

THE ART LAW REVIEW

Editors

Lawrence M Kaye and Howard N Spiegler

THE LAWREVIEWS

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PREFACE

We are pleased to introduce you to the very first edition of *The Art Law Review*. The field of art law has developed over many years to become a significant speciality in the law, as collectors, galleries, auction houses, museums and everyone else involved with art have expanded their collections and businesses throughout the world. Besides involving billions of dollars in the trade, art law has become the means by which the diverse cultures of our societies are governed and encouraged to develop.

We have invited leading practitioners in the field of art law around the world to detail the key developments in their respective countries pertaining to this dynamic and growing area of legal expertise. We have also asked that other leaders in the field focus on particular important issues in this area of law. We thank all our distinguished authors for their fine contributions. We hope you will find them informative, instructive and interesting.

By way of introduction, a brief overview of developments in this field during the past 50 years in the United States, where we practise, seems a good place to begin. Considering that English common law, upon which US law is based, originated in the early Middle Ages, the field of art law in the United States can rightly be characterised as a newborn. The roots of art law in the United States began in the form of intermittent cases in the early to mid twentieth century when visual artists began confronting problems in protecting their work – and themselves – particularly in the areas of copyright and obscenity.¹ Indeed, a body of law that could be characterised as art law did not really begin to take hold in the United States until the 1960s, and even then in a most disorganised fashion. The late and renowned Professor John Henry Merryman, who in 1972 offered at Stanford Law School the first formal art law class in a US law school entitled ‘Art and the Law’, wrote a few years later that he started the course partly out of ‘a desire to determine whether “art law” really was a field’ and noted that he ‘took a good deal of ridicule from colleagues who thought the whole enterprise frivolous and insubstantial’.²

We have come a long way since then. A multitude of art law courses are now taught at US and European law schools and other institutions, such as the major auction houses.³ And although in the late 1960s and early 1970s, when we began practising art law, one would have

1 See generally Joan Kee, *Models of Integrity: Art and Law in Post-Sixties America*, Introduction, 1-42 (University of California Press, 2019).

2 John Henry Merryman, ‘Art and the Law, Part I: A Course in Art and the Law’, 34 *Art Journal* 332, No. 4, 332 to 334 (Summer 1975).

3 See, e.g., Center for Art Law, ‘Art Law Courses and Programs Worldwide’, at www.itsartlaw.org (last accessed 29 October 2020).

been hard pressed to find anyone in the Martindale Hubble Law Directory designated as an 'art lawyer', today art lawyers proliferate in the directory; and for the New York area alone, where we practise, there are several pages listing lawyers who call themselves art lawyers.

So, what is art law? Professor Merryman observed that a primary reason for creating his new and novel art law curriculum was that 'the growth of American art and the emergence of the United States as a major art market involved problems and interests that were sufficiently substantial and complex to call for the services of specially attuned and trained practicing lawyers'.⁴ Well, Professor Merryman's observation was quite prescient, for that is exactly what has happened during the past 45 years in the United States, and indeed throughout the world. Art law became a respected discipline within the law, and more and more practitioners around the globe began to specialise in the field as the nexus between art and law became more clearly defined.⁵

What had previously consisted of random cases involving visual artists and emerging issues affecting the growing art market started to morph into a cogent body of law. Even before Professor Merryman started his course and wrote the textbook to accompany it (*Law, Ethics and the Visual Arts*), in 1966 Scott Hodes published a book on the law of art and antiquities.⁶ Many other texts followed.⁷ Art law seminars and symposia began to proliferate and now take place almost every day somewhere in the world.

As the international art market grew and became more sophisticated, so did the practice of art law and the number of practitioners who began to devote themselves to the field. Today, art law is an amalgam of myriad legal areas that academicians, practitioners, lawmakers and judges have adapted to the specific needs of stakeholders in the art world, and art law specialists have learned how to apply traditional legal principles to art market disputes and transactions as the art world became more prevalent and more complex. The stakeholders in need of special art law expertise range from the poorest artists to the most sophisticated corporations and government entities. Even a partial list is daunting: museums, collectors, importers and exporters, galleries and dealers, auction houses, living artists (and even dead ones), including digital artists, families and family offices, estates, trusts and foundations, insurance companies, appraisers, art advisers, experts, consultants, corporate art collections, and national and state governments. To address the needs of these varied stakeholders, the experts in the field have taken general legal principles and areas of practice and applied them to the unique needs of the art law stakeholders, in addition to creating new specialties uniquely applicable to art law disputes and transactions. Among many others, these include property law, the law of contracts, consignments, torts, intellectual property, tax, trusts and estates, authentication, insurance, cultural property, moral rights, resale rights, free speech, sales and other commercial law, warranties, conflicts of law, private international law, comparative law, customs, criminal law and securities law. And the list goes on.

4 Merryman (footnote 2), at 332 to 333.

5 A practical and informative guide to the development of art law can be found in Kee (footnote 1). The early roots of art law are also explored in James J Fishman, 'The Emergence of Art Law', 26 *Clev. St. L. Rev.* 481 (1977).

6 *The Law of Art & Antiques: A Primer for Artists and Collectors* (Oceana Publications, 1966).

7 Notable among the many are Franklin Feldman and Stephen Weill, *Art Works, Law, Policy, Practice* (New York Practising Law Institute 1974); Leonard Duboff, *Deskbook of Art Law* (Washington DC Federal Publications, 1977); and the seminal text on art law, Ralph E Lerner and Judith Bresler, *Art Law: The Guide for Collectors, Investors, Dealers & Artists* (Practising Law Institute 1989), which is now in its fifth edition.

We have been practising art law since before it became a field, having started in the early 1970s. We believe our own professional journeys serve to illustrate some of the ways this area of law has grown and developed, so we would like to briefly share some of our experiences.

Larry first entered this field as a summer associate at the firm of Botein, Hays, Sklar and Herzberg in 1969. On reporting for duty at this first legal job, he was introduced to a brilliant attorney, who ended up serving as a revered mentor for both of us for many years to come, Harry Rand. Harry was representing the Weimar Art Museum, located in what was then East Germany, which was seeking to recover two paintings by Albrecht Dürer that were taken during the Second World War by US soldiers from a castle in which the paintings had been placed for safekeeping. East Germany (officially the German Democratic Republic), which owned the museum, sued a negligence lawyer residing in Brooklyn, New York, who had purchased the works from a US soldier who appeared at his door one day in 1946.

As it turned out, this was the first case of a foreign sovereign suing in the United States to recover cultural property. It involved many legal issues that took some 15 years to resolve finally in favour of East Germany, to which the paintings were ordered to be returned. The legal principles established in the *Weimar Museum* case continue to be cited in cases involving the recovery of artwork and other cultural property, especially those relating to the statute of limitations, and *Weimar Museum* stands as one of the iconic cases in this area of law.

During the pendency of the case, Howard joined Botein and started a professional relationship with Larry that has spanned many decades.

Our success in the *Weimar Museum* case and the publicity surrounding it attracted the interest of the Republic of Turkey, which was in a dispute with the Metropolitan Museum of Art (the Met) regarding a remarkable collection of ancient jewellery and other artefacts on display in the Met, which had been looted from caves in Turkey many years before. It turned out to be one of the leading cases involving the restitution of antiquities looted from foreign sovereigns, which led to a worldwide interest in trying to prevent such looting from countries around the world.

We sued the Met on behalf of Turkey and a six-year litigation ensued, largely spent defending dismissal motions brought by the Met on the grounds of the statute of limitations and other technical defences. But after we got past all that time-consuming and expensive motion practice, we then commenced the long discovery process, whereby we obtained information from the Met's own files about its knowledge of the objects' provenance or history, and its conduct in acquiring them. Nonetheless, the case presented significant obstacles for us. It was, after all, one of the first major cases brought against a major museum by a foreign government to reclaim looted cultural property. Indeed, at the time of its inception, most commentators were openly questioning how a previously undiscovered and undocumented collection of antiquities could be identified as having been looted from Turkey, let alone recovered.

However, we did prevail and the antiquities, known as the Lydian Hoard, were returned to Turkey in 1993 and exhibited at one of the great Turkish antiquity museums, the Museum of Anatolian Civilizations in Ankara, where it was greeted with great interest and excitement by Turkish visitors to the museum as well as those from other countries. We were privileged to visit the museum when the objects were displayed there, and we cannot adequately describe the excitement displayed by the Turkish viewers. Once the director revealed to them that we and our colleagues had assisted the government in securing the return of the objects, many people came over to thank us personally for helping to ensure that this important part of their heritage had been returned, to be viewed and appreciated by the Turkish people. The Lydian

Hoard case is considered by many as the starting point for the efforts by art-rich countries to reclaim their cultural property, which have continued and increased to this day.

As that case was ending, Botein closed shop and we joined our current firm, Herrick, Feinstein. We brought what was now a growing caseload of restitution work to Herrick, which until that time was a very successful firm that had no experience with art law. Indeed, there were still only a very few attorneys who regularly practised in this area of law.

By the mid 1990s, we were certainly known as art lawyers, particularly in the area of restituting looted antiquities to their country of origin. But then, for various reasons, the world's attention started to turn back to the Nazi era before and during the Second World War, and it became clear that the Nazis not only committed the most horrendous crimes against humanity, but they also committed the most extensive theft of cultural property in modern human history. As restitution experts, it was a natural fit for us to become involved in cases brought to recover artworks looted by the Nazis so that they could finally be returned to the families of the victims of the Holocaust. We would like to briefly mention two of those cases.

We were retained to handle one of the first important cases involving Nazi-looted art, representing the family of an art dealer who escaped from Austria after having had one of her paintings stolen by a Nazi agent. The painting by Egon Schiele is known as *Portrait of Wally*. The case started when the Wally was seized from the Museum of Modern Art (MoMA) in New York by state and then federal prosecutors after it was brought to the United States as part of an exhibition of work by Schiele in the collection at the Leopold Museum in Vienna.

