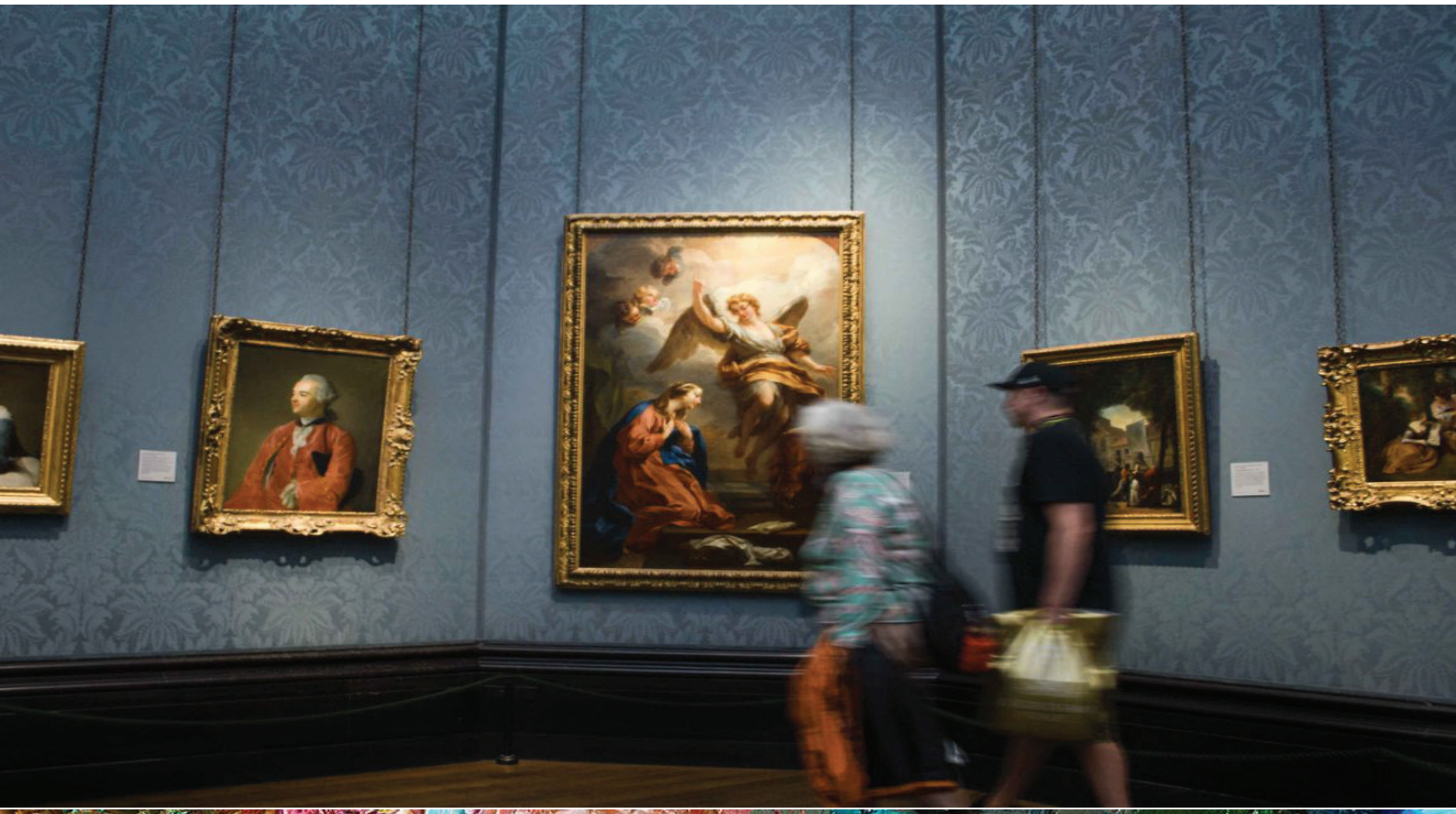
Art Law & Tax Review

by KG Law Firm & ArtSecure

in collaboration with Art Athina



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What is art law?

Art law is a multidisciplinary area of law encompassing tax, commercial, intellectual property, private and public international law as well as requiring in-depth knowledge of the international art market.

