative to time-consuming art fairs. Others are concerned that digitalisation may be undercutting the sheer physical power of art. While some attribute the recent resurgence of the market to super wealthy collectors, others contend that technology is saving the market. In any event, gallery sales are up 10 per cent globally in the first half of this year compared to last. While 23 per cent of galleries were forced to cut staff in 2020, 25 per cent hired new employees in the first half of this year and 50 per cent said sales had improved this year over last. On the other hand, this improvement is mostly due to larger galleries, while smaller and mid-size galleries suffered a slight dip in sales. And NFTs apparently adversely affected the profits of many brick-and-mortar galleries, with European galleries experiencing a sales reduction of 7 per cent.¹⁵

IV CONCLUSION

In sum, while the pandemic has been devastating to all, the art market has demonstrated its resilience, as collectors, mostly young wealthy ones, have become accustomed to online purchases of artworks and new digital works, such as NFTs. Whether traditional modes of doing business will return in a significant way as the pandemic hopefully recedes remains to be seen. Perhaps the subject of an entry in the next edition!

Turning back to this Review, we again open the volume with substantive chapters that present an overview of current and significant issues in several important areas of art law:

- a* recent developments in the art market;
- b* art authentication;
- c* art and technology;

12 Vivienne Chow, 'Fine Art Asia, Hong Kong's Homegrown Art Fair, Returns—a Third Smaller, More Local, and With NFTs', *Artnet* (7 October 2021), <https://news.artnet.com/market/fine-art-asia-opening-hong-kong-2018293>.

13 Eileen Kinsella and Naomi Rea, "'Now It's Just the Real People": Art Basel Opens Its First Fair in 18 Months With an Among-Friends Vibe (and Steady Sales, Too)', *Artnet* (21 September 2021), <https://news.artnet.com/market/art-baselsales-report-2021-2011301>.

14 Gareth Harris, 'Strong sales at 1-54 fair—with more African dealers than ever', *The Art Newspaper* (14 October 2021), www.theartnewspaper.com/2021/10/14/1-54-fair-london-2021.

15 Clare McAndrew, 'Resilience in the Dealer Sector: A Mid-Year Review 2021', Art Basel & UBS Report at 10, 12, 54, 113, available for download at https://d2u3kfw92fzu7.cloudfront.net/The_Art_Market_Mid-Year_Review_2021.pdf.

- d* international copyright issues;
- e* moral rights;
- f* recent trends in art arbitration and mediation; and
- g* cultural property disputes.

We then present chapters on recent art law developments in 20 key countries. Each country's chapter gives a review of hot topics, trends and noteworthy cases and transactions during the past year, then examines in greater depth specific developments in the following areas: art disputes, fakes, forgeries and authentication, art transactions, artist rights, and trusts and foundations, and finally offers insights for the future.

We hope that you enjoy reading all of these excellent contributions.

Lawrence M Kaye and Howard N Spiegler

Kaye Spiegler PLLC

New York

December 2021

Part II

JURISDICTIONS

BELGIUM

*Lucie Lambrecht and Lucy Ryan*¹

I INTRODUCTION

Belgium has always been a melting pot of different influences: Dutch, French, German, English and Spanish. In art terms, the country is primarily a trading country, rather than a country of origin. Belgium's importance in international art trade reaches far beyond what could be expected for such a small country.

In 2015, Belgium held sixth place in the market for contemporary art in Europe, after the UK, France, Germany, Italy and Austria, with a sales value totalling US\$4.1 million; equivalent to 1 per cent of the world art auction market.²

Most international auction houses have representative offices in Brussels, and some occasionally organise local sales. Local auction houses are spread all over the country but are mainly concentrated in Antwerp and Brussels. Art gallery clusters are situated in the major cities and on the Belgian coast, with African and non-European art being the most commonly traded art categories in Brussels.

Several art trade fairs are organised each year: BRAFA (Brussels' Antiques and Fine Art Fair), BRUNEAF (focused on African and non-European art) and Art Brussels (contemporary art). The contemporary art market is gaining considerable traction as many Paris-based galleries and, more recently, galleries from Latin-America, have opened branches in Brussels.

Disputes involving art transactions have unfortunately become more frequent, which are often litigated through the court system. In the absence of special courts or tribunals, these cases are usually brought before the ordinary civil courts. If a claim involves a criminal offence, the case can also be brought before the criminal courts and will be tried as priority over the civil claim. The trend towards criminalisation of art offences is increasing given the ever-growing regulation of the art and finance sphere, such as in anti-money laundering and terrorist financing law.