Even though it took more than 10 years for the *Portrait of Wally* case to be finally resolved, it had an enormous influence from the moment it started. The fact that a loaned artwork at MoMA could be seized by US government authorities sent shock waves throughout the world and was a major factor in causing governments, museums, collectors and families of Holocaust victims to focus their attention on Nazi-looted art. Less than a week before the scheduled trial, the case was settled on three major terms:

- a* the Leopold Museum paid the family US\$19 million, reflecting the true current value of the painting, in return for the surrender of their claim;
- b* a ceremony and exhibition was held at the Museum of Jewish Heritage in New York for three weeks before *Portrait of Wally* was returned to Austria; and
- c* the Leopold Museum agreed that signs would be permanently affixed next to *Portrait of Wally* at the museum and wherever it might be exhibited anywhere in the world, explaining the true facts of the painting's ownership history.

Shortly after the *Portrait of Wally* case commenced, we assisted the sole living heir of the renowned Dutch art collector and dealer, Jacques Goudstikker, to recover an extraordinary collection of Old Master paintings that had been looted during the Second World War by Herman Goering, who was second only to Hitler in the Nazi regime. With the adoption in 1998 of the Washington Principles, a non-binding international convention that for the first time brought together 44 nations in an effort to foster the restitution of property looted during the war, the Netherlands adopted a new restitution regime designed to right the wrongs of the past. To make a very long story very short, we assisted Marei von Saher in her Dutch restitution proceedings, and in 2006 we were able to effect the return of 200 works to her.

We also became involved in major art restitution cases brought against foreign sovereigns, which involved the Foreign Sovereign Immunities Act, a law that has been used in numerous cases since then as the basis for suing foreign sovereigns to recover artworks in their possession.

Over the years, we have also developed a wide-ranging practice in non-restitution art disputes, from simple breach of contract cases to more complex disputes involving dealers, collectors, artists and other art world stakeholders covering a wide range of disputes including trademark and copyright infringement, defamation, moral and visual rights, breach of warranty, misattribution, tax and trust matters, valuations, appraisals, experts and auctions.

We also became involved in the transactional side of art law. This aspect of our practice expanded when our restitution clients began asking us to handle transactions involving the sale and other disposition of major artworks and collections we had recovered for them. The transactional side included not only private treaty sales and auction sales, but also estate planning, providing tax advice, assisting not-for-profit entities, planning nationwide and international loans and exhibitions, and advising banks and collectors on using artworks as collateral for bank loans, among many other cutting-edge art law issues.

A sampling of the varied transactional matters we have been privileged to work on is a microcosm of the range of transactional matters that specialist art lawyers came to handle as the international art market expanded. To name but a few: we represented the Neue Galerie in New York in the acquisition of the famed *Woman in Gold* painting by Gustav Klimt, depicted in the film of that name, which has become the *Mona Lisa* of that museum's collection, regularly attracting huge numbers of visitors; we represented the European Fine Arts Foundation (TEFAF) in the creation of its New York Fall 2016 Art Fair; we represented the Malevich heirs in numerous auction sales during the course of 15 years, including the US\$60 million sale of *Suprematist Composition* (1916), which set a world record for Russian art; we represented the Estate of Frances Lasker Brody in the historic sale of its art collection at Christie's (the highlight of which was a Picasso masterwork, *Nude, Green Leaves and Bust*, which sold for a then auction record of US\$106.5 million); we represented a private art collector in one of the largest transfers of Mesoamerican art to a museum, and advised the collector's foundation dedicated to the study and advancement of Mesoamerican art; and we conducted an internal investigation on behalf of an internationally recognised art gallery concerning the authenticity of certain paintings bought and sold by the gallery.

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

- a* cultural property disputes;
- b* the art market;
- c* art authentication;
- d* art and technology;
- e* international copyright issues;
- f* moral rights; and
- g* recent trends in art arbitration and mediation.

We then present reports on recent art law developments in 21 key countries. Each country's report 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, trusts and foundations, and finally offers some insights for the future.

We hope you enjoy reading all of these excellent contributions.

Lawrence M Kaye and Howard N Spiegler

Herrick, Feinstein LLP

New York

December 2020

Part II

JURISDICTIONS

ISRAEL

Meir Heller, Keren Abelow, Talila Devir and Niv Goldberg¹

I INTRODUCTION

The world of art and culture occupies a central place in Israel. One indication of this is the fact that Israel has the most museums per capita in the world,² including the Israel Museum, one of the leading encyclopedic museums in the world.³

Most of Israel's art is traded in auctions and through galleries, though there is no database of the volume of transactions. Many of the galleries represent living Israeli artists and concentrate on twentieth and twenty-first century art.

Christie's and Sotheby's have representative offices in Israel, which facilitate transactions for Israeli and international clients and do not hold auctions in Israel. Prominent Israeli auction houses are Kedem, Tiroche and Ishtar. Contemporary Israeli artists have achieved international success, including Michal Rovner, Sigalit Landau, Yael Bartana, Zibi Geva and Gal Weinstein. Prominent private collectors based in Israel include the publisher Amos Schocken, Zvi Meitar, Doron Sebbag and Igal Ahouvi. The late shipping tycoon Sammy Ofer was also a prominent collector.⁴ There are important corporate collections of Israeli art, such as those of the Phoenix Insurance Corporation and the Israel Discount Bank.

No specific legislation regulates art transactions,⁵ and so the general contract and sales laws apply, as discussed herein. Legal disputes over transactions are adjudicated in arbitration

1 Meir Heller is a senior partner, Keren Abelow is a senior associate, Talila Devir is an associate and Niv Goldberg is a consultant at E Landau Law Offices. The authors express their gratitude to Leora Kesten Roth, a partner at E Landau Law Offices, for her generous assistance.

2 '10 of Israel's best museums', CNN Travel (2017), at <https://edition.cnn.com/travel/article/best-israel-museums/index.html> (last accessed 6 October 2020). In the past decade, Yad Vashem was twice rated by tripadvisor.com in the top five and top 25 museums in the world.

3 Fifty-eight of more than 200 museums are recognised according to the definition of the Museums Law, 5743-1983, SH 1084 p. 113 (as amended). See also Reshimat Hamozeonim Hamukarim Al Pi Chok (List of Museums Recognized by Law) Israeli government, at www.gov.il/he/departments/general/list_of_museums_recognized_by_law (in Hebrew) (last accessed 6 October 2020). Welcome to the Israel Museum, Jerusalem, at www.imj.org.il/en/content/welcome-museum (last accessed 8 October 2020). See also 'The Largest Art Museums In The World', WorldAtlas, at www.worldatlas.com/articles/the-largest-art-museums-in-the-world.html (last accessed 8 October 2020).

4 Holder of one of the largest Chagall collections, with estimated total value of more than US\$500 million.

5 Except for transfer of copyright, which requires a written document.

or in court. The relevant court is primarily determined according to the financial value of the matter and location of the transaction or defendant.⁶ The sale of items from museum collections is regulated by law,⁷ which sets conditions for such sales.⁸

A recent trend in art transactions is the growing market of Israeli auction houses using online services,⁹ as well as galleries transitioning into online auction houses. These changes were necessitated following the coronavirus pandemic, which resulted in restrictions on foreign visitors to Israel, and have allowed international collectors greater access to the local market.¹⁰

II THE YEAR IN REVIEW

A particularly notable development in recent years concerns the tension between private and public ownership of culturally significant assets. Primarily two laws regulate ownership of cultural property: the Antiquities Law 5738-1978¹¹ and the Archives Law 5717-1955.¹² Whereas the Antiquities Law radically limits private ownership of the types of items it regulates,¹³ the Archives Law provides for limited restrictions on the handling and export of publicly significant writings and other type of records.¹⁴

In a series of recent rulings, the state took a position of limiting private ownership of certain disputed cultural properties, on one occasion even taking action to deprive a dealer of ownership of manuscripts put up for auction, preventing its sale.¹⁵ The grounds for action were that the properties in question have a value that transcends the boundaries of the individual, and is of great value to the entire nation – mainly because of their importance in preserving collective memory and identity.

The courts acknowledged the role of the state as a homeland and, therefore, a cultural centre for the entire Jewish people, to justify rulings preferring public ownership to private ownership.

6 Courts Law (Consolidated Version), 5744-1984, § 40 51, SH 1123 (as amended), p. 198.

7 Museums Regulations, 5745-1984, KT 4638 p. 397; Antiquities Law, 5738-1978, SH No. 885 (as amended), p. 76.

8 The conditions are: obtaining the museum's management's approval for sale, drafting a written sale agreement, and using the proceeds of the sale solely for the purpose of purchasing another exhibit (unless the museum management decides otherwise); see Museum Regulations (footnote 7, above), § 12. If the sale concerns antiquities, the museum is further required to notify the Antiquities Authority; see Antiquities Law (footnote 7, above), § 26.

9 e.g., *Invaluable and Bidspirit*.

10 Although hard data for 2020 is not yet available, anecdotal evidence and the online auction scene globally indicate that this internationally accessible market has seen intensified growth as a consequence of the covid-19 pandemic.

11 Antiquities Law (footnote 7, above).

12 Archives Law, 5715-1955, SH No. 171 (as amended), p. 14.

13 Antiquities Law (footnote 7, above), § 2.

14 Although the State Archivist is entitled to demand a review any archival material (but not take possession over them), she is allowed to photocopy the material, only subject to its owner's consent; see Archives Law (footnote 12, above), § 9.

15 See Opening Motion (Jerusalem District Court) 34193-07-20 *Attorney General v. Bidspirit et al.* (filed July 2020), NetHamishpat Court Database (in Hebrew).

