

The strategic value of art wealth management