1 Lucie Lambrecht is the founder and managing partner and Lucy Ryan is a legal consultant at Lambrecht Law Office. The authors thank Zacharias Mawick, freelance research assistant, for his assistance with the chapter introduction.

2 'Artprice', Art Market Report 2015.

II THE YEAR IN REVIEW

A number of new legislative projects affecting the art market have been finalised or passed. First, the Civil Code has been reformed and a new Book 3, dedicated to property law, has been inserted in it.³ There are some noteworthy changes to the existing legal provisions, including:

- a* the legal treatment of treasure finds, which was historically based on a legal tradition dating back to Roman times with a pragmatic approach in case law, has been redefined and regulated;
- b* finders' rights (to acquire ownership) have been made subject to a number of administrative requirements and waiting periods;
- c* the concepts of 'possession' and 'good faith' have been redefined; and
- d* the rights of the dispossessed owner of movable goods have been extended: original owners can still reclaim a stolen or lost object from current holders within three years of a theft or loss, but the original owner is no longer required to reimburse the current holder the purchase price if the latter bought the object via auction or from a trader in the relevant market.

Second, a new act concerning trade of objects made of ivory, including antiquities, which prohibits virtually any export and import, was supposed to have entered into force on 1 October 2019. However, the law has not yet been implemented as it has not been published in the Belgian State Gazette.⁴ Due diligence in this paradox situation is an ever-evolving topic.

The year 2020 also saw the implementation of the Fifth Anti-Money Laundering Directive in Europe.⁵ The Belgian Act of 20 July 2020 to implement the Directive entered into force on 15 August 2020.⁶ Shortly after this was implemented, Belgium was referred to the European Court of Justice for failing to implement the Fourth Anti-Money Laundering Directive. The new legislation, *inter alia*, requires art dealers to identify customers involved in art-related transactions of €10,000 or more and to register with the federal government, which is perceived as a huge burden for art traders, galleries and art fairs. Remarkably, the new requirements apply to all artworks and movable goods older than 50 years old, which is far more extensive than the European notion of 'works of art' in the Fourth Anti-Money Laundering Directive. Recently, the country's Financial Sector Federation, Febelfin, inaugurated the Anti-Money Laundering Consultation Platform to merge the private and public financial sectors in the fight against financial corruption. This is a targeted effort to tackle financial fraud as, in 2020, banks reported 17,678 suspicious transactions to Belgium's Financial Intelligence Processing Unit (CTIF), which represented 55 per cent of money laundering cases transmitted to the judicial authorities.

On 3 December 2020, the European Union's Sixth Anti-Money Laundering Directive came into effect for all Member States, including Belgium. Belgium has not yet implemented this Directive into law. The new Directive provides for better cross-border cooperation, a complete definition of 'criminal activity', liability for 'legal persons' and reinforcement of punitive measures with a maximum imprisonment sentence of at least four years in some cases.

3 The new Civil Code was introduced by an Act of 13 April 2019 replacing the old Civil Code in various stages. The new Book 3 (Property Law) entered into force on 1 September 2021.

4 As at the time of writing.

5 Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018.

6 Act of 20 July 2020 containing various provisions to prevent money laundering and terrorist financing and to limit the use of cash, MB/BS of 5 August 2020.

In addition, the art market still needs to adjust to new administrative requirements in the context of the European Import Regulation,⁷ which entered into force in 2019.

The current international trend of increasing regulation of the art market and art trade-related subjects in general is clearly evident in Belgium.

III ART DISPUTES

i Title in art

Sales contracts are consensual contracts in the sense that they are not subject to any formal conditions to be valid: title is transferred to the buyer as soon as there is agreement about the price and the subject matter. Nevertheless, any transaction of more than €3,500 should, in principle, be evidenced in writing.⁸

Buyers of works of art can also rely on bona fide possession to invoke good title in relation to third parties.⁹ The buyer must have reasonably believed that he or she bought the object from the true owner (*versus dominus*), even if the seller was not, at the time of sale, the true owner. It does not suffice that the buyer did not know he or she was not buying from the true owner (actual knowledge), it must also be obvious that he or she could not have known this in the particular circumstances (constructive knowledge). Under the new Civil Code, the concept of 'good faith possession' has been legally defined as meaning that a possessor is in good faith if he or she lawfully assumes that he or she is the holder of the right that he or she possesses. Good faith is presumed unless proven otherwise.¹⁰

The buyer's duty will be assessed differently according to the nature of the object and the capacity of the buyer as a professional or private party. The burden of proof rests with the claimant (original owner) to show that some facts peculiar to the situation should have triggered doubts with the buyer about the rights of his or her predecessor.