This principle was introduced in 2015 in the *Vienna case*¹⁶ regarding the ownership of archival material that documented 300 years of history of the Vienna Jewish community. The Jewish community that remained in Vienna after the Second World War transferred the materials to the Central Archives for the History of the Jewish People (CAHJP), in Jerusalem, as the community was not able to preserve them at the time. After 66 years, the community leadership requested their return, but was refused, and thus turned to court. The court ruled in favour of the CAHJP, holding that in certain circumstances the importance of maintaining cultural objects and making them accessible to the public takes precedence over formal questions of property ownership.¹⁷

This innovative approach was used again in 2019 in a dispute about drafts of Israel's Declaration of Independence, dated 1948. After 70 years, the drafters' heirs put them up for sale at auction, but the state sued for ownership, and was denied owing to the doctrine of laches.¹⁸ On appeal, the Supreme Court ruled that there is a superior public interest in having the drafts in the hands of the state, emphasising the importance of cultural properties when conflicted with the general property law. By doing so, the Supreme Court created a formal distinction between private property and cultural property.¹⁹

This approach culminated in the case of the Damascus Crowns,²⁰ a dispute about nine ancient codices of the Bible (Crowns) salvaged by the Mossad from the synagogues of the devastated Jewish community in Syria. The court favoured the position of the National Library of Israel, classifying the Crowns as 'treasures of the Jewish People' and concluding that the most appropriate place for them is the National Library – despite the claims of various groups of Damascene Jews and their last Rabbi, who had helped to salvage the Crowns.²¹ The court clarified, once again, that cultural assets have a distinct status from ordinary property in a manner that justifies their transfer to public ownership. An additional prominent case in this context regards the literary inheritance of Franz Kafka and Max Brod,²² in which the Supreme Court of Israel recognised the National Library, over several other claimants, as the appropriate body to house this literary legacy, considering its wide cultural importance.²³

16 C.A. (Supreme Court) 9366/12, *Israelitische Kultusgemeinde Wien v. Central Archives for the History of the Jewish People* (24 September 2015), Nevo Legal Database (by subscription, in Hebrew).

17 Guy Pessach, 'The Court and the Politics of Memory: Following 9336/12 *Israelitische Kultusgemeinde Wien v. Central Archives for The History of The Jewish People* (2018) 48 *Mishpatim* 91, 92.

18 Civil Appeal (Supreme Court) 8323/17 *State of Israel v. Beham* (20 May 2019), Nevo Legal Database (by subscription, in Hebrew).

19 *id.*, at para. 2 of Justice Hendel's decision.

20 Civil Case (Jerusalem District Court) 17135-12-14, *National Library of Israel v. Ministry of Justice* (17 August 2020), Nevo Legal Database (by subscription, in Hebrew).

21 The case was covered by the international press; see, e.g., 'Israeli court: Damascus Bibles to stay in National Library, *Washington Post*, at www.washingtonpost.com/world/middle_east/israeli-court-damascus-bibles-to-stay-in-national-library/2020/08/18/a2a20c68-e187-11ea-82d8-5e55d47e90ca_story.html (last accessed 4 October 2020).

22 Family Appeal (Supreme Court) 6251/15, *Eva Dorit Hoffe v. Shmulik Kasuto* (7 August 2016), Nevo Legal Database (by subscription, in Hebrew).

23 These legal proceedings have attracted the attention of the media outside Israel, too; see, e.g., 'A Yearslong Battle Over Kafka's Legacy Ends in Jerusalem', *New York Times*, at www.nytimes.com/2019/08/07/books/kafka-archive-jerusalem-israel.html (last accessed 4 October 2020) and 'Unseen Kafka works may soon be revealed after Kafkaesque trial', *The Guardian*, at www.theguardian.com/books/2019/apr/17/unseen-kafka-works-may-soon-be-revealed-after-kafkaesque-trial (last accessed October 4 2020).

An additional development stems from traditional and religious elements in the character of Israel.²⁴ In this respect, an interesting change has been taking place in the state's attitude towards freedom of artistic expression, when this conflicts with religious sentiments. The heritage of the Jewish people and democracy, both as general concepts, were long ago introduced as a norm in Israel's Basic Laws.²⁵ This juxtaposition reflects the decades-long friction between liberal and traditional values in all realms of government and law.

Despite many legislative attempts to grant protection for the freedom of expression under a distinct Basic Law, this has been established to date only in case law. Several bills aiming to grant statutory protection have not passed.²⁶ Nevertheless, the Supreme Court has repeatedly ruled that freedom of expression enjoys 'legal supremacy' over other basic rights.²⁷ Religious sentiments, in contrast, are protected under the Penal Law,²⁸ which imposes penalties for expressions likely to offend the faith or the religious sentiments of others.²⁹ And yet, when required to balance the two rights, the courts have repeatedly given precedence to freedom of expression over any other right and have ruled that it should be restricted only in the case of gross and profound violations of religious sentiments.³⁰

Recent events raise questions of an about-face. The incumbent Minister of Culture in 2017 announced her intention to cut the budget of the Israel Festival³¹ because of performances that included nudity, perceiving them as 'detrimental to the basic values of . . . Israel as a Jewish and democratic state'.³² This position was reiterated by the Minister in 2019³³ when she threatened to cut the budget of a museum displaying a sculpture perceived as sacrilegious by many in Israel's Christian community.³⁴ The Association for Civil Rights in Israel petitioned the Administrative Court to instruct the mayor to refrain from interfering in the content of works of cultural institutions owned by the municipality. The petition³⁵ and the appeal against it³⁶ were rejected for procedural reasons, but a precedent was set: although

24 The Jewish nature of the state was first defined within the Declaration of Independence of 1948 – see www.knesset.gov.il/docs/eng/megilat_eng.htm (last accessed 7 October 2020).

25 This is emphasised in Section 1A of Basic Law: Human Rights and Dignity. In addition, Section 1 of the Judicial Principles Law, 5740-1980, prescribes a link between Israeli Law and Jewish heritage, stipulating that when a court fails to find an answer to a legal question in the statutes or case law or by analogy, it shall decide it in the light of principles that are part of the Jewish heritage. See also discussion regarding Basic Law: Israel – the Nation State of the Jewish People, in this chapter.

26 The most recent bill was discussed by the Knesset on 15 June 2020; see Protocol No. 41 of the 23rd Knesset.

27 High Court of Justice 806/88, *Universal City Studios Inc v. The Film and Play Review Council* (15 August 1989) pp. 831 to 832, Nevo Legal Database (by subscription, in Hebrew).

28 The Penal Law, 5737-1977, § 173, SH No. 894 (as amended), p. 226.

29 Jewish and non-Jewish.

30 *Universal City Studios* (footnote 27, above), at para. 8 of Justice Shamgar's decision.

31 'Israeli festival faces state funding cuts over nudity', *Jerusalem Post* at www.jpost.com/israel-news/culture/israeli-festival-faces-state-funding-cuts-over-nudity-494500 (last accessed 1 October 2020).

32 Based on the fact that modesty is a key value for Orthodox Jews; see Modesty (Tzniut) My Jewish Learning, at www.myjewishlearning.com/article/modesty-tzniut/ (last accessed 7 October 2020).

33 See 'Israeli museum to remove McJesus sculpture after protests', *The Guardian*, at www.theguardian.com/world/2019/jan/17/israeli-museum-remove-mcjesus-sculpture-after-violence-protests-haifa (last accessed 2 October 2020).

34 Importantly, it should be noted that the Ministry of Justice disagreed with the Minister's authority to do so.

35 Civil Case (Haifa District Court) 67938-01-19, *The Association for Civil Rights in Israel v. Mayor of Haifa* (10 February 2019), Nevo Legal Database (by subscription, in Hebrew).

36 Administrative Appeal (Supreme Court) 2211/19, *The Association for Civil Rights in Israel v. Mayor of Haifa* (11 November 2020), Nevo Legal Database (by subscription, in Hebrew).

the authority authorised to determine museum content is the professional body (the curator), it must take into account the feelings of the public; concurrently, the mayor has the authority, and duty, to act to prevent harm to these feelings.

In 2020, the Jerusalem Municipality cancelled an exhibition in an illustration festival because of nudity presented in the illustrations, on the grounds that it displayed 'contents that might offend the feelings of some of the public'.³⁷

These decisions to restrict artistic freedom based on the concern for offending feelings, represent a different position than that dictated by the Supreme Court to date, according to which only an actual gross and profound injury to religious sentiments justifies the restriction of creative freedom.

i Trends in art law

In 1968, the Knesset legislated the Attorney General's (AG) special standing, enabling the AG to intervene in a proceeding that may affect a public interest.³⁸ Until recently, this standing had never been exercised in the context of cultural assets.

The first occurrence was in the *Damascus* case, when the AG intervened on his own initiative and submitted an opinion siding with the National Library,³⁹ in which he emphasised the importance of the Crowns to the entire Jewish people and not just a particular community, and supported the National Library's petition to establish a charitable trust that will be the legal entity entitled to hold and safeguard the Crowns.

In August 2020, in a step that can be considered unprecedented, the AG himself initiated an action concerning the public auction of rare manuscripts from the Bergen-Belsen concentration camp.⁴⁰ The AG requested the court to have them transferred to a charitable trust, which the court was asked to establish, claiming they were a 'distinct public asset'. Consequently, the defendant, the owner of the manuscripts, donated them to Yad Vashem,⁴¹ thus pre-empting the legal discussion. Nonetheless, the action filed by the AG paves the way for future claims of public ownership over privately held cultural assets, and to a possible restriction on their trade altogether.

These two disputes highlight another innovative trend in the field of cultural property: the establishment of a charitable trust requires, by law, the execution of a written deed by

37 The Jerusalem Municipality has Ordered the Exclusion of an Exhibition it Commissioned for a Festival. The Reason: Nude Illustrations (in Hebrew) *Haaretz*, at www.haaretz.co.il/gallery/art/.premium-1.9025214 (last accessed 2 October 2020).

38 Legal Procedure Ordinance (Appearance of the Attorney General) (New Version), § 1, LSI No. 11 p. 282.

39 Filed on 15 October 2016.

40 Minutes of a Rabbinical Court established in the Bergen-Belsen Displaced Persons camp immediately after the Second World War, which documented the decisions regarding remarriage of men and women whose spouses' fate was unknown (a very complex issue in the Jewish religious law since remarrying is forbidden unless officially divorced or if the spouse is proven to be dead; whereas if no evidence exists, the marriage is forbidden, a predicament that became very common, naturally, in the circumstances). The manuscripts are a first-hand and authentic testimony, in close proximity to events, not only about the fate of Holocaust victims and the story of the survivors, in the days when documentation and collection of such information only began, but also of the activities of an official Jewish religious tribunal dealing with one of the most important issues in the Jewish world.