Greece's first art law review

While art remains a passionate endeavor for many, it is also being increasingly treated as a separate asset class altogether. This makes the preservation of its value a crucial consideration and its management ever-more challenging.

Globally, we observe a trend towards more regulation of the art sector, from anti-money laundering obligations imposed on art market participants, to strict rules on the cross-border movement of art and cultural items. At the same time, as the value of art increases, transactions are moving from informal agreements toward a market where careful due diligence and written agreements are becoming necessary.

It is our belief that art market participants, whether they are museums, foundations, artists, dealers, collectors, investors, financial institutions or other art market service providers, can greatly benefit from keeping abreast of legal developments affecting the art sector. This has led us to the initiative to launch Greece's first biannual Art Law & Tax Review, in collaboration with ArtAthina, one of Europe's oldest art fairs.

New collaboration launched

KG Law Firm, the largest legal practice in Greece for several decades and ArtSecure, a boutique law firm offering specialized advice on art, intellectual property and cultural property matters, have launched a new, pioneering collaboration. ArtSecure's deep knowledge of the law relating to art, cultural property and the international art market offered in collaboration with this leading full-service commercial law firm aims to open new possibilities for the art world.

About KG Law Firm

KG Law Firm is a multi-practice business firm and is highly regarded as the preferred firm of domestic and international clients seeking Greek partners for cross-border legal expertise. KG Law Firm's Private Wealth Practice is ranked among the leading private clients practices in Greece, according to the specialized guides Chambers & Partners High Net Worth 2020 and ITR World Tax 2020.

About ArtSecure

ArtSecure has nearly a decade's experience on art, cultural property and intellectual property matters, having advised on both domestic and cross-border transactions.

Both firms have long appreciated the multi-disciplinary character and rapidly evolving trends in this particular area of law. Our combined expert knowledge from all related to art legal fields allows us to offer our clients a unique blend of expertise and market knowledge.

Our team is led by KG Partner Theodore Rakintzis and ArtSecure Founder Phoebe Kouvelas

Contents

Artworks made of ivory: legal status of their cross-border trade

On May 18 2020, the Court of Appeal of England and Wales dismissed FACT's (Friends of Antique Treasures Limited) claim for judicial review of UK's Ivory Act 2018, one of the strictest ivory bans worldwide. According to the Act, (a) buying/ selling/ hiring, (b) offering or arranging to buy/ sell/ hire, (c) keeping for sale/ hire, (d) exporting from and (e) importing into the UK for sale/ hire is prohibited, with civil and criminal sanctions. Only narrowly-defined exemptions are allowed for certain objects dated from 1 January 1918, 3 March 1947 and 1 January 1975 (depending on the case), as well as acquisitions by qualifying museums.

At the European level, trade in ivory is strictly regulated through the EU Wildlife Trade Regulations. The general rule is that trade of ivory to, within and from the EU for commercial purposes is not permitted. Specifically, all EU member states have ratified the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), which has 183 signatories. Under the current CITES regime, international trade in ivory is banned, with strictly limited exemptions. The EU, through its Regulations, has adopted additional measures which are stricter than the CITES provisions.

Exemptions from the above general rule are permitted, as follows:

— intra-EU trade is authorized for ivory items imported into the EU before the elephant species was listed in Appendix I of CITES (18 January 1990 for African elephant and 1 July 1975 for Asian elephant). Intra-EU trade can only occur if a certificate has been issued to this effect by the relevant EU Member State, except for 'worked specimens' acquired before 3 March 1947, which can be traded in the EU without a certificate;

— re-export from the EU is authorized for ivory items acquired before the date on which CITES became applicable to them, i.e. 26 February 1976 for African elephants and 1 July 1975 for Asian elephants.

Factors which will determine the possibility of trade within the EU and re-export from the EU include the date and legality of acquisition, the date of import in the EU, whether the item falls under the definition of 'worked specimen', whether it is raw ivory etc. Often, providing proof of the above is not a simple matter and the means of proof usually differ depending on the case.

In relation to Greece, the country has not passed measures stricter than those of the European Regulations and therefore it is possible for one to invoke one of the trade exemptions, if those apply to the specific case.

