

Buyers, keepers? Issues of title and provenance in international art transactions

By Noor Kadhim Al-Wakil



Section of Jan & Hubert Van Eyck, *Adoration of the Mystic Lamb (or the Ghent Altarpiece)*, 1432. This work ranks among the most significant works of art in Europe and is the most frequently stolen artwork in history, 6 times.

“Here’s an unrepeatable tidbit of gossip: a dealer I had worked with in the past was so hard up for money that he sold a painting three times, and he did this more than once; and, now faces an investigation and possible jail term.” -

Negotiating the transfer of a high value item of property, such as an artwork, is not easy, especially when that item has an historical and sentimental value. For one, how do you put a price on sentiment? Second, how should you, as a dealer, a lawyer, a gallery, or auction house, assure your client that someone else will not come and lay claim to their new acquisition? In this article I will take a look at the legal issues involved in purchasing artwork, from the purchaser’s perspective, and outline the steps you can take to protect yourself if you ever

happen to be involved in a title, or other type of third party, dispute after the transaction.

Tom, Dick or Harry

The underlying basis for a third party claim may vary, as may the type of claimant.

The artwork may have been stolen from the true owner at some point in the transfer process or the seller may have granted the artwork as collateral, by way of security, for a loan or other transaction, which he did not declare to the purchaser. If the seller defaults under the original transaction and the third party attempts to claim the secured art, an innocent purchaser may get a nasty surprise. The claimant may also be a museum or charity, to which the artwork was promised by the

seller in a moment of benevolence, and the museum later discovers that the promise was reneged upon. In these cases, a claim for the artwork may surface years after the purchase of the work. Claims may be brought by individuals or, in the case of stolen cultural items, by the government of a state that believes it has a right to reclaim its heritage. Claims may also be brought by financial institutions that want to sell the item to recover a debt, or by beneficiaries who believe they are entitled to the art for their collection.

I became more aware of these issues when acting for a prominent Middle Eastern art collector. The client had, about two years prior to my involvement in the case, bought a miniature sculpture in London from a friend, for a hefty sum. At the time, we had advised him to do his due diligence on the item and include extensive protection in his contract, covering issues such as good title, indemnity and insurance. In the final version of the contract, which we did not see until after the client had signed, we saw that he had deleted those important provisions. Why? Because the seller was an old friend, and my client did not see the need to include the warranties in a contract, or upset him. As one art commentator has said, in the hushed and clubby world of art dealing, such an inquiry can sometimes appear rude. What happened next for my client is a classic “I told you so” moment. A third party creditor of the seller started an action in the UK courts, claiming that the artwork was given to him as security, and that he intended to reclaim the work if his debt was not paid. My client was caught in the middle as the innocent third party buyer, and, as a UAE resident, may be requested to appear as a witness in the proceedings. If the debtor ultimately fails to satisfy the debt, my client may have to return the artwork to satisfy the terms of the security, under UK law.

Between a rock and an art place

Inserting adequate protection may not be enough to protect a collector who wants to keep hold of the art, rather than merely be paid compensation for it if the result is that he is deprived of the work. For a well-known collector such as my client, a dispute over the right to ownership of a work can come as both an emotional and financial shock. Unlike other, more

readily replaceable, objects, artwork is unique and personal. It has an ‘intangible value’ attached to it, which cannot be reduced to figures. The emotional value of an art transaction has surfaced many times in wrangles between high-profile individuals and art industry players. In 2012, Christie’s withdrew Jean-Michel Basquiat’s 1983 painting *Museum Security* from sale. It had emerged, just before the sale was due to take place, that the painting was part of a title dispute, subject as it was to a third party guarantee, and the threat of a title dispute initiated by Spencer-Churchill prompted the painting to be withdrawn. By way of background, in early 2011, a member of the Mugrabi family had tried to buy the painting for \$5.5million, an offer that incensed Spencer-Churchill so much that he instructed his dealer not to sell the painting to anyone connected with the Mugrabis. The dealer went against the seller’s wishes and sold the painting to none other than a Mugrabi family corporation for \$6.125 million. To make matters worse, the Mugrabis struck a deal with a third party to sell the artwork at auction, setting a reserve price lower than that which would have satisfied Churchill-Spencer. Christie’s estimate was that the painting would sell for anything from \$9 to \$12 million. The Mugrabis’ intended purchaser struck a deal that the painting would be sold to him for a minimum price and, were the price to be exceeded at auction, the profit would be split between the purchaser and the Mugrabis. When Spencer-Churchill found out that his agent had lied to him and that the reserve price was so low, his rage prompted him to intervene, claiming he was duped in his original deal with the Mugrabis. It was the threat of the title claim that led to the painting’s withdrawal, needless to say, a somewhat embarrassing situation for Christie’s.