41 A statutory authority and Israel's official memorial to the victims of the Holocaust.

the owner of the donated property;⁴² however, in the case of the Crowns, the court declared a charitable trust despite the absence of a deed or a known owner, and also determined the identity of the trustees' electing entities⁴³ and the terms of the trust.⁴⁴ By so doing, the court created a new form of ownership for cultural property, neither private nor state-appropriated, but owned by a charitable trust managed by representatives of the general public. This precedent opened the door to the AG's claim to declare the Bergen-Belsen manuscripts a charitable trust, albeit in that case, a self-proclaimed owner was present, and it will not be surprising if the use of charitable trusts as a legal form of ownership becomes more common in the context of cultural assets.

ii Notable art-related transactions, litigation and legal changes

Art-related transactions in Israel have significantly declined in 2020 mainly due to the fact that the buyers are tourists and foreign residents, who have been prevented from entering Israel following the coronavirus pandemic.⁴⁵ However, the turnover of auction houses (operating online) has actually increased slightly. As for private galleries, some have switched to online auctioning, which has enabled them to maintain a certain level of sales; however, most galleries have suffered from very limited activity and some have closed down altogether.⁴⁶

There were historically significant transactions in 2018 and 2019 by the Israel Museum, which sold 152 artworks from its collection, in support of its acquisitions fund, in a series of seven auctions, generating a total of US\$10,476,822.⁴⁷

In litigation, the most significant cases are those discussed above regarding private ownership over cultural property.

42 Trust Law, 5739-1979, § 17, SH No. 941 p. 128. In the deed of a charitable trust, the creator of the charitable trust expresses his or her intention to create a charitable trust and determines its objectives, its assets and its terms.

43 The court appointed an array of public non-government entities, each with a right to appoint one or more trustees.

44 The Crowns, codices aged from several hundred years to 1,000 years, were created in various locations in medieval Europe and found their way to Damascus, where they were safeguarded by the Jewish community for hundreds of years.

45 'The Status of Artists in Israel is Difficult, but Stable' (in Hebrew), *Haaretz*, at www.haaretz.co.il/gallery/art/.premium-1.8871385 (last accessed 1 October 2020).

46 Information courtesy of Kedem Auction House.

47 Sale 16823: 'Selections from the Israel Museum, Jerusalem Sold to Benefit the Acquisitions Fund', Christie's, at <https://onlineonly.christies.com/s/selections-israel-museum-jerusalem-sold-benefit-acquisitions-fund/lots/439> (last accessed 1 October 2020); Sale 15979: 'Impressionist and Modern Art Day Sale', Christie's, at www.christies.com/SaleLanding/index.aspx?intsaleid=27593&clid=1&saletitle=&pg=all&action=paging (last accessed 1 October 2020); Sale 16169: 'Post-War and Contemporary Art, Paris, Day Sale', Christie's, at www.christies.com/salelanding/index.aspx?intsaleid=27702&clid=1&saletitle=&pg=all&action=paging (last accessed 1 October 2020); Sale 15480: 'Modern British Art Day Sale', Christie's, at www.christies.com/modern-british-art-day-27402.aspx?saletitle= (last accessed 1 October 2020); Sale 15581: 'Latin American Art', Christie's, at www.christies.com/latin-american-art-27452.aspx?saletitle= (last accessed 1 October 2020); Sale 17692: 'Art Moderne', Christie's, at www.christies.com/art-moderne-28327.aspx?lid=1&saletitle= (last accessed 1 October 2020).

The most significant recent legislation is the Basic Law: Israel – the Nation State of the Jewish People, enacted in 2018,⁴⁸ declaring Israel as the national home of the Jewish people, in which they fulfil, inter alia, their cultural right for self-determination⁴⁹ and affirming that the state shall act to preserve their culture.⁵⁰

III ART DISPUTES

i Title in art

With few exceptions, Israeli law has no designated legislation regulating title in artworks or their transactions. A main difference between auctions and private sales (when the private sale is not conducted through a dealer) is the application to consumer protection laws and ‘market overt’ rule. The general legislation governing contracts, mainly the Contracts Law⁵¹ and the Sale Law,⁵² apply equally.

Contracts are formed by offer and acceptance.⁵³ ‘Consideration’ is not a condition for their formation,⁵⁴ albeit payment of consideration is relevant to the application of the ‘market overt’ rule (as below). Title of ownership transfers to the buyer when the sold movable is physically delivered, unless the seller and buyer have agreed otherwise.⁵⁵ Unless otherwise specifically prescribed, contracts may be oral or by any other means.⁵⁶ Thus, transactions involving tangible artworks are not subject to any formalisms,⁵⁷ as opposed to immovables or intellectual property rights.⁵⁸

The obligation of parties to act in good faith is imposed by the Contracts Law, throughout the entire life of the contract (from negotiation to performance and enforcement).⁵⁹ However, good faith, per se, is not presumed or necessary for transfer of title. Lack of good faith does not void the transaction, but may entitle the injured party to remedies, such as compensation, enforcement or the cancellation of the contract, the latter resulting in cancellation of the title transfer.⁶⁰

48 Basic Law: Israel – The Nation State of the Jewish People (2018).

49 id., at § 5.

50 id., at § 6c.

51 Contracts (General Part) Law, 5733-1973, SH No. 694 (as amended), p. 118; Contracts (Remedies for Breach of Contract) Law, 5731-1970, SH No. 610, p. 16.

52 Sale Law, 5728-1968, SH No. 529 (as amended), p. 98.

53 Contracts Law (footnote 51, above), at § 1.

54 Gabriela Shalev and Efi Zemach, *The Law of Contract*, 28, 147 (4th ed., 2019).

55 Sale Law (footnote 52, above), at § 33.

56 Contracts Law (footnote 51, above), at § 23.

57 One caveat is due – an undertaking to make a future gift (donation included) requires a written document. Hence, if one wishes to undertake an obligation to gift an artwork, one must do so in writing; see Gift Law, 5728-1968, § 5(a), SH No. 509, p. 102. However, for a bequest (including of an artwork), a plain written undertaking will not suffice, and a properly executed will is required; see Inheritance Law 5725-1965, § 8, SH No. 446 (as amended), p. 63.

58 Land Law, 5729-1969, § 8, SH No. 575 (as amended), p. 259. Though, in some exceptional cases, the courts have used the principle of good faith to approve agreements relating to immovables that were not made in writing. Copyright Law, 5768-2007, § 37(c), SH No. 2119 (as amended), p. 38.

59 As per § 12 and § 39 to the Contracts Law (footnote 51, above). The obligation to act in good faith is enshrined also in the Sale Law (footnote 52, above), at § 6.

60 The rules concerning remedies of contracting parties are assembled in the Remedies Law (footnote 51, above).

Although buyers may obtain title over movables (such as artworks) despite the lack of good faith, market overt protection for the buyer may be incomplete if the buyer lacks good faith.⁶¹ The market overt rule provides protection to a bona fide purchaser, when purchasing from an art dealer or at auction, by clearing the buyer's title to the purchase from prior ownership or other adverse right.⁶²

The market overt rule is conditional on payment of a consideration and receipt into possession being performed in good faith.⁶³ In a seminal case,⁶⁴ the Supreme Court discussed the application of this rule regarding a claim to restitute artworks sold in a flea market, which were afterwards discovered to be stolen, of high value and painted by an important artist. The Court ruled that to meet the 'consideration' requirement, a substantial consideration is due, applying an objective standard. Hence, consideration must correlate to the real value of the chattel, regardless of whether the parties to the sale contract both believed, in good faith, that it was of a significantly lesser value. Thus, a gross error regarding a work's value is a mistake of fact. The Supreme Court ruled, that in relation to these artworks,⁶⁵ the original owner, who was not a party to the contract, may sue for rescission based on the legal rule of 'tracing'. In contrast, insubstantial errors will not provide for rescission.⁶⁶

The good faith requirement has been determined by case law to be judged according to a subjective standard; thus, the buyer must show that, in the circumstances,⁶⁷ he or she was unaware that the seller was not entitled to sell the chattel.⁶⁸ Hence, whereas a buyer who turned a blind eye will not be entitled to this defence, mere negligence does not deprive the buyer of title.⁶⁹

Good faith and consideration may protect the buyer's title also in situations of 'adverse transactions',⁷⁰ which may occur more frequently in a private sale. Generally, when a person undertakes to sell a chattel to buyer A, and prior to its delivery sells it to buyer B, the first buyer will prevail. However, if the second buyer receives the chattel or the rights in it in good faith and for consideration, this buyer will prevail.

61 Sale Law (footnote 52, above), at § 34.

62 Eyal Zamir, 'Market Overt in the Sale of Goods: Israeli Law in a Comparative Perspective', 24 *Israel Law Review* 82, 83 to 84 (1989).

63 Those conditions are stipulated in the Sale Law (footnote 52, above), at § 34: 'Where any movable property is sold by a person who carries on the sale of property of the kind of the thing sold, and the sale is made in the ordinary course of his business, ownership passes to the buyer free of every charge, attachment or other right in the thing sold even if the seller is not the owner thereof or is not entitled to transfer it as aforesaid, provided that the buyer buys and takes possession of it in good faith.'; see also Avi Weinroth, *Property Law* (2016), 247 to 253.

64 The case was discussed by the Supreme Court for the first time in Civil Appeal (Supreme Court) 5664/93 *Canaan v. United State of America* (13 April 1997), Nevo Legal Database (by subscription, in Hebrew), and again, by an extended panel of judges, in Further Hearing (Supreme Court) 2568/97 *Canaan v. United State of America* (20 February 2002), Nevo Legal Database (by subscription, in Hebrew).

65 *Canaan v. United State of America* (2568/97), at paras. 27 to 35 of Justice Or's decision (footnote 64, above).

66 *Halstock v. Ben Ami*, the Magistrate Court of Tel-Aviv – Jaffa, 86495/00 (30 January 2003).

67 Civil Appeal (Haifa District Court) 41802-05-15, *Dakduki v. Progress D.S. (Investments & Finance 1992) Ltd* (6 December 2015), Nevo Legal Database (by subscription, in Hebrew), at para. 36.

68 Weinroth (footnote 63, above), at pp. 249 to 250; Civil Appeal (Haifa District Court) 3495/06 *Taliah v. Migdal Insurance Company Ltd* (4 September 2007), Nevo Legal Database (by subscription, in Hebrew) at para. 14.