These rules apply similarly whether goods are acquired by auction or by private sale. In a private treaty situation, the buyer has more reason to be cautious than in a public sale where the auction process normally determines the price-setting. It is also obvious that the standard of diligence required when buying from a local auctioneer in a house sale is higher than when buying from an international auction house that abides by the highest professional standards.

ii Nazi-looted art and cultural property

In the context of international agreements regarding the restitution of looted cultural assets during the Second World War, Belgium assigned a special team within the Ministerial Department of Economic Affairs to recover art and archives looted from Belgium. This initiative has since been disbanded, even though not all registered items have been retraced or recovered. Where possible, Belgian enforcement authorities seek to rely on the (voluntary) assistance of the diplomatic or enforcement agencies of the country where the object concerned is located. No other specific laws have been enacted in relation to Nazi-looted art and cultural property and case law is sparse in this area.

7 Regulation (EU) 2019/880 of the European Parliament and the European Council of 17 April 2019 on the introduction and the import of cultural goods.

8 Article 8.9 of the new Civil Code applicable as from 1 November 2020.

9 Article 2279 of the (old) Civil Code. See Article 3.51 of the new Civil Code.

10 See Article 3.22 of the new Civil Code.

iii Limitation periods

In the case of theft or loss, the original owner has the right to reclaim the asset from the current possessor during the first three years following the loss or theft. The original owner is not required to reimburse the current possessor of the purchase price even if the latter bought the object via auction or from a trader in the relevant market. This three-year limitation period is only applicable when the possessor is in good faith, in which case the acquisition of title is immediate.¹¹

In other cases, a purchaser can acquire ownership title by having quiet possession of an item for 30 years, provided his or her possession is continuous, undisturbed, public and unambiguous. Acquisitive limitation periods differ slightly for immovable property, for which a good faith purchaser will acquire ownership after undisturbed possession for 10 years. In the case of bad faith, ownership will revert after 30 years if undisturbed.¹²

The law implementing Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a Member State differs from the Belgian Civil Code regime in that the Belgian government must request restitution within three years of the relevant authority having knowledge of the item's location and identity of the possessor. In any case, the statutory limitation is 30 years from the moment the item was unlawfully removed from Belgian territory. There are no other special limitation periods such as for art misappropriated during the Nazi era.

The 30-year limitation issue has been addressed in the *Khurvin* case, which gave rise to a series of proceedings before the Belgian courts, instituted by the Islamic Republic of Iran in 1981. Here, the Iranian government sought the return of 349 archaeological objects that had been brought into Belgium in 1964 by a French–Belgian collector, on the basis of their illegal exportation. In June 2013, after a lengthy procedural battle before the Brussels civil courts, the Court of Cassation rejected the finding of the Brussels Court of Appeal that the title claim of the Iranian Republic had expired after 30 years on the basis of Article 2262 of the old Civil Code. Accordingly, the Court of Appeal's judgment was annulled to that extent.¹³ The case was then referred to the Court of Appeal of Liège, which resolved the issue on a definitive basis and decided to allow the objects to return to Iran.¹⁴

iv Alternative dispute resolution

The Belgian Judicial Code lays down specific rules and procedures for the following alternative dispute resolution methods:

- a* arbitration;
- b* mediation; and
- c* collaborative negotiating.

Since 2015, mediation (voluntary and judicial) has received equivalent status to court procedures and arbitration in all civil and commercial matters and is actively encouraged by judicial and bar authorities.

11 See Article 3.28, Paragraph 1 of the new Civil Code.

12 See Article 3.27 of the new Civil Code.

13 Court of Cassation, 4 October 2012, published on the official website of Belgian case law (<https://juricaf.org/arret/BELGIQUE-COURDECASSATION-20121004-C110686F>).

14 Liège, 14 October 2014, unpublished.

Collaborative negotiations, which – like mediation – can only be conducted by registered lawyers specially trained to that extent, have only been endorsed by procedural law since January 2019, in an effort to facilitate and widen the alternative means to settle disputes.

There are no specialised Belgian alternative dispute resolution organisations or other institutions dealing specifically in art law matters.

IV FAKES, FORGERIES AND AUTHENTICATION

A commonly invoked civil law remedy is the action to rescind the sale contract for fraud (misrepresentation) or mistake (error).

Fraud or misrepresentation is defined in Article 1116 of the (old) Civil Code as the intentional use of false representations or omissions of such nature that the other party would never have contracted without such representations or omissions. This action is available up to 10 years after the discovery of the fraud. Upon rescission of the contract, the buyer must return the object sold and the seller must reimburse the price. Compensatory interests can be claimed, but as a rule, no compensation is provided for loss of profit or missed opportunities.