Stolen art

It may surprise the reader to learn that trafficking of cultural property is one of the most prolific types of trafficking in today’s society. While definitive statistics cannot be confirmed by Interpol, recent US Department of Justice reports cite art crime as being just below drug and arms trafficking in terms of value. Putting exact figures on art crime, however, is impossible because the value of a painting, or an item of



Jean-Michel Basquiat, *Museum Security*, 1983. Acrylic on Canvas.

cultural property, is not always the same in the country in which it was stolen and the destination country. Also, artwork thefts often go unreported because the money used to purchase the works may not have been declared, for tax reasons, or because the money represented the proceeds of criminal activity. This subject is discussed in more detail, in relation to the recovery of art, below. While the statistics may not be verified, one thing seems to be clear. Art crime is no longer the relatively low-value ideological crime it used to be. It has shifted from the province of what one commentator has dubbed “burglars and break-in artists whose résumés might feature armored-car robberies, small-time bank jobs, and drug-dealing” and into the hands of more sophisticated networks of organized criminals. In the last decade, while the popularity of stocks and shares in intangible assets as investments has diminished, art (especially contemporary art) has, along with commodities such as gold, silver and wine, risen to become a new super-asset class. When an artist reaches a certain celebrity status in society, or where the work concerned is one of a handful of rare ‘Old Masters’ works, no longer does the artwork merely retain a sentimental subjective value alone. It gains a second, measurable monetary value, dissociated from emotion. This, coupled with physical artworks’ quality of desirability as ‘unique’, ‘non-replicable’

items of beauty, makes them a target for increasingly sophisticated criminals.

Another phenomenon of the twenty-first century has been the looting, by fundamentalist terrorist groups, of state antiquities. The terrorists will then try to sell their looted works on to unsuspecting art galleries and private collectors. The looters rely on this as a source of funding for their other criminal activities. Examples include Mohammed Atta, who tried to sell looted antiquities in 1999 as a funding source for the 9/11 attacks. Arts and culture commentator, Michael Kelly (Esquire), divides nations into ‘art hungry’ and ‘art rich’ states. The hungry ones are mostly those Western states that do not possess cultural riches of a scale comparable to the emerging or developing states, which they often colonized and sacked in the past. Much of the art from the art-rich states therefore ended up in the coffers of the art-hungry nations, either through sale or outright theft. Historically, art-hungry nations, collectors and museums paid little regard to the cultural significance of the antiquities they recovered from the art-rich states. All they cared about was acquiring as much property as possible. We can trace this back to the time of the Elgin Marbles, torn from their contextually important location in the Parthenon on the Acropolis in Athens, and moved to Britain as part of a controversial agreement between the Ottoman authorities and the British ambassador Lord Elgin. Most of the artwork that originated before World War Two has a greater risk of being the subject of disputed title claims due to the high percentage of art stolen during the Holocaust or pre-Holocaust era. This is why purchasers should be even more diligent when purchasing artwork emanating or first sold during that era.

Encumbered art

A third type of claim may arise when someone, usually a bank, turns up on the scene and asserts that the seller had, prior to its sale, granted them a lien or security over the artwork. According to Artvest Partners, as much as \$14 billion worth of art has been pledged as collateral on art loans. This is a sign of just how much momentum the art loan business has gained since the recovery of the art market. What is more, the current size of the art financing market has been said to be in the range of US

\$7 billion and growing. If this much art is out on loan and double that figure is pledged as collateral against art transactions, the chances of defaults, and the possibility of a claim against an unsuspecting third party purchaser, are much higher than before.

Promised art

The fourth type of claim that can arise is where a museum, gallery, or charitable institution attempts to reclaim artwork that was sold to an innocent third party on the basis that the work was promised to that institution by the seller at some point prior to the sale. During prosperous times, the seller may have promised the work to a charitable organisation and then neglected to inform the beneficiary of this change of heart. As in the case of pledged artwork, a claim can then arise. Purchasers do not pay much attention to these issues because they rely on art dealers, or the auction houses, to eliminate these potential defects in transfer. The dealer usually represents and warrants to the purchaser in the contract that the work is being transferred free and clear of all liens. If they have not performed their due diligence correctly, purchasers would normally be able to sue the dealer rather than the original seller. The steps that should be taken in the due diligence process are explained below. However, merely purchasing work through a dealer does not necessarily protect a purchaser in a lawsuit for the recovery of an artwork, even if both the purchaser and the dealer were ignorant of defects in the seller's title.