69 Weinroth (footnote 63, above), pp. 249 to 250.

70 Movable Property Law, 5731-1971, § 12, SH No. 636, p. 184.

Defects in the making of contracts,⁷¹ among them ‘mistakes’,⁷² can invalidate title transfer and result in rescission. A contract based on a mistake of fact, or law, but not on how worthwhile the transaction is,⁷³ can be grounds for rescission, if the contract would not have been concluded were it not for the mistake, and if the other party knew or should have known of the mistake.⁷⁴ When the mistake is mutual, rescission can be applied for through the court,⁷⁵ and if granted, damages may be ruled for the defendant.⁷⁶

Purchasers have no formal duty to enquire into title (subject to the deprivation of market overt defence when turning a blind eye). The Museums Regulations require the registration of exhibits,⁷⁷ including how an exhibit came to a museum. Although certain legal experts interpret this as requiring provenance research, this has not yet been adjudicated.

In March 2014, the Museums Council of the Ministry of Culture approved a draft of a code of ethics, containing a section entitled ‘Stolen Property’, which effectively adopts the due diligence obligation of the International Council of Museums’ Code of Ethics for Museums,⁷⁸ but this has yet to be approved by the Ministry of Justice.

ii Nazi-looted art and cultural property

In the years immediately following the Holocaust, many cultural items arrived in Israel, a large proportion of them to museums.⁷⁹ The most significant concentration of looted art in Israel is the Jewish Restitution Successor Organization (JRSO) Collection.⁸⁰ When the collection was distributed after the second world war, hundreds of artworks and items of Judaica⁸¹ were deposited with the Israel Museum.⁸² Despite the magnitude of artworks in the museum’s possession that are known to be looted, only a few, some of them well known, have been restituted.⁸³

71 Contracts Law (footnote 51, above), at Ch. 2.

72 *id.*, at § 14.

73 *id.*, at § 14(d).

74 *id.*, at § 14(a).

75 *id.*, at § 14(b).

76 *id.*

77 See Museum Regulations (footnote 7, above), at § 6.

78 International Council of Museums, Code of Ethics for Museums (as amended), at <https://icom.museum/wp-content/uploads/2018/07/ICOM-code-En-web.pdf> (last accessed 13 October 2020), at para. 2.3.

79 Wesley A Fisher and Ruth Weinberger, ‘Holocaust-Era Looted Art: A Current World-Wide Review’ (Conference on Jewish Material Claims Against Germany and World Jewish Restitution Organization, 2014), at <http://art.claimscon.org/wp-content/uploads/2014/11/Worldwide-Overview.pdf> (last accessed 12 October 2020), pp. 28 to 29.

80 A collection composed of about 1,200 artworks and Judaica looted by the Nazis during the Holocaust, collected by the Jewish Restitution Successor Organization and the Jewish Cultural Reconstruction.

81 Including works by Max Liebermann, Egon Schiele and Alfred Sisley.

82 At the time, named the Bezalel National Museum.

83 The restituted works include Liebermann’s *Garden at Wannsee* and Pissaro’s *Boulevard Montmartre: Spring*. For the former, see News, ‘Israel Museum restitutes Impressionist masterpiece by German-Jewish artist Max Liebermann’, lootedart.com: The Central Registry of Information on Looted Cultural Property 1933-1945, at www.lootedart.com/news.php?r=Q2VHRB636761 (last accessed 8 October 2020); for the latter, see *Boulevard Montmartre, Spring* – Camille Pissarro, Google Arts & Culture, at <https://artsandculture.google.com/asset/boulevard-montmartre-spring/GQFQaBkcnONwiQ?hl=en-GB>

One significant restitution claim was resolved by the Tel Aviv Museum of Art, regarding the Josef Israëls painting *From Darkness to Light*.⁸⁴ A significant unresolved claim has been lodged with the Israel Museum regarding the ancient Birds' Head Haggadah.⁸⁵

Although Israel endorsed both the 1998 Washington Principles and the 2009 Terezin Declaration, there is no legislation incorporating these principles. There is only one Israeli law, from 2006, regarding restitution,⁸⁶ the main purpose of which was to establish the Hashava Company.⁸⁷ As this law did not specifically mention art or cultural property,⁸⁸ these issues have been addressed only secondarily.⁸⁹ One of the Hashava Company's unfulfilled goals, in this context, was to implement legislative change that would impose a duty on Israeli museums and cultural institutions to conduct provenance research on their collections.⁹⁰ The State Comptroller pointed to the lack of this obligation as a possible cause for the scarce restitution from the JRSO Collection.⁹¹ Not a single claim has ever been brought before the courts.

The Hashava Company operated for a restricted period, dissolving in 2017.⁹² Several private initiatives have since been established in an attempt to replace it and continue its work, such as the Hashava Foundation,⁹³ which works to promote legislative change in the field of Nazi-looted art and cultural property.

(last accessed 8 October 2020). See also 'A Race Against Time: The Story of Artworks Looted during the Holocaust' (in Hebrew), ynet, at www.ynet.co.il/articles/0,7340,L-4951480,00.html (last accessed 8 October 2020).

84 See, generally, 'How a Nazi-looted painting entered an Israeli museum', *The Art Newspaper*, at www.theartnewspaper.com/news/how-a-nazi-looted-painting-entered-an-israeli-museum (last accessed 9 October 2020).

85 For more information, see 'Jewish Family Fights for Ownership of the Israel Museum's Prized Passover Haggadah', *artnet News*, at <https://news.artnet.com/art-world/jewish-family-birds-head-haggadah-921581> (last accessed 7 October 2020).

86 Assets of Holocaust Victims Law (Restitution to Heirs and Dedication to Aid and Commemoration) 5766-2006, SH No. 2049 (as amended), p. 202. Prior to this law, these types of issues were indirectly addressed by the Administrator General Law, 5738-1978, SH No. 883 (as amended), p. 61.

87 The Company for Location and Restitution of Holocaust Victims' Assets, Ltd.

88 Controversy arose regarding the Hashava Company's authority to handle art and cultural properties; see Ministry of Finance, The Company for Locating and Restoring the Assets of Holocaust Victims Ltd, State Comptroller's Annual Report 67A, 115, at www.mevaker.gov.il/he/Reports/Report_552/17acedcf-d600-4531-abff-781f7d96dc7d/401-ozar-shoa.pdf (last accessed 9 October 2020), at p. 131.

89 Based on a summary report issued by the company; see Summary 2007-2017 (in Hebrew), The Company for Locating and Restoring the Assets of Holocaust Victims Ltd, at www.hashava.org.il/download/files/%D7%A1%D7%99%D7%9B%D7%95%D7%9D_%D7%A4%D7%A2%D7%99%D7%9C%D7%95%D7%AA_2007-2017.pdf (last accessed 9 October 2020).

90 *id.*, at p. 32.

91 State Comptroller's Report 67A (footnote 88, above), at 115 to 116.

92 With the dissolution of the company, its various powers and functions were distributed between the Custodian General under the Ministry of Justice, the Authority for the Rights of Holocaust Survivors under the Ministry of Finance and the Ministry for Social Equality.

93 Hashava Foundation: Restituting Justice, at <https://en.hashava.org/> (last accessed 6 October 2020). The authors of this chapter are affiliated to the Hashava Foundation.

One development is the Jerusalem Declaration,⁹⁴ announced at the 2018 Conference on the Future of Looted Art,⁹⁵ and officially adopted by the Education and Culture Committee of the Knesset.⁹⁶ One significant aspect of the Jerusalem Declaration is its call to museums to take their heirless art collections out of their storerooms and to display them in public as a memorial to the unprecedented Nazi looting of art and culture.

iii Limitation periods

The Prescription Law regulates the Israeli limitations of actions in civil claims,⁹⁷ and stipulates a period of seven years for any claim that is not related to land.⁹⁸ The limitation period starts on the day on which the cause of action accrued.⁹⁹ However, the Prescription Law provides for exceptions in which the period of limitation shall be postponed or prolonged,¹⁰⁰ for example when there is delay in discovering the facts that establish the cause.¹⁰¹

Alongside the limitation periods, the Prescription Law acknowledges applicability of the rule of laches (delay).¹⁰² A defence based on laches may be accepted even if the limitation period has not expired.¹⁰³ In contrast to the statutory periods of limitation, courts have wide discretionary power in exercising pleas of laches.¹⁰⁴

When special limitation periods may apply

Although there are a few exceptions to the statutory periods, the law does not address looted art claims or special related limitation periods. However, the rules of limitation of civil proceedings in Israel are classified as procedural, rather than substantive, and therefore do not annul the rights themselves, but might only bar the plaintiff from receiving remedies from the courts.¹⁰⁵ Therefore, if a possessor were to relinquish his or her right to plead limitation, the claim could proceed to adjudication.

In this regard, a claim brought against the Claims Conference, Inc¹⁰⁶ challenged its refusal to award the claimants a grant on the ground that the claim was time-barred. The claimants responded, raising a 'moral' claim that it is inappropriate to plead prescription

94 'The Jerusalem Declaration on the Future of Looted Art', in 'Conference on the Future of Looted Art: A Summary', Jerusalem, October 2018, at pp. 18 to 19, at <https://drive.google.com/file/d/1xjPMS7qO6G1ZvWbFaQlywlK0xYSP1VwR/view> (last accessed 12 October 2020).

95 The conference was sponsored by The Center Organizations of Holocaust Survivors in Israel.

96 Protocol No. 711 of the Education, Culture and Sports Committee of the Knesset, 7 November 2018.

97 Prescription Law, 5718-1958, SH. No. 251 p. 112. Though, it should be noted that as per Article 29(d) of the Prescription Law, 'the period of prescription shall not be shorter than it was before the coming into force of this Law'.

98 *id.*, at § 5(1).

99 *id.*, at § 6.

100 *id.*, at §§ 7 to 8 and 10 to 18b.

101 *id.*, at § 8.

102 *id.*, at § 27.

103 *id.*; see Civil Appeal (Supreme Court) 9839/17, *Habitat Ltd. v. CAFOM* (17 December 2018), Nevo Legal Database (by subscription, in Hebrew).