In any case, trade and the cross-border transfer of items containing ivory is a particularly complex matter. Given the fact that the UK's almost complete ban on ivory trade has already made collectors and traders to house their collections elsewhere, seeking specialized advice is necessary for those that trade in or collect artworks containing ivory.

Art collections, succession planning and taxation

The succession of an estate that includes artworks and other items of cultural significance is an event that may have adverse tax consequences, particularly if the value of such estate is of importance. Greece is among the countries which still taxes inheritances and donations. For this reason, understanding the Greek tax treatment of the succession of an art collection is crucial for structuring such succession. Two main factors could influence such structuring: the valuation of the art collection, and the desired mechanism or vehicle for implementing this succession.

The simplest way of passing an art collection to the next generation of heirs or beneficiaries is the inclusion of this collection to the estate of its owner. In that case, under Greek tax law, it is critical to determine the taxable value of an art collection or artwork; such value is included to the estate that is taxed at rates of up to 10%, 20% or 40% upon death or donation (depending on the family relationship between the deceased/donor and the heir/donee). In principle, movable items (including artworks) arevaluated at their fair market value, as evidenced by the most appropriate means. This fair market valuation requirement is very broad, since there are no specific guidelines on how such valuation should be conducted. However, if an artwork has been insured, then the fair market valuation of such artwork cannot be lower that the valuation included in the insurance policy. Another factor that will influence the valuation of artworks is the eventual introduction of a wealth registry, which shall include, among others, artworks and other items of cultural significance.

It can be easily deduced that the inclusion of artworks in the estate of an individual with Greek ties (e.g. citizenship, residence) may have adverse tax consequences and may entail burdensome administrative procedures. By contrast, including an art collection in a vehicle such as a trust, foundation or charitable entity, may result to tax efficient outcomes, while serving better the will of their owner for their management after his/her demise. The Greek Tax Administration has recently clarified the tax treatment of foreign trusts and foundations; according to such guidance, the potential imposition of Greek inheritance or donation tax can be delayed until the dissolution of such vehicle, with proper structuring. Additionally, if a collector wishes that his/her collection is dedicated to a charitable cause, then the establishment of a non-profit entity may also present many advantages, both from a tax and a private law perspective. Yet, the decision for the establishment of a vehicle for the ownership and management of an art collection should also take into account other considerations, apart from tax structuring.

The particularities of the art market, as well as the subjective character of valuating artworks, create a complex tax environment for their intergeneration gratuitous transfers. Additionally, the constantly evolving regulation of the ownership of artworks emphasizes the necessity of correct tax compliance. Therefore, the tax treatment of the succession of artworks, either within the owner's family, or for charitable causes, has a central role in determining how such succession will be structured. In case a tax collector is a Greek national or citizen or his/her artworks are located in Greece, the tax treatment of the succession of his/her art collection may be the starting point for deciding whether to own such artworks directly, or in a more structure way through a vehicle.

Art businesses 2020: a practical guide on the new due diligence obligations

For the first time, the EU has expressly targeted art market professionals by imposing on them obligations for the prevention of money laundering and terrorist financing. Specifically, the 5th Anti-Money Laundering Directive ("5th AMLD") imposes due diligence obligations on those who store, trade or act as intermediaries in the sale of fine art valued €10,000 or more. Under these obligations, art businesses will now be required to identify the customer and verify the customer's identity, identify the beneficial owner, assess the purpose and intended nature of the business relationship and conduct ongoing monitoring of that relationship.

Additionally, the trader will be required to collect even more in-depth information (particularly, in relation to the source of the funds) where:
(a) the transaction is particularly complex, unusually large, conducted in an unusual manner or seems to lack economic or lawful purpose,
(b) the transaction relates to a cultural artefact &
(c) a high-risk third country is involved.

What's Next?

In practice, starting from January 2020, art businesses will need to have in place an efficient AML framework. The following actions will be necessary:

Adopt a Risk-Based Approach & Prepare a Risk Assessment

The first step will be to adopt a risk-based approach in order to determine and assess (on a regular basis) the exposure of the particular business to the risk of money laundering and terrorist financing, and identify what mitigation is, or needs to be in place. This risk assessment will then be used as a reference against which each business relationship will be rated. In assessing the risk factors, the type of customer (e.g. individual, company or trust?), the distribution channels (e.g. entirely online or face-to-face?) and the countries involved (high-risk 3rd country or an EU member state?) are all relevant, yet non-exhaustive. Regulatory supervisors can ask to see a business' risk assessment at any time.