‘Error’, as defined in Article 1110 of the (old) Civil Code, is established if it is excusable, meaning that the buyer erred about an essential feature of the object at the time he or she purchased it, such as its authenticity. The person in error must be in good faith, but it is up to him or her to prove that any other reasonable person in the same circumstances would have erred. The limitation period and the right to compensation are the same as for misrepresentation.

The seller also warrants the absence of defective title and hidden defects and must hold the buyer harmless against adverse third-party claims.

When facing an authenticity issue, Belgian courts tend to designate judicial (i.e., court-appointed) experts in the absence of, or in addition to, expertise reports ordered by the parties, which may be produced together with their submissions.

Fakes or forgeries also constitute a criminal offence, punished by Article 498 of the Criminal Code, when the seller gives another or a similar object than what was contracted for (e.g., a fake painting) with the intention to deceive. Forgery and counterfeiting can also constitute criminal offences under the Code of Economic Law.

See Section V.i for remedies under consumer legislation.

V ART TRANSACTIONS

i Private sales and auctions

Belgium has implemented the European directives on consumer sales (in Articles 1604 and 1649 *bis* et seq. of the old Civil Code). Accordingly, sellers of works of art must guarantee the conformity of the goods with the contract of sale, similar to any other consumer goods. The seller is liable towards the buyer-consumer for any lack of conformity that exists at the time of delivery of the goods that becomes apparent within two years of the delivery. In the case of secondary market sales, the seller and consumer can agree a shorter time period for the seller’s liability, which must not be less than one year.

No lack of conformity will be deemed to exist if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of, the lack of conformity. Thus, if adequate disclosure was given by the seller of the uncertainties relating to a work’s authenticity, the buyer’s claim should fail.

Legal remedies include the right to ask for the good to be repaired, replaced and reduced in price or (more likely in the case of fake works) for the contract to be rescinded.

Any clauses or agreements entered into before notification of a lack of conformity and that limit or exclude the consumer's rights under this regime will be null and void.

Consumer claims for non-conformity are subject to a limitation period of one year from the discovery of the lack of conformity, provided that this period will not expire within the legal warranty period referred to above.

Distance sales and off-premises sales are moreover subject to a right of withdrawal of 14 days from the day the consumer acquires physical possession of the goods.¹⁵ However, a consumer may not invoke the right to withdraw from the sale if it concerns an auction sale.¹⁶

The consumer protection rules on public sales are moreover expressly carved out for sales of artworks, objects from a collection – excluding tapestries and jewellery – and antiquities.¹⁷

Apart from those referred to above there are no specific laws governing auction sales.

ii Art loans

There is no published case law involving art loans to the authors' knowledge.

However, it was reported that a dispute arose between the authorities of the Ghent Museum of Fine Arts and the insurer in the context of the Jan Van Eyck exhibition that came abruptly to a halt in March 2020 following Belgian coronavirus restrictions. The question remains of who will be liable to reimburse the €3 million worth of cancelled tickets.

The Belgian Judicial Code¹⁸ provides that cultural property owned by foreign authorities is immune from execution (specifically, civil – conservatory or executory – attachment) when present in Belgium for the purpose of a public and temporary exhibition, provided the property is not used for economic or commercial activity of a private nature. Beneficiaries include state entities, provided they exercise some degree of sovereignty, and international governmental organisations. Privately held artworks do not benefit from this immunity privilege.

iii Cross-border transactions

In the event of a restitution or title claim, the competent jurisdiction within the European Union will be determined pursuant to Regulation (EU) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcements of judgments in civil and commercial matters. Article 7(4) establishes a new criterion of jurisdiction specific to art restitution claims: the courts where the cultural object is situated will have jurisdictions concerning civil claims for the recovery of the object.

Regarding choice of law, the Belgian Private International Law Code provides a special rule for cultural property: when a good that is part of a state's cultural heritage leaves the territory of that state in breach of its law, the restitution claim by that state shall be governed by its law applicable at that time or, at that state's choice, by the law of the state in the territory of which the good is located at the time of the restitution claim.¹⁹ However, if the

15 Articles VI.47–52 and VI.67–73 of the Code of Economic Law.

16 Articles VI.53, 11° and VI.73, 11° of the Code of Economic Law.

17 Article VI.75, Paragraph 1, 2° of the Code of Economic Law.

18 Article 1412 *ter* of the Judicial Code.

19 Article 90 of the Private International Law Code.

law of the state of origin does not grant any protection to the possessor in good faith, the latter may invoke the protection that is attributed to him or her by the law of the state in the territory of which the property is located at the time of the restitution claim.