104 Civil Appeal (Supreme Court) 2919/07, *The State of Israel – the Atomic Energy Commission v. Guy-Lipfel* (19 September 2010), Nevo Legal Database (by subscription, in Hebrew), at para. 96 to Justice Amit's decision.

105 Prescription Law (footnote 97, above), at § 2; Tal Havkin, *Limitation of Actions*, 14 (2014).

106 Civil Case (Tel-Aviv District Court) 1296/02, *Mariana Rodstein, et al. v. Claims Conference* (1 June 2008), Nevo Legal Database (by subscription, in Hebrew).

when dealing with Holocaust-related claims. Although the court expressed its dissatisfaction with the defendant relying on limitation rather than addressing the substantive claims, it ruled that the court is obliged to consider this defence under law¹⁰⁷ and the claim was barred. Thus, even in this very particular and sensitive context, Israeli courts have not disregarded the statute of limitation.¹⁰⁸ The court remarked that the claim was not filed against the German government holding the stolen property, but against the Claims Conference in its capacity as a conduit for handling claims (alleging negligence in lawsuits against the German government). From this remark it can be learned that in lawsuits filed directly against an entity holding looted property, the said moral argument may be accepted.

A 2004 bill was proposed to amend the Prescription Law, recognising that civil proceedings relating to Holocaust-related damages require unique treatment.¹⁰⁹ However, this bill (which did not pass) did not specifically address claims for restitution of looted art or cultural property.¹¹⁰ A similar proposal is incorporated in a draft of the codex that is under consideration to replace substantial portions of Israeli civil law.¹¹¹

It has been suggested that museums and cultural institutions ought to be perceived as custodians or trustees.¹¹² Israeli case law dictates that the date of accrual of a claim based on a violation of the trustee's duty begins, inter alia, upon the trustee's denial of his status. Thus, arguably, if a restitution claim is filed against a museum, the cause of action will accrue only if the museum denies its status as a trustee of the work. This interpretation coincides with a perception, based on proclamations and the experience to date, that an Israeli cultural institution will not object to restitution based merely on a time-bar argument.

Recent cases or litigation that address time limitation issues

In the 2019 Supreme Court decision concerning the drafts of Israel's Declaration of Independence (aforementioned),¹¹³ the laches defence was dismissed, inter alia, in light of the public interest in restituting these drafts to the state. Moreover, it was stated that the application of laches in such circumstances should be examined from the perspective of cultural property law, weighing the duty of restitution of cultural property.¹¹⁴

107 id., at pp. 14 to 15.

108 See also Civil Case (Tel-Aviv District Court) 18277-07-13, *Linden Kristina v. Conference on Jewish Material Claims Against Germany* (18 May 2017), Nevo Legal Database (by subscription, in Hebrew), at pp. 4 to 6.

109 Though, not referring specifically to claims of restitution of cultural property.

110 See discussion concerning the Bill: Protocol No. 529 of the Constitution, Law and Justice Committee, of the 17th Knesset (17 April 2008).

111 Draft Bill The Civil Code Law, 5771-2011, § 996(b), HH (Gov.) No. 595 p. 1111.

112 See Meir Heller, Keren Barth-Abelow and Talila Devir, 'Claims for the Return of Cultural Heritage: The Israeli Perspective', in 25(2) *Art Antiquity and Law* (July 2020), 119, 124. Based on the notion of 'constructive trust'. The Israel Museum, for instance, defines its possession over the looted art it holds, as 'custodianship'; see WWII Provenance Research JRSO | The Israel Museum, Jerusalem, at <http://museum.imj.org.il/imagine/irso/en> (last accessed 14 October 2020).

113 See Section II, above.

114 *State of Israel v. Beham* (8323/17) (footnote 18, above), at paras. 33 to 35 of Justice Mintz's decision.

In 2015, a revolutionary amendment to the Prescription Law was legislated, stipulating the suspension of the limitation period in circumstances in which the plaintiff was misled,¹¹⁵ where ‘misleading’ also includes ‘knowing non-disclosure of any of the facts that constitute the cause of action’.¹¹⁶ Thus, this amendment gives more weight to the defendant’s misconduct.¹¹⁷

iv Alternative dispute resolution

There are no specific alternative dispute resolution regulations or organisations for art disputes in Israel, and as set forth herein, there are few known disputes that were mediated privately. A dispute regarding art will be heard as any other civil claim in the competent court, as previously noted.

The new civil procedure regulations, which take effect as of 1 January 2021,¹¹⁸ apply a mechanism of mandatory preliminary mediation meetings¹¹⁹ to all magistrates’ courts in the country and to civil lawsuits with a value exceeding 40,000 shekels. Arbitration, however, is conditional on all parties to the conflict agreeing to it.¹²⁰ Unless the parties have agreed to refer the dispute to mediation or arbitration, disputes regarding art will be heard as any other civil claim in the competent court, as previously noted.

In Israel, there is a system of private tribunals to which a dispute can be referred with the parties’ consent (e.g., religious court, financial court). Due to the fact that art and Judaica purchases are often made anonymously (for tax evasion or money laundering reasons), in practice many such disputes are referred to a Rabbinical tribunal, whose principles include confidentiality. These tribunals hear disputes behind closed doors and the details of the parties and the case are not disclosed.

Regarding dispute resolutions involving looted art, the Restitution Law provides a particular evidence-based mechanism for determining the ownership of Holocaust victims’ property, as articulated in the law, transferred to the Hashava Company.¹²¹ In practice, there is no evidence that cultural property was ever transferred to the now-defunct company and therefore no mechanism is known to have been used in this regard.

Following discussions held at the Ministry of Justice regarding the responsibility for conducting provenance research in Israel, the Hashava Company drafted a policy document regarding the special status of looted art and cultural assets in Israel,¹²² recommending, inter alia, that when heirs claim ownership, their claims should be heard by the institutions

115 Or someone else on the defendant’s behalf.

116 Prescription Law, 5718-1958, Amendment No. 5 (2015), SH No. 2497 p. 217.

117 Bill Prescription Law (Amendment No. 5) (Postponing the Limitation Period), 5775-2015, HH (Par.) No. 600 p. 125; Additional Civil Appeal (Supreme Court) 6938/19, *Dani Ilani v. Pier Baruch* (20 August 2020), Nevo Legal Database (by subscription, in Hebrew).

118 Pending any unforeseen delays. Implementation of the updated regulations has been delayed several times since their adoption in 2017.

119 Civil Procedure Regulations, 5778-2018, §§ 37 to 39.

120 Arbitration Law, 5728-1968, §§ 1 tp 3, SH No. 535, p. 184.

121 Assets of Holocaust Victims Law (footnote 86, above), at §§ 2 to 22. A mechanism (§ 11 of the Law) has also been established before the courts in the event of a dispute as to whether an asset is the property of a Holocaust survivor or not.

122 Company Policy – Locate and Recover Holocaust Victims’ Assets Regarding the Unique Status of Holocaust-Looted Cultural Assets Located in Israel (27 April 2015), at www.hashava.org.il/download/files/%D7%94%D7%9E%D7%A2%D7%9E%D7%93%20%D7%D7%99%D7%99%D7%97%D7%95%D7%93%D7%99%20%D7%A9%D7%9C%20 (last accessed 12 October 2020).

holding the property in accordance with the mechanism to be determined, on the basis of the Washington Principles and the Terezín Declaration.¹²³ However, to date this has not been codified in legislation. The Hashava Foundation has recently begun working to amend this lacuna, and one of its goals is to advance legislation to establish an objective and independent decision-making mechanism for deciding the claims of heirs in the matter of looted art.¹²⁴

There have been two notable disputes relating to art and cultural property involving alternative resolution.¹²⁵ One was the controversy over Max Liebermann's *The Basket Weavers*, which was resolved through a mediation process,¹²⁶ at the end of which the work was returned to the original owners' heirs.

The second case was in respect of the Bruno Schulz frescoes.¹²⁷ A diplomatic resolution was reached, in which further to a joint declaration by Israel and Ukraine, a protocol was executed between the governments of the two countries,¹²⁸ recognising the frescoes as the property and cultural wealth of Ukraine, and establishing a 20-year renewable loan to Israel.¹²⁹

IV FAKES, FORGERIES AND AUTHENTICATION

Israeli law does not distinguish between art and other forms of movable property in providing relief against fakes, forgeries and inauthenticity. Breach of contract can be remedied via enforcement or termination (and restitution), with the possibility of recovering damages in either case. Illegal or unconscionable contracts are void.

The sale of a fake or forgery can be either a result of a mutual mistake or misrepresentation by the seller; both situations can be resolved under contracts law through rescission, discussed in Section III.¹³⁰

In addition to remedies through contracts law, tort claims to recover damages can also be lodged if the representation of the item is negligent or fraudulent.¹³¹ In assessing negligence, the defendant's actions are compared to those of a 'reasonable and intelligent person'.¹³² In the case of professional conduct, the 'reasonable and intelligent person' is one

123 id., at para. 1.2.

124 See Heller, et al. (footnote 112, above).

125 Interestingly, both require dispute resolution of an international nature.

126 Conducted by Adv. Meir Heller. For further reading, see 'Artwork Nazis stole in WWII returning to Jewish owner's heir', Ynetnews, at www.ynetnews.com/articles/0,7340,L-4946706,00.html (last accessed 7 October 2020).

127 Three Holocaust-era wall murals by the Galician Polish-Jewish artist Bruno Schulz, who was murdered by the Nazis. For further reading, see 'Behind Fairy Tale Drawings, Walls Talk of Unspeakable Cruelty', *New York Times*, at www.nytimes.com/2009/02/28/arts/design/28wall.html (last accessed 7 October 2020).

128 The Ukrainian Ministry of Culture and the Israeli Ministry of Foreign Affairs.

129 Protocol Between the Ministry of Culture and Tourism of Ukraine and the Ministry of Foreign Affairs of the State of Israel on the Temporary Loan of Wall Paintings of Bruno Schulz, Isr.-Ukr., 28 February 2008.

130 See Section III.i, above.

131 Tort Ordinance (New Version), § 35-36, DMI No. 10 p. 266 (as amended); id., at §§ 56, 63 (breach of statutory obligation).