KYC & Ongoing Monitoring

Further, art businesses will need to be satisfied that they know the identity of the customer and the beneficial owner by carrying out Know-Your-Customer due diligence checks as soon as the business relationship commences. Having done that, art professionals will then need to monitor the business relationship and identify any changes in the customer's circumstances which may affect their risk profile. For example, professionals will need to be able to demonstrate that they use systems for the immediate identification of politically exposed persons (PEPs) or criminal sanctions imposed on a customer. Nevertheless, this ongoing monitoring will not be required for customers who only carry out occasional transactions with the art business, which arguably amounts to the majority of transactions. It is, therefore, necessary for art market professionals to exercise judgement as to with which customers they have a business relationship, and which customers come to them only for an occasional transaction.

Appoint an Officer & Train the Staff

In order to be able to implement the above actions, art businesses will have to appoint a compliance officer at management level with sufficient knowledge of the businesses' money laundering and terrorist financing risk exposure to whom all employees will report any suspicious activity. Additionally, businesses will also be required to provide special ongoing training to employees to help them recognize operations which may be related to money laundering and to instruct them as to how to proceed in such cases.

Report to & Cooperate with the Authorities

Where the transaction – whether concluded or attempted - appears suspicious, art professionals must report it to the competent authorities, regardless of the amount involved and must promptly respond to requests by the competent authorities for additional information.

It is clear that the beginning of the new decade brings important changes in the way the art world conducts business. It is thus important that art market participants act proactively and take all the necessary steps to implement the obligations imposed by the 5th AMLD as soon as possible in order to be able to demonstrate compliance and minimize the risk of being found guilty of a criminal offence.

New regulation on the import of cultural goods in the EU: how can the art market prepare?

On June 2019, the European Union passed a Regulation on the Introduction and the Import of Cultural Goods. Its end is certainly worth pursuing; it aims to ensure the prevention of terrorist financing and money laundering through the sale of pillaged cultural goods to buyers in the Union. The means to this end, however, have spurred intense criticism from art market professionals, as it imposes certain obligations on importers of cultural goods which are, in many cases, difficult (if not unrealistic) to attain.

Cultural goods (a) of certain age and value and (b) created or discovered outside the customs territory of the EU are subject to uniform controls upon their entry into the EU. Depending on the age and value of the item, one may have to obtain an Import License, or make an Importer Statement.

Importing higher-risk cultural goods (as defined under the Regulation) requires an **Import License**. In order to obtain one, an application must be submitted to the competent authority of the importing member state along with either an export license or evidence of the absence of laws requiring the issuance of an export license at the time they were taken out of its territory.

For objects determined to be of lower-risk, an **Importer Statement** that the object has not been unlawfully exported from the country of creation or discovery will suffice. Accompanying the declaration, the importer will have to provide a standardized description of the object in question.

The 5-Year Window

A notable derogation is interesting: where the country of origin cannot be reliably determined, or the export of the object took place before 24 April 1972, the importer need only provide evidence that the object in question was lawfully exported from the last country where it was located for more than five years.

This is good news for those that legitimately own objects for which scholars have difficulty ascertaining their origin and therefore it is unclear which should be the country of export. However, it does open a window for abuse. For example, smugglers may well place a looted object in one country, leave it for 5 years and then obtain an Import License invoking the 5-year rule. Further, the 5-year rule also gives ideas for “jurisdiction shopping”, meaning that one may place a looted object for 5 years in a country which may have more lenient laws on the export of cultural goods, obtain the export license once the 5-year requirement is met and import it in the EU taking advantage of the derogation.

A Few Paradoxes

As discussed above, to obtain an Import License, one needs to either have an export license or give evidence that no such license was required at the time of export. In order to satisfy either of these requirements, the importer must know the exact date that the object was exported from the country of creation or discovery.

This is rarely the case in reality. The history of ownership for objects that are of significant age usually lacks detailed documentation and often one can only assume that an object was exported by the country of creation by a certain date by piecing together available information. It may seem that the Regulation is offering two options for those applying for an Import License, when in fact, it offers none for those unsure of the exact export date (arguably accounting for the majority of cases).