Recently, the Belgian federal state has declared that Belgium, with a deep history immersed in colonialism, will return looted artefacts to the Democratic Republic of the Congo, by way of transfer of legal ownership of the antiquities to the Congolese state. Although there is no dedicated restitution commission in Belgium, it represents a predominant shift in cultural heritage dialogue as it seems that the country will systematically return objects to its rightful owner. Parallel to this, Belgian authorities recently released a restitution policy document, which is the first attempt at a series of guidelines for dealing with colonial collections and restitution, adapted to the Belgian context.

As a Member State of the European Union, Belgium is also subject to the European Import Regulation²⁰ and the European Export Regulation,²¹ both specially dedicated to cultural property and establishing export and import licensing systems.

At an international level, Belgium ratified the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property on 31 March 2009. The Convention entered into force in Belgium on 1 July 2009. An implementing law has been in preparation for years, but no final instrument has yet been enacted.

Belgium is also a party to the Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict and its Protocols, as well as the 2001 Convention on the Protection of the Underwater Cultural Heritage. Recently, Belgium has updated its implementation law of the 2001 Convention,²² which now protects both underwater cultural heritage and valuable wrecks.

Specific legislation to protect certain important items of cultural property has been enacted on a regional level, mainly providing for classification or listing measures and export restrictions.

In this regard, an essential feature of the Belgian constitutional system is the federalisation of the Belgian state. Movable cultural heritage falls within the powers of the three Belgian communities (Flemish, French and German-speaking) while the powers to regulate immovable cultural heritage belong to the three Belgian regions (Flanders, Wallonia and Brussels). However, in 2014, the Brussels region, given its specific status, was granted its own powers for the protection of immovable as well as movable and intangible cultural property 'of regional interest' situated in the Brussels region.

Accordingly, four regulations seek to protect movable cultural heritage in Belgium:

- a* Decree of the French Community of 11 July 2002;
- b* Decree of the Flemish Community of 24 January 2003, as occasionally amended;
- c* Decree of the German-Speaking Community of 20 February 2017; and
- d* Decree of the Brussels Region of 25 April 2019.

20 Regulation (EU) 2019/880.

21 Council Regulation (EC) No. 116/2009.

22 The law of 23 April 2021, implementing the Convention on the protection of the underwater cultural heritage and the protection of valuable wrecks came into effect on 4 June 2021. It abolishes the original implementation law of 2014.

The territorial reach of those regulations depends on the actual location of the item within the Belgian territory. Some exceptions can come into play if the item has just been transferred from one community or region to the other to prevent abuses.

There are no notable tax considerations in Belgium regarding art acquired internationally. In accordance with EU tax rules, Belgium levies import taxes and VAT on the import into Belgium from outside the European Union. Artworks benefit from a favourable rate of import VAT (currently 6 per cent).

iv Art finance

Art finance in Belgium has been incentivised by the possibility to take security on movable assets (including artworks) without taking possession (non-possessory pledge). Previously, a pledge on movable assets involved the physical dispossession of the asset. Pursuant to the new Pledge Act,²³ in force since January 2018, a pledge on movable artworks can simply be established by contract and made enforceable by third parties by its registration in the central Pledge Register.²⁴ The two methods (pledge with or without dispossession) co-exist and can be applied at the parties' choice.

(See Section II regarding the implementation of the Fifth Anti Money Laundering Directive in Belgium pursuant to which the client identification and know-your-customer rules henceforward also apply to the art market.)

The previous legal restriction on payments in cash subsists under the new legislation: no (art) professional may accept cash for the payment of artworks or otherwise in excess of €3,000. Penalties of up to €225,000 may be imposed in the case of infringement of this restriction but are capped at 10 per cent of the amount paid.²⁵

VI ARTIST RIGHTS

i Moral rights

Artists enjoy moral rights that are non-transferable (inalienable). Any overall waivers of these rights for the future are deemed null and void.

Moral rights include, inter alia:

- a* the right of disclosure (undisclosed works cannot be subject to attachment);
- b* the right to authorship; and
- c* the right of integrity, including the right to oppose any distortion, mutilation or other modification or degradation of a copyrighted work that can be harmful to the honour or reputation of the artist.²⁶

Moral rights expire 70 years after the artist's death, similar to economic rights.

23 Act of 25 December 2016 modifying several provisions relating to guarantees *in rem* on movable property, MB/BS of 30 December 2016.

24 The Pledge Register is operated and managed by the federal Department of Finance (<https://pangafin.belgium.be/>).

25 Article 67 *juncto* 137, 1° of the Act of 18 September 2017 on the prevention of money laundering and terrorist financing and on the restriction of the use of cash.