When in Rome...

The place where the artwork was purchased is likely to be relevant. This is because it is usually the place of performance of the contract (i.e. the entry into the contract), whose laws govern claims related to title in the absence of choice by the parties. This is because in some jurisdictions, usually developed common-law states, more sophisticated laws exist to protect the return of property, and equitable remedies may apply. The protection may be contained in local law or supported by international treaties to which those states have signed up, or both. But amongst these jurisdictions, different regimes apply depending on the stance that each country takes in relation to issues of title transfers

for art sales. Let us take the USA and England as examples. In the USA, a person cannot transfer title to a third party if they did not have it to begin with. Although the US courts will generally measure the steps taken by the purchaser to guard against buying stolen art against the efforts the claimant made to recover the art, the burden will usually weigh more heavily on the purchaser, who is assumed to have the sophistication and the resources to authenticate the history of a purchase. In the UK a stricter standard applies than in other European jurisdictions, but it is not as high as in the USA. A purchaser of stolen, pledged or promised work cannot acquire good title to the work regardless of the defect in title of the seller even if he was an innocent party. This is because the principle of "nemo dat quod non habet" applies (i.e. "you cannot transfer something you do not have").

There are a few statutory exceptions to this rule. Notable exceptions occur under the Sale of Goods Act 1979, where the purchaser may prove, within the limitation period, that he was acting in good faith and without knowledge of the defect, and he was either buying from a 'seller in possession' (who delivered goods to him which he had already contracted to sell to another party) or he was buying from a 'buyer in possession' (for example, from a buyer whose property was still subject to a retention of title clause, such as goods under a hire purchase agreement where title has not yet passed to the buyer). An onerous burden rests on the purchaser to prove that he did carry out adequate due diligence on the purchase, especially if it is a dealer or gallery who should know better.

However, in the UK, a limitation period of six years from the date of the contract's formation applies. This means that if on the expiry of 6 years after the victim's right arises (i.e. after the first acquisition of the item in good faith) no action has been initiated, the victim's right is extinguished. In other European jurisdictions, one can transfer good title without having it to begin with. Different limitation periods apply in relation to commencing actions in different European states. In Germany, the limitation period for actions is ten years, and in Italy it can be almost immediate.

Culture cultures

In the UK, under the Theft Act, a dealer can be found guilty of handling stolen goods provided the prosecution can prove there is reasonable cause to believe the goods were stolen and that the dealer acted dishonestly. The exchange of cultural property, and antiquities specifically, presents the greatest risks here. The majority of antiquities on the market do not come with adequate documents of provenance, giving rise to the reasonable suspicion that they have been looted or smuggled. This is especially the case if they come from the major drug-producing countries of Asia or South America, or the war-torn Arab states. The dealer must believe the goods were stolen, as mere suspicion is not enough. Further, he must also have acted dishonestly. However, under the Criminal Justice Act and the Drug Trafficking Act, all you need prove is that the dealer had good reason to suspect that the artwork was stolen if they are acting as an intermediary to the transaction. In using ‘suspicion’ as opposed to ‘belief’ as the benchmark, the evidential bar has been set lower.

Using common sense in such instances is important. The anti-money laundering laws that have been implemented into UK legislation as a result of the EU legislation are even tougher in combatting art crime. While these go beyond the scope of this article, it is important for prospective dealers and purchasers, especially galleries of repute, to take note of the gravity of the implications of being found complicit in an art crime under these provisions. It may be trite, but it is important to stress that purchasers on the secondary market should obtain, where possible, a verified and unbroken chain of documents of provenance. The importance of this rises with the value and cultural significance of the transaction. Added to each specific country’s national legislation, there is a further layer of transnational legal protection of which purchasers, dealers, and auctioneers should take heed, especially when buying cultural antiquities. After notable decisions in relation to the return of stolen art, such as the US court judgment in 1989 on the Kanakaria marbles, doing due diligence on art transactions became a hot issue at an international level. In that case, the Indiana district court found that Peg Goldberg was not acting in good faith when she bought the Kanakaria mosaics because she had not been