Further, the frequent lack of knowledge in relation to the exact export date may also put the importer at risk of making a false declaration in their Importer Statement before the competent authorities, as the inferences on the export date derived from the information at hand may be hardly accurate. This is not a trivial matter, as the Regulation obliges Member States to impose penalties for such false statements and the submission of false information.

Some Implications

International dealer associations have opposed the Regulation since its inception claiming that it would place a considerable administrative and financial burden on art and antiques businesses throughout Europe. Indeed, the Regulation will add operational costs by setting levels of due diligence that are hard to attain and will introduce lengthy delays (the competent authorities can take up to 90 days to decide on an import application) which will arguably slow business.

Participation in international art fairs will also be affected. Although an import license is not required for temporary admission of objects to be presented at art fairs (an importer statement suffices), nevertheless, if the object sells, the dealer would have to await receipt of the license before finalizing the deal, which could lead to a lost sale (both due to the delay itself and due to the uncertainty of obtaining the import license).

Art Market Preparations

Although the Regulation is already in force, in practice it will not be fully implemented until the rules for the centralized electronic licensing system are established (scheduled for June 2021) and the system becomes operational (expected to take another 2-3 years). Therefore, the art market does have time to prepare. Below are a few suggestions on how to do so.

For one, collectors and institutions considering to buy objects which fall under the scope of the Regulation must request export documentation and all the available provenance information.

It would also be wise for collectors and institutions to update their record-keeping practices to collect and retain as much export and transport documentation as possible. Where the previous owner is known to the possessor, they should make contact and collect any missing pieces of information relating to the object's previous locations. It will also prove useful to start keeping records of objects in a standardized way which will include detailed information on the description, origin, dimensions and high-resolution images; this way once the Regulation's criteria are published, it will be much easier to comply with them.

Now is also the time to conduct provenance research to document all available information on the object's origin, history of ownership, previous publications and exhibitions as well as previous locations. As this may be time-consuming and costly, one can start by selecting the objects that are most valuable to the collection – both in terms of monetary and historic value.

Lastly, for objects whose country of origin cannot be reliably determined, one should consider taking advantage of the 5-year provision by not moving the object to another country for at least 5 years.

Managing legal risks in museums and art collections: a call for a risk-based approach

Art collecting can be a passionate endeavor. Owning, managing and operating an art collection, on the other hand, comes with far-reaching obligations and responsibilities encompassing legal, financial and reputational risks. If not addressed, these risks can expose to significant harm, with direct or indirect impact on value. Increased costs for litigation and remedial actions, ineffective allocation of resources and reduced fundraising capacity compromise the overall financial position of the collection. Further, reputation damage can result in decline in on-site visits, reduced borrowing capacity and negative impact on public and customer confidence in an organization.

The current approach to managing legal risks is mainly reactional and empirical; often, a triggering event will force the museum to acknowledge a legal risk and delve into a costly 'fire-fighting' mission. The problem with such approach is multifaceted. Firstly, the museum does not have a clear view of the legal risks it runs for all its processes and cannot therefore act pro-actively to mitigate them. Secondly, lack of knowledge in relation to risk often leads to ineffective resource allocation; the museum will tend to allocate resources more heavily to some activities for which risk is thought to be high and less so in areas where risk is perceived to be lower. Nevertheless, this perception of risk is not derived from a factual assessment but rather from random experience, which is subjective, at best. This lack of deeper, factual knowledge in relation to legal risks leads to loss of value whether due to the materialization of a risk which has not been identified (resulting in costly remedial action/ reputation damage), or from ineffective resource allocation.