26 Article XI.165 of the Code of Economic Law.

ii Resale rights

In accordance with European Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art, Belgium enforces the artist's resale right for original works of art, in the name of the living artist and in the name of the heirs, up to 70 years after the creator's death.²⁷ The royalty is payable by the vendor who is jointly and severally liable with the professional intermediary (gallery, auctioneer, art dealer) that brokered or carried out the sale. To qualify, the works of art must be executed by the artist himself or herself or be part of a series produced under the artist's supervision in limited edition.

Exempt from the resale right is the first resale of works up to €10,000 within three years of acquisition from the artist. Private sales with no professional intermediary involved are excluded altogether.

The artist's resale right is calculated on the total amount excluding VAT, with a minimum amount of €2,000 for the artwork to qualify. The maximum royalty on any resale is €12,500. The artist's resale right applies to Belgian artists, EU artists and other artists whose countries grant equivalent protection. Since 2015, artists' resale rights have been managed centrally by a single platform called 'eResale Right'.²⁸

iii Economic rights

Belgian copyright law has implemented or is in the process of implementing all applicable European directives on copyright and neighbouring rights. This is reflected in the basic provision defining the scope of the artist's economic rights:²⁹

Only the author of a literary or artistic work has the right to reproduce or cause to be reproduced, in whole or in part, by any means or in any form, direct or indirect, temporary or permanent (reproduction right).

That right includes, inter alia, the exclusive right to authorise adaptation or translation of the work.

This right also includes the exclusive right to authorise rental or lending of the work.

Only the author of a literary or artistic work shall have the right to communicate to the public the work by any means, including making it available to the public in such a way that members of the public may access it from a place and at a time individually chosen by them (right of communication to the public).

Only the author of a literary or artistic work shall have the right to authorise the distribution to the public, through sale or otherwise, of the original of the work or copies thereof (distribution right).

The first sale or other transfer of ownership in the European Union of the original or a copy of a literary or artistic work by its author or with his consent exhausts the distribution right of that original or copy in the European Union.

Specifically, regarding artists' economic rights over their work, we note the following. The sale of an artwork allows the buyer to exhibit the work without requiring the artist's consent, but only in circumstances that do not affect the honour or reputation of the artist. Transfer of title does not imply the transfer of any (other) copyrights to the artwork. The artist retains

27 Article XI.175–178 of the Code of Economic Law.

28 www.resaleright.be.

29 Article XI.165, Paragraph 1 of the Code of Economic Law.

the right of access to his or her work; for example, to make a copy, but he or she must exercise it in a reasonable manner. However, when the artwork incorporates a portrait of a person, the latter's permission (or his or her successors until 20 years after his or her death) is required to exhibit it in public.

Reproducing images of an artwork in museum catalogues, websites or auction catalogues requires permission from the artist, unless these images are merely used to advertise the public exhibition or public sale of those artworks and do not serve any other commercial purpose. Works of art under copyright can also be freely reproduced for the sole purpose of illustration, teaching and scientific research. This is permissible to the extent it is justified by its non-commercial purpose and as long as the normal exploitation of the work is not affected, and provided further that the source, including the author's name, is indicated, unless this is not possible.

A new EU Copyright Directive in the Digital Single Market was introduced by the EU in June 2021 (the DSM Directive), which protects creativity in the digital age, bringing concrete benefits to the creative sectors, including cultural heritage institutions and artists across the EU. A Member State must now limit how copyrighted content is shared on online platforms. The Directive's most controversial component, Article 17, requires online platforms to filter or remove copyrighted material from their websites, including reproductions of an artist's imagery without the author's consent.

A draft bill implementing the DSM Directive into Belgian law is currently under review by the relevant advisory bodies. Most of the provisions will be transposed into Book XVII of the Belgian Code of Economic Law, while supplemental provisions will be implemented into the Belgian Judicial Code. The bill, if enacted, also provides for the creation of a new service within the Federal Department of Economy, the Service for the Fight against Copyright Infringements and Related Rights on the Internet, to combat mass online infringement.

VII TRUSTS, FOUNDATIONS AND ESTATES

Private collections are mostly unincorporated; contractual structures vary depending on the family and estate planning of the owner or founder. If incorporated (hence separated from the founder's other assets), the private foundation is the preferred type of entity. Legal restrictions on free disposals such as forced heirship rules are an important factor in the choice of the appropriate form to hold and manage a private art collection.

The non-profit association and the foundation are the two basic types of not-for-profit entities that can be incorporated in Belgium. Trusts cannot be constituted under Belgian law.