properly cautious at the time of purchase. Amongst other things, she knew the objects came from a territory under military occupation, knew they were unique, that the transaction was carried out in haste, and failed to enquire as to the provenance of the items. Subsequently, the 1995 UNIDROIT Convention attempted to fill the gaps of the 1970 UNESCO Convention. Although the UNESCO Convention lies at its core, the UNIDROIT Convention is focused more specifically on the recovery stage and establishes conditions for restitution and return claims on stolen or illegally exported cultural objects. Article (4) of the UNIDROIT Convention recommends that due diligence be carried out at the time of purchase when transacting for cultural material. The 1999 Council for the Prevention of Art Theft (CoPAT) Codes later tried to set a standard of diligence which aimed to protect honest dealers and auctioneers from theft actions, and were also designed to prevent the transfer of stolen art.

Terms of art

If you follow the steps below, as a purchaser, you should be able to satisfy yourself that you have done all that you can to ensure that your purchase was not illegal, or contractually defective.

1. As a first step, Interpol’s art theft database and the Art Loss Register should be checked. The Art Loss Register is the most comprehensive international database of stolen, missing and looted artworks, and adds around 14,500 art works each year.
2. If buying art in the USA or from a US seller, it is also sensible to verify that under the Uniform Commercial Code (UCC) in the states which are a party to the UCC that the artwork is not the subject of any pre-registered security interest. It is only worth doing a UCC search in states in which the seller has a residence; if the seller does not have a residence in the USA, the claimant will not be protected by the UCC provisions. If the seller is based in the UK, it may also be prudent to search the register of bills of sale in the High Court.
3. A Google search should also be conducted on the seller and on the artwork to ensure that there are no suggestions that the work has been stolen or promised to a third party. Checking these registers and conducting searches are also helpful in determining, if faced with

a title claim, that the buyer carried out enough due diligence before buying the work.

4. When buying artwork emanating from around the time of the Second World War an even more diligent check of the provenance of the artwork should be undertaken. During the Holocaust, a high percentage of artwork was stolen. If there is a gap in the provenance of works of art known to be in Europe any time in the period 1933 - 1948, one should check the provenance for any “red flags”, such as the names of Jewish families or dealers who collaborated with the Nazis.

5. Make sure the seller inserts representations and warranties that they own the artwork free and clear from all liens, and that the work has not, and will not, be pledged to a third party. This is to safeguard against any claims by creditors or museums later on who may claim the artwork was promised to them. A search of the registers is unlikely to reveal these potential claims, so these should be covered in the contract.

6. Request that the seller insert adequate indemnities in the purchaser’s favour in the event that the above representations and warranties are breached and he is faced with any title claims. Such indemnities should include legal fees, as these are likely to be high.

7. If the artwork is not physically in the possession of the seller at the time of purchase, and is likely to remain with a third party for any period of time after purchase and before delivery, the purchaser should obtain written assurances from the party in possession that they do not object to the transfer, or at least obtain a contractual assurance from the seller that he will procure the possessor’s consent. This is important as it is more difficult to reclaim artwork that is already in the physical possession of a third party for practical and emotional reasons.

8. Obtain title insurance. This will not protect against losing the piece but will at least recover the amount paid for the piece or, if the insurance covers this, the greater amount of the sum paid and the market value at the time of loss.

The last word

Most transactions should be straightforward: you see a sofa in a shop and you buy it. But for paintings, artefacts and sculptures, is not always that simple. This is because such things have attained rarity and prestige and an intrinsic value linked to social stature and desirability. The cross-border nature of art transactions, the different laws that may apply, and the diverse origin of the artwork should make purchasers extra wary. As the CEO of a specialist art insurance company has pointed out, just because you bought it, it does not mean that you own it. Your newly-acquired Rembrandt may, literally, be ‘a steal’.

About the writer

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End Notes :

i Kenny Schachter, *Art Market Monitor*, 2012.

ii The case was settled in late 2012 for USD 15 Mil, and featured in *Christie’s Post-war and Contemporary Sale in New York on 13 Feb 2013*

iii Anthony Amore and Tom Mashberg, *Stealing Rembrandt (The Untold Stories of Notorious Art Heists)*, Palgrave Macmillan (2011).

iv *According to the 2011 Report.*

v UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.*