The Risk-Based Approach

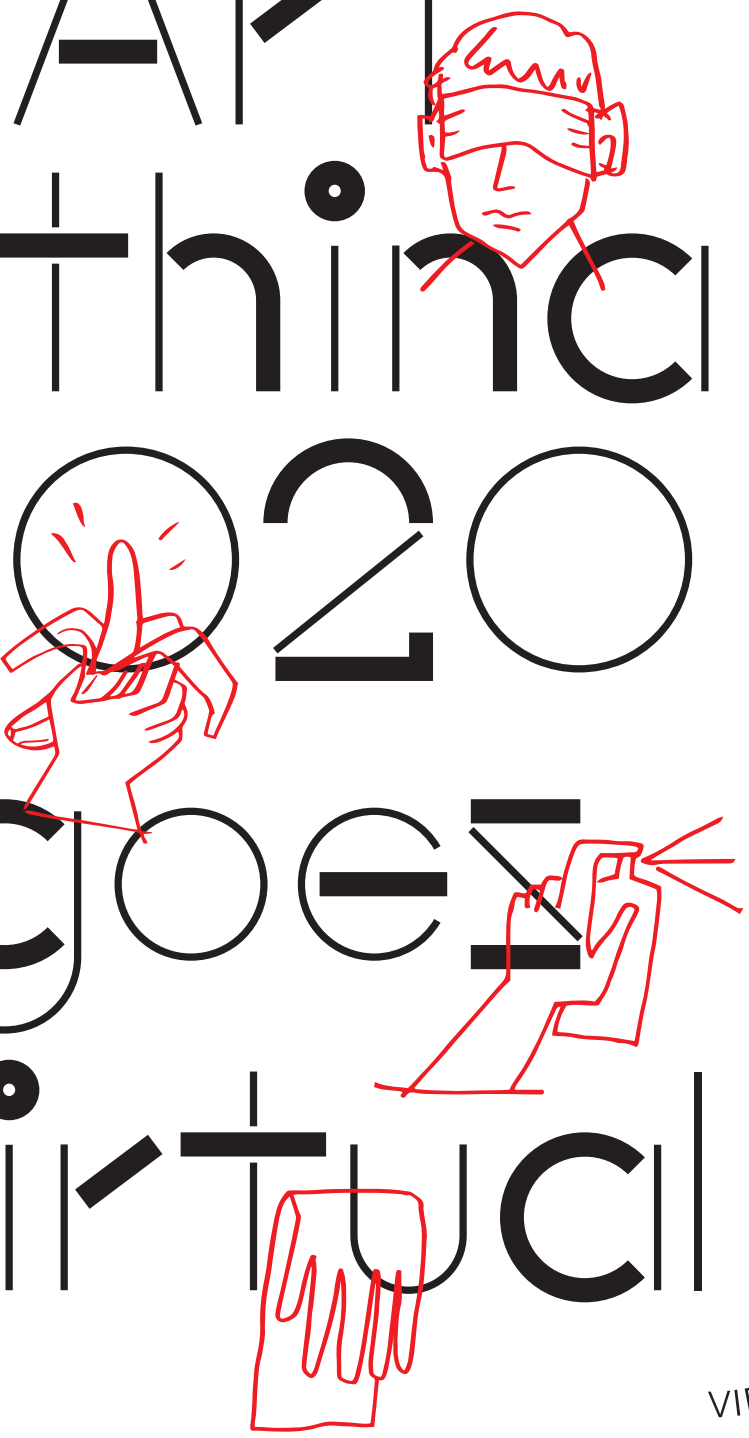
What is lacking is a top-down assessment of legal risks using a tested methodology to systematically, pro-actively and holistically identify and assess the sources of risk for all art collecting processes & activities. Such assessment will propose mitigating measures proportionate to the type and level of risk associated with each activity, putting valuable resources to optimal use. Crucially, it also indicates actions which will mitigate risks not only for the collection management areas where legal support is typically sought (e.g.: purchases) but also for those that legal advice is thought to be irrelevant (e.g.: cataloguing) but may involve risks previously not contemplated.

The Collection's Value is Enhanced

By adopting a risk-based approach, art collection management professionals are given invaluable tools which can enhance the value of the collection, whether by allocating resources more effectively, unlocking value to engage in business opportunities that were previously considered too risky or minimizing spending on remedial actions.

We have developed the industry's first Legal Risk Assessment model designed for museums and private art collections by combining expert knowledge from three knowledge domains: risk management, art law and collections management. Guided by our innovative risk library, we are able to identify and assess more than 60 legal risk categories and 100 risk mitigating activities.

Art Athina 2020 goes virtual



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ART ATHINA 2020 CONTEMPORARY ART FAIR

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