A foundation with a cultural purpose can be recognised as a public utility foundation. Setting up a public utility foundation requires approval by royal decree, which gives the foundation an international quality label. The public utility foundation has a more advantageous tax status than a private foundation and is the preferred form for museums holding and managing important art collections.

Since the new Code of Companies and Associations came into force in May 2019, there are no minimum thresholds for members and directors except that a non-profit association must have at least three directors (or two directors if the association has only two members). A foundation can have one or more directors. For all other purposes, the law leaves a fair amount of scope to freely determine the internal organisation and operation of the entity.

Unlike a non-profit association, which can be dissolved by a special majority decision of its general assembly of members, a foundation can only be dissolved by a court decision.

The net assets remaining after the entity's liquidation must be assigned to another non-profitable purpose.

Tax aspects

Income tax

Private foundations and private museums taking the form of a non-profit association or a (private) foundation are, in principle, subject to the legal entities tax regime applicable to not-for-profit entities. The foundation or museum will not be assessed through the normal tax rate on its overall income but a withholding tax will be levied on certain types of income (real estate, financial and rental income).

VAT

Not-for-profit private museums are VAT-exempt taxpayers. Private foundations are subject to VAT if they perform economic activities other than exempt museum activities. A VAT exemption applies if the annual turnover subject to VAT does not exceed a certain threshold (€25,000).

Tax in compensation of inheritance taxes

Private foundations and non-profit associations are subject to an annual levy of 0.17 per cent on their assets situated in Belgium if the value of those assets exceeds €25,000. Public utility foundations are exempted from this tax, which makes it attractive to apply for public utility status if the foundation owns a valuable art collection.

Inheritance and gift taxes

Initial endowments to a foundation in the form of money or artworks are subject to gift or inheritance taxes at the applicable regional rate, depending on whether the initial endowment occurs during the founder's lifetime or upon his or her death. The rates can differ according to the region with the power to tax, being the region where the benefactor is or was last domiciled. If the benefactor has or had his or her tax residence in another country, no tax is due by the beneficiary unless Belgium-situated real estate is concerned.

The same tax treatment applies to subsequent endowments or contributions of money or artworks to an existing foundation.

Individuals and companies do not pay wealth tax on their assets including art and other cultural property.

Belgium does not levy a separate capital gains tax on the disposal of cultural assets. Income and capital gains on works of art and cultural property are taxable according to the general income taxation rules.

Capital gains on the sale of art and cultural property by:

- a* an individual in his or her private capacity acting within the 'normal management of his personal property' is not subject to tax;
- b* an individual speculating (e.g., when he or she has taken out loans for the purchase of artworks, or when the trading is significant and occurs on a regular basis) is taxable at a special personal income tax rate;

- c an individual art market professional acting within the scope of his or her business or profession is taxable as professional income at the normal rate; and
- d a commercial company (art dealers, auction houses, art galleries) is subject to corporate income tax at the normal rate.

Proceeds obtained by a non-profit entity that is subject to the tax on legal entities (e.g., museums in the form of a non-profit association or foundation) from the sale of art or cultural property are generally not taxable.

The power to impose inheritance and gift taxes belongs to the three Belgian regions with some residual powers still left with the federal state. The (last) residence of the donor or deceased determines which region is competent.

Formal donations (made by notarial deed) are subject to registration duties on donations if the notarial deed was drawn up before a Belgian notary or, if before a foreign notary, the deed is (voluntarily) registered in Belgium.³⁰ Informal gifts not incorporated in a deed are not subject as such to registration duties.

Tax rates for movables are flat and range from 3 per cent to 7 per cent depending on the parental link (if any) between donor and beneficiary. The 7 per cent rate applies to donations to unrelated parties including non-profit entities. Reduced rates apply to certain public entities while state museums and similar public authorities or entities are tax-exempt.

Inheritance taxes are due on the net estate of the deceased. Rates are progressive and differ according to the parental link. Legacies to unrelated parties are taxed at the highest rates, which go up to 65 per cent or 80 per cent, depending on the taxing region.

The taxable estate for inheritance tax purposes also comprises by legal fiction certain assets that are no longer part of the estate at the donor's death, including assets given away during the three-year period preceding the donor's death and that were not subjected to gift taxes (informal or unregistered gifts).

As for gift taxes, reduced rates apply to certain beneficiaries including non-profit entities. Bequests to state museums are tax-exempt.

No tax breaks are available when loaning or depositing art or other cultural property to public institutions.

Both lifetime gifting and bequeathing art or other cultural property to public institutions benefit from reduced gift and inheritance tax rates or from an outright tax exemption.

By making gifts or legacies to a public museum in a tax-efficient way, parties can reduce their total inheritance tax bill.

