

ART AND LAW: STATE OF THE ART

Wealth Structuring is a core activity for any private banker, including Nachenius Tjeenk. Works of art or even an art collection may have a part to play within this. The most important aspect is undoubtedly the aesthetic pleasure: you can sit back and admire a painting on your dining room wall whenever you want. With all due respect, you cannot say the same of a securities portfolio! The constantly rising prices on the art market mean that excellent returns can be achieved in financial terms. Moreover, a proper art collection is not taxed annually, as is the case with your securities.



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Art lovers are, however, confronted with the law in many ways, often unexpectedly. This starts with the purchase. Difficulties may commence with an ill-advised purchase by an inexperienced buyer or non-professional seller. Yet

there are other problems which may arise on purchase. Is it best to buy direct from the artist, from a gallery, from an art dealer or at an auction? The chosen method can make quite a difference. At an auction the buyer is usually aware of having to pay a mark-up (which may include VAT, or it may be due separately). But does the buyer also know the consequences of the EU's Seventh VAT Directive? In the Netherlands this generally means that the auction house, which usually acts as agent on behalf of the vendor, only has to charge VAT over the mark-up, but this may vary in other countries.

Spoils of war

If a buyer does not purchase art directly from the artist, then he or she also has to deal with what is known as *droit de suite*, or artists' resale rights. Artists hold inalienable rights to part of the proceeds of any subsequent sale when an art dealer is involved, whether as buyer or seller. A sale price of up to €50,000 entails *droit de suite* of 4%, a lower percentage applies above that price. Furthermore, not everything may be put up for sale. Art is also an expression of national identity. As Busken Huet said, the Netherlands is 'Rembrandt country'. That is why many countries enforce restrictions on

Art and the law converge on many aspects. Russell Advocaten has published two books dealing with several aspects of art and the law (in addition to the problems described), based on actual cases, which will be of interest to any art lover:

De Regelen der Kunst II en III
(The rules of Art II and III).

trading major works of art. In the Netherlands this is embodied by the Cultural

Heritage Preservation Act, which allows the sale of specific items only following permission from the relevant government minister. There are also many international treaties, particularly governing restrictions on trading in the spoils of war.

Nude

Legal problems do not cease once you possess the work of art. It remains a work of art and that means that the artist can object to any form of damage or change. Even in the case of ownership: the owner may not paint a moustache on a portrait or add clothing to a nude, as one German lady discovered in the early years of the previous century. The painting may need cleaning or restoring: the contract with the restorer needs to be studied closely. After all, the restorer will be working on a valuable object and carrying out many procedures which, if done inexpertly, could cause a huge amount of damage.

Damage

Many insurance companies require clients to list valuables separately; special security arrangements are needed above a specific sum. Most legal difficulties concern the sum for which the item is to be insured, however.

Underinsurance can lead to unpleasant consequences and to a limit being placed on the amount paid out. It is even more serious if an item is overinsured. After all, the client should not receive more than compensation for the actual damage suffered. In such cases, the indemnity principle is applied. If the insurance company suspects that a client has deliberately insured an item for too high a sum, it may refuse to pay out altogether. Any deceit on the part of the client leads to the insurance contract being annulled: *fraus omnia corrumpit*. That is why insurance policies for valuable works of art always include a clause on how the value of the insured item will ultimately be established in the event of an insurance claim. The parties may also expressly agree to an assumed value for the object. Such agreements (again: except in the case of deceit) are binding for both parties. A separate problem arises if a museum requests the loan of a work of art for a specific exhibition. Insurance plays a major part here, including during transport.

Farewell

Finally: there comes a time when the owner has to say farewell to his work of art, no matter how dear to him. In principle, works of art are treated in the same way as other assets on the death of the owner, but here too there are the beginnings of a specific regulation governing works of art. In 1999 the European Parliament adopted a resolution calling for regulations on death duties such that the heirs no longer have to pay the entire amount, but may pay at least part of the due tax in the form of works of art. However,

negotiations with the inspector of taxes are required for this.

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Russell Advocaten is located in Amsterdam. In addition to specialising in art and the law, the company has a dynamic and international business law practice. It acts on behalf of medium-sized and large (family) businesses in the retail, food/non-food, ICT and real estate sectors and private individuals. The practice also assists clients in their day-to-day business, e.g. through (boardroom) counselling, often not just solving but preventing legal problems.

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