132 id., at § 35.

who shares the same level of expertise in the relevant field.¹³³ Thus, experienced dealers and other experts must overcome a higher threshold to avoid a finding of negligence. In addition, deceitfully selling a fake or forged item intentionally is a criminal offence.¹³⁴

i Rules and regulations governing warranties

Dealers, as commercial entities, are required to represent their merchandise faithfully.¹³⁵ As part of this obligation, the seller must not mislead a consumer in any material matter in the transaction. A 'material interest' is defined, inter alia, as a fact relating to the nature, substance and type of the goods sold; the identity of its creator; the place of production; the acceptable price for it; and the previous use made of it. If a dealer, actively or passively, misrepresented the nature of the merchandise, the purchaser may cancel the transaction within a reasonable time from the discovery of the misrepresentation.¹³⁶ This type of action by a dealer is also tortious.¹³⁷ Conspiracy to defraud, including, for instance, a conspiracy to deceitfully influence the market price of goods sold in a public auction, is also a criminal offence.¹³⁸

ii Role of experts, artist foundations and catalogues raisonnés

Case law regarding the role of experts in questions of art, specifically artist foundations and catalogue raisonnés, is limited. In one case, a buyer lost his legal right to claim non-conformity in the work and to cancel the transaction after purchasing it at auction, because he received an expert opinion on it before the purchase,¹³⁹ and was denied remedy.¹⁴⁰ In another case, the opinion of an expert, who was the author of an artist's catalogue raisonné, was sufficient for the court to declare the work inauthentic.¹⁴¹

133 id.

134 Penal Law (footnote 28, above), at § 415; see also id., at §§ 418 and 420, which criminalise, respectively, the making and use of forged documents, for example forging provenance documents.

135 Consumer Protection Law 5741-1981, §§ 2(a)(1), 2(a)(6), 2(a)(8), 2(a)(9), 2(a)13 2(a)(14), 2(a)(15), SH No. 1023 (as amended), p. 248.

136 id., at § 32.

137 id., at § 31.

138 Penal Law (footnote 28, above), at § 440.

139 Prior to the private purchase of an artwork, the buyer had it assessed at Sotheby's. The court ruled that this fulfilled the requirements of Section 14 of the Sale Law, which excludes a claim of unsuitability if the buyer has checked the item and has not immediately declared its unsuitability.

140 Civil Case (Tel-Aviv Magistrates Court) 27303/06, *Leibitz v. Zach* (24 July 2007), Nevo Legal Database (by subscription, in Hebrew).

141 Civil Case (Tel-Aviv Magistrates Court) 60503/05, *Stieglitz v. Feld* (31 August 2008), Nevo Legal Database (by subscription, in Hebrew). The witness's status as author of the catalogue raisonné was the predominant factor in the court recognising her as an expert witness.

V ART TRANSACTIONS

i Private sales and auctions

Private or auction sales of works of art are not specifically regulated in Israeli law, and the ordinary contracts and sale laws apply.¹⁴² Certain restrictions apply to sales of exhibits by museums.¹⁴³

Contrary to the usual rule of 'when the hammer comes down' a sale agreement is executed, the courts have recognised that this rule cannot apply to a good faith purchase at auction, in a manner that prevents the buyer from returning a work that turned out not to be as it was presented.¹⁴⁴ The seller is obliged to give the buyer an adequate opportunity to inspect the purchase immediately on receipt, when the buyer is responsible for examining it and for promptly notifying any non-conforming discrepancies to the seller.¹⁴⁵ A non-conformity is very broadly defined in the law.¹⁴⁶

The discovery of a non-conformity gives the buyer the right to rescind the purchase.¹⁴⁷ In the event of an undisclosed non-conformity that the seller knew or should have known about, but did not disclose to the buyer, the buyer will be entitled to rely on it; this is true even if the buyer failed to inspect the purchase on receipt and despite any agreement between the parties. These provisions place an increased responsibility on the seller, and even more so for auction houses, who are presumed to know, or should know, the true nature of items they sell.

As in many other parts of the world, Israeli auction houses have formed a practice of 'terms and conditions' (T&C),¹⁴⁸ restricting their responsibility for the information provided about items for sale. Although some provisions of the Sales Law are dispositive, this is not the case for the provision concerning a non-conformity that is not disclosed by a seller.

The level of responsibility to which auction houses commit in practice regarding the information they present to potential buyers varies from broad to very partial, but most undertake to allow cancellation and refund if information they have presented turns out to be erroneous. Some auction houses remove all responsibility from themselves and make it clear that the sale is 'as seen',¹⁴⁹ but most clarify that the buyer will be refunded on discovery of inauthenticity.

142 See Section III.i, above.

143 See Museum Regulations (footnote 7, above), at § 12: the sale is conditional on the approval of the museum's management, and the consideration must be used only to purchase other exhibits for the collection.

144 Civil Case (Tel-Aviv Magistrates Court) 34948/00, *Barin v. Vengrowich* (17 December 2002), Nevo Legal Database (by subscription, in Hebrew).

145 Sale Law (footnote 52, above), at §§ 11 to 16. The buyer's failure to disclose the non-conformity to the seller will bar his or her reliance on it and his or her right to rescind the purchase.

146 Inter alia, as a breach of the seller's obligation by delivering property of a different type than agreed, or in terms of type, description, quality or features different from what was presented to the buyer, or one that does not otherwise match what was agreed between the parties.

147 As well as a hidden non-conformity, defined as one that cannot be detected by a reasonable examination.

148 Participation is subject to agreement to the terms and conditions.

149 See, e.g., the following terms and conditions: Kedem Auction House, at www.kedem-auctions.com/11028-2/ (last accessed 12 October 2020); Tiroche Auction House, at www.tiroche.co.il/howItWorks?lang=english (last accessed 13 October 2020); Matsart Auctioneers and Appraisers, at www.matsartauctioneers.co.il/termsandconditions.asp (last accessed 12 October 2020).

All auction houses seem to clarify within their T&C that they are operating only as agents of the sellers and, therefore, are not responsible for inaccuracies. However,¹⁵⁰ this will not exempt them from the application of the Consumer Protection Law, which is not dispositive, and imposes an extensive duty of disclosure on a practitioner to disclose to the buyer any defect or inferior quality or other characteristic known to him or her that significantly reduces the value of the item.¹⁵¹

The amount of time given to the buyer for the purpose of inspection and notification of non-conformity (and, as a result, rescission) is usually limited in the T&C to 30 days. This practice is in line with court rulings that ‘hammering’ only creates a conditional sale, followed by a period during which the buyer may inspect the property.¹⁵²

Online transactions are subject to special regulations in the Consumer Protection Law that provide enhanced protection to the buyer, such as the buyer’s right to cancel the transaction within 14 days of receipt of purchase, without cause.¹⁵³ Regulations regarding distance selling for online sales do not specifically apply to auctions or art, and most auction houses clarify in their T&Cs that only the auction house has the right to cancel a sale.

ii Art loans

The Loan of Cultural Objects Law was enacted against the backdrop of perceived reluctance by foreign institutions to enter loan agreements with Israeli entities, out of concern of being sued by Holocaust survivors or their heirs.¹⁵⁴ When the bill was introduced in the Knesset,¹⁵⁵ the debate reflected the tension between the reluctance to ‘reward’ holders of looted art and the alternative of not having cultural properties displayed in Israel.¹⁵⁶

The provisions of the Law echo the balance that has been found, which is intended to address the aforementioned tension: Article 1 emphasises that the law enables the loan without prejudicing the Jewish people’s claims in respect of looted art; Article 3 provides for the protection afforded by a decree granted by the Minister of Justice to the loaned property;¹⁵⁷ and Articles 4 to 6 stipulate the Minister’s obligation to publish the decree in such a way as to allow objections before it is granted, and to specify the conditions under which the Minister must refrain from issuing such a decree.¹⁵⁸

150 As detailed relating to warranties – see Section IV.

151 Consumer Protection Law 5741-1981 (footnote 135, above), at § 4(a)(1). In addition, a practitioner is forbidden to sell or hold for commercial purposes, an asset that is deceiving (§ 2(b)).

152 See *Barin v. Vengrowich* (footnote 144, above).

153 Consumer Protection Law (footnote 135, above), at § 14C(c)(1). There are rulings condemning unfair systematic intervention in online sales through the engagement of fictitious participants, e.g., Civil Appeal (Supreme Court) 5378/11, *Arthur Frank v. Olsale* (22 September 2014), Nevo Legal Database (by subscription, in Hebrew). However, this has not yet been discussed in the context of art auction sales.

154 Loan of Cultural Objects (Restrictions of Jurisdiction) Law, 5767-2007, SH 2085 (as amended), p. 137.

155 See Protocol of Meeting No. 231 of the 16th Knesset (8 March 2005).

156 For further discussion on this issue, see Heller, et al. (footnote 112, above), at pp. 132 to 135.

157 As long as the loaned work is in Israel by virtue of the loan agreement: (1) the Israeli courts will not have jurisdiction over suits concerning the right of ownership, possession or any right contravening the right of the lender in the property, and (2) the Israeli courts will not render decisions that will prevent the property being returned to the lender on expiry of the loan period.

158 The Minister is required to verify the existence of an alternative judicial instance where claims concerning the cultural property included in the decree can be determined. Article 6 of the Loan of Cultural Objects Law strictly prohibits the Minister from issuing a decree when he is convinced that *prima facie* evidence exists that the party opposing the decree does possess rights in the property.

iii Cross-border transactions

Although there are no restrictions on exports of art, any removal of an antiquity from Israel is forbidden unless the relevant authority has given its approval.¹⁵⁹ The Archives Law also sets restrictions on archival materials leaving Israel¹⁶⁰ and requires confirmation that the State Archivist has been given the opportunity to make a copy. Violation of this law constitutes a criminal offence punishable by a fine.

Israel is a party to one of the international conventions that impose limitations on illicit trafficking of cultural properties.¹⁶¹

Tax considerations

As a general rule, no imports of art into Israel are subject to customs duties. However, value added tax (VAT) applies to all art imported to Israel.¹⁶² Original works of art imported by a museum or educational institution, or which are imported by a tourist, an immigrant or a returning resident, are exempt from VAT but must be declared on entry to Israel.¹⁶³ VAT is applied to the auction house's commission and if the purchase is an import, the VAT for the import is paid by the buyer. As for commercial sales of used art, VAT will only apply to the difference between the purchase price and sale price, and not the item's full sale price.¹⁶⁴ The import of personal items by immigrants to Israel (or returning residents) can be facilitated VAT-free, allowing private art collections to be brought into the country, with certain restrictions (the collection must be from the importer's household, the item cannot be sold within six years of its arrival in Israel, etc.).¹⁶⁵

iv Art finance

There is no form of art finance in Israel. However, there is some renting of artworks, allowing owners to profit from their collection and giving renters an option to enjoy art at an affordable price or for a specific event.¹⁶⁶

159 Defined in Article 1 of the Antiquities Law (footnote 7, above) as an asset (whether detached or connected), made by a person before 1700 CE, including anything added to it afterwards and being an integral part thereof; or an asset, as stated in paragraph (1), made by a person on or after 1700 CE, and is of historical value and the Minister has declared it an antiquity; or it constitutes ancient zoological or botanical remains from before 1300 CE.

160 This includes any writing, recording and the like that is held with a government body, or is interesting for a study of the past, the people, the state or society or is relating to the legacy or life work of prominent individuals.

161 Prominent conventions include: Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954 (the Hague Convention); the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property; UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995, Rome); Convention for the Safeguarding of the Intangible Cultural Heritage, Paris, 17 October 2003. Israel is a party only to the Hague Convention.

162 As of October 2020, at the rate of 17 per cent.

163 Value Added Tax Law, 5736-1975, § 32(4), SH No. 792 (as amended), p. 52.

164 *id.*, at § 5(a); Taxation Decision 5289/17 (20 March 2017), Nevo Legal Database (by subscription, in Hebrew).

165 See www.gov.il/he/departments/guides/guide-for-immigrants-and-foreign-residents (last accessed 2 December 2020).

166 In some cases, the renter has the option to purchase the work while receiving a credit for the rent.

There is no legislation in Israel that is relevant to transparency that specifically affects transactions in art. However, the main anti-money laundering legislation, the Prohibition on Money Laundering Law,¹⁶⁷ prohibits money laundering through the sale or purchase of certain assets, including art. In 2017, the definition of assets was expanded to include any and all types of assets.

Other relevant pieces of legislation¹⁶⁸ include the Law for Reducing the Use of Cash 2018¹⁶⁹ (which, since it came into effect on 1 January 2019, has resulted in a reduction in the volume of sales of expensive art items) and the Counter-Terrorism Law, 5776-2016, as well as several prohibitory regulations.¹⁷⁰

Customer due diligence requirements are regulated by the Sales Law defining the scope of deficiency and related remedies, and by the Consumer Protection Law, discussed in Sections IV and V.i, above.

VI ARTIST RIGHTS

i Moral rights

Moral rights are governed by the Copyright Law¹⁷¹ and comprised the right to authorship and to preservation of the integrity of a work. Any act that compromises these rights is considered an infringement of moral rights under the Copyright Law, and generally entitles the artist to statutory damages of up to 100,000 shekels for each infringement.

An amendment to the Copyright Law that entered into force in September 2019 allows for the use of 'orphan works' under certain conditions, namely that the user conducts a diligent search to find the creator of the work; states clearly that use of the work is in accordance with the Copyright Law and publishes contact information so that anyone may send the user details of the identity of the creator; and, in the case of commercial use, is required to publish advance notice of the intention to use the work.¹⁷² Any use of a work complying with the above conditions will not be deemed a breach of the creator's moral rights.

ii Resale rights

This is not applicable in Israeli law.

iii Economic rights

The Copyright Law governs economic rights in artistic works and stipulates that the copyright holder in a work has the exclusive right to economic exploitation thereof, including copying, publication, public performance or broadcasting, making the work available to the public over the internet, creating derivative works, and offering works for rent when applicable.

The term of protection for copyright in artistic works is 70 years from the death of the artist. The artist is generally the first owner of the copyright in a work. An employer owns

167 The Prohibition on Money Laundering Law, 5760-2000, SH No. 1753 (as amended), p. 293.

168 For the full list, see the Israel Money Laundering and Terror Financing Prohibition Authority website, at www.justice.gov.il/En/Units/IMPA/Legislation/Pages/default.aspx (last accessed 13 October 2020).

169 Purchases of more than 50,000 shekels may no longer be made in cash.

170 The Counter-Terrorism Law, 5776-2016, SH No. 2556 p. 898; Prohibition on Money Laundering (Financial Sanction) 5762-2001, KT 5762 No. 1 p. 248.

171 The Copyright Law (footnote 58, above).

172 Publication can be on the internet or in a daily newspaper.

rights in an artistic work created by an employee in the course of employment unless agreed otherwise. In the case of commissioned works, the artist will own the rights unless implicitly or explicitly agreed otherwise with the client.¹⁷³

The Copyright Law provides for a range of permitted uses in copyright-protected works, including a 'fair use' provision. Infringement of copyright in artistic works entitles the artist to statutory damages of up to 100,000 shekels per infringement (the court can award higher compensation with proof of damage). Copying an infringing work for commercial sale, or importing an infringing work into Israel, as well as sale or distribution of infringing copies, are criminal offences under the Copyright Law.

The aforementioned 2019 amendment introduced measures to protect works against online piracy, authorising courts to issue orders to internet providers instructing them to block access to infringing content available on the internet, and provided copyright owners with a cause of action to obtain identifying information about a party whose actions allegedly infringe their copyright.¹⁷⁴

VII TRUSTS, FOUNDATIONS AND ESTATES

There is no practice in Israel of holding property (including works of art) through locally formed trusts and foundations. Since estate tax does not apply in Israel, it is not known to be used as a tool for Israeli tax planning. However, the practice of using foreign trusts and foundations or offshore entities does exist.

Donations to public institutions holding the requisite tax accreditation (museums and cultural institutions in Israel are mostly public institutions accredited for tax purposes) entitle the donor under certain conditions to tax benefits, and the institution receiving the donation does not pay tax on the donation. Many public institutions are affiliated to a foreign tax entity, entitling foreign-based donors to local tax benefit from a donation.¹⁷⁵

VIII OUTLOOK AND CONCLUSIONS

As discussed in detail in Section III.ii on Nazi-looted art, the Hashava Foundation is advancing legislation to establish a decision-making mechanism for adjudicating the claims of heirs in the matter of looted art. We anticipate that in the coming years there will be developments in this field, as well as in applying the duty to conduct provenance research to institutions holding looted art and cultural property. The Ministry of Justice is preparing a bill endeavouring to regulate significant issues in matters of restitution, including statute of limitations, burdens of proof and ways of resolving disputes.

Another phenomenon has surfaced recently, regarding the economic situation of cultural institutions that, in the normal course of events, are supported mainly by private donations and contributions from the state's budget, and also by ticket sales. A continuing political

173 The exception to this rule is when the commissioned work is a portrait or a photograph from a private event, in which case the client will own rights in the work, unless agreed otherwise.

174 While relevant for all works, this amendment was initiated by producers and distributors of cinematic works who wished to crack down on illegal streaming sites.

175 Typically, the entity would be a US 'Friends' organisation, which is a tax-exempt organisation under § 501(c)(3) of the United States Internal Revenue Code and is eligible to receive charitable contributions of cash, objects and stocks.

and budgetary crisis, exacerbated as a result of covid-19, which has dramatically decreased revenues from ticket sales, has led to an unusual and unfamiliar situation in the annals of Israeli museums. Against this background, it is not surprising that the global phenomenon of deaccessioning has not skipped over Israel. At the time of writing, a legal and public battle is taking place following an attempt by the LA Mayer Museum for Islamic Art to sell hundreds of exhibits from its collection, through the Sotheby's auction house. On 12 November 2020, the Hashava Foundation filed a petition (by the authors of this chapter) with the High Court of Justice, to prevent the sale that was planned for 26 November 2020.¹⁷⁶ The primary grounds for the petition were that the decision-making process regarding the sale of the exhibits was neither consistent with the provisions of Regulation 12 of the Museums Regulations¹⁷⁷ nor with the provision of Section 26 of the Antiquities Law (which prescribes the manner in which a collection from museum collections may be sold, transferred or liquidated). At a hearing before the Supreme Court on 18 November 2020, the parties agreed to negotiate towards a limited sale of agreed items, and that no sale will take place before the Supreme Court rules on the petition. Indeed, following the petition, Sotheby's has cancelled the sale and negotiations on this matter are ongoing.

This state of affairs has prompted a public discussion and rethink of the museum regulations in respect of the sale of exhibits.¹⁷⁸

176 High Court of Justice 7847/20, *Hashava Foundation v. The Minister of Culture and Sports* (12 November 2020), Nevo Legal Database (by subscription, in Hebrew).

177 See footnotes 7 and 143, above.

178 As discussed in Section V.i, above.

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Meir joined E Landau Law Offices in 1998. He was admitted to the bar in 1997, after graduating from the faculty of law at the Hebrew University of Jerusalem, where he has also completed master's degrees in both business administration and law.

Meir has extensive experience in representing Israeli and international clients in complex litigation in a range of international and domestic matters, including energy and infrastructure, financing, commercial contracts, tenders, restitution of lost and looted art, inheritance, trusts, defamation, administrative law, real estate, environmental law, maritime law and private international law.

Meir is one of Israel's leading experts on cross-border disputes and has represented clients in complex matters involving multiple jurisdictions, such as the United States, Canada, Germany, Italy, China, Switzerland, South Africa and the United Kingdom. He is often appointed by Israeli courts to administer large and complex estates with multiple heirs. Meir has an extraordinary record of success in the Israeli courts, including in complex appeals and precedent-setting cases before the Israeli Supreme Court.

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Niv Goldberg is formerly collections manager of the Yad Vashem Museum of Holocaust Art. An expert on Holocaust art, Nazi-looted art and restitution, he is completing his final year of law school at the Hebrew University of Jerusalem.

Niv recently joined the firm of E Landau Law Offices, where he will be taking articles, and where he serves as a consultant to the cultural property, art and restitution practice in his field of expertise.

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