The 'acceptance in lieu' regime is where heirs or legatees of an important art collection can opt for payment of the inheritance taxes by means of works of art belonging to the estate of the deceased or the heirs or legatees, provided certain criteria are met, and subject to the appraisal and acceptance of the artworks by the relevant authorities.

Partial income tax relief is available to individual and (only for cash gifts) corporate taxpayers in the form of a deduction from taxable income, under certain conditions and subject to financial thresholds, in respect of gifts in cash exceeding (currently) €40 or gifts in the form of works of art made to or for the benefit of qualifying entities, including public museums and recognised cultural institutions.

30 A recent legal bill seeks to make the registration of Belgium of donation deeds passed abroad mandatory so as to trigger the Belgium registration duties immediately.

Gifts of money or other property to public institutions, which qualify as sponsoring or advertising expenses, are fully deductible if made within the scope of the donor's business and provided they are proportionate and reasonable.

VIII OUTLOOK AND CONCLUSIONS

The major legal issues requiring further implementation, clarification or guidelines include:

- a* guidance on the application of the anti-money laundering requirements on the art sector: as seen in certain other EU countries, it would be useful if the government or trade bodies could issue specific guidelines for art market participants, particularly regarding the new registration requirement for art professionals;
- b* guidance on the application of the European Import Regulation. The delicate question arises as to how the main obligation set out in Article 3(1) of the Regulation is to be construed and applied in practice given its wide and general scope,³¹ pending the entry into force of the administrative requirements for issuing import statements and import licences;
- c* clarity is required on the entry into force of the new legal restrictions on the ivory trade;
- d* difficult issues and conflicts will undoubtedly arise out of the co-existence for some time of the old and new Civil Code and the application of the new provisions on pre-existing situations. Future case law may resolve some of those; and
- e* the outstanding question regarding Belgium's ratification of the UNESCO 1970 Convention is when the law implementing the Convention will finally be enacted. This law is long overdue (the Convention was ratified on 1 July 2009) and much anticipated by art law professionals.

31 Article 3(1) entered into force on 28 December 2020. It reads: 'The introduction of cultural goods referred to in Part A of the Annex which were removed from the territory of the country where they were created or discovered in breach of the laws and regulations of that country shall be prohibited. The customs authorities and the competent authorities shall take any appropriate measure when there is an attempt to introduce cultural goods as referred to in the first subparagraph.'

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Lucie Lambrecht is the founder and managing partner of Lambrecht Law Office. She has been practising as a lawyer at the Brussels Bar since she obtained her law degree from the University of Leuven (KUL, 1986) and her master's degree in law from the University of London (LLM, 1987). Before she set up her own legal practice, Lucie worked at the banking and corporate practices of Linklaters' and Allen & Overy's Brussels offices for more than 20 years; she also worked as a lawyer in London for a couple of years. However, art law has always been Lucie's main area of interest, and she has further developed this since her time in London.

Lucie has been an independent adviser for the Flemish government for many years and was thus involved in the preparation of a number of pieces of important legislation in cultural property matters. She has been a speaker at various legal seminars and has published diverse articles in specialist legal periodicals in her different areas of expertise. She is a member of several professional associations and groups, including Collections Legal, the Institute of Art and Law, Professional Advisers to the Art Market, the Art Law Foundation and the Belgian Copyright Association. Lucie has been a substitute judge at the Court of Appeal of Brussels since 2014. She was appointed as an arbitrator in the original arbitration pool of the Court of Arbitration for Art in January 2020.

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Lucy Ryan is a qualified barrister-at-law, having graduated from the Honorable Society of King's Inns, Dublin, Ireland in 2017. Prior to this, she completed her undergraduate studies in law with history, graduating from University College Dublin in 2016. Following this, she finished her art law LLM at the University of York in 2020 for which she received the highest grade in her year, a first-class honours with distinction. In 2021, she completed a master's in EU public affairs and international law. She is fluent in English with professional proficiency in French.

During her art law LLM at the University of York, her studies focused on intellectual property law, comparative law, international protection of cultural property and art law. In particular, her thesis focused on the restitution process of art looted during the Second World

War, analysing specific restitution legislation in the common law jurisdictions of the UK and the US. Additionally, she scrutinised the moral element of these claims, probing whether a statute of limitation should remain or be removed in relation to claims.

Lucy has worked in a variety of legal areas, but is currently working in-house for an international tax company and conducting freelance legal consultancy work for Lambrecht Law Office. On a personal level, Lucy possesses an avid interest in amateur photography and has a love for art and music. She hopes to practise as an art lawyer in the future at a more international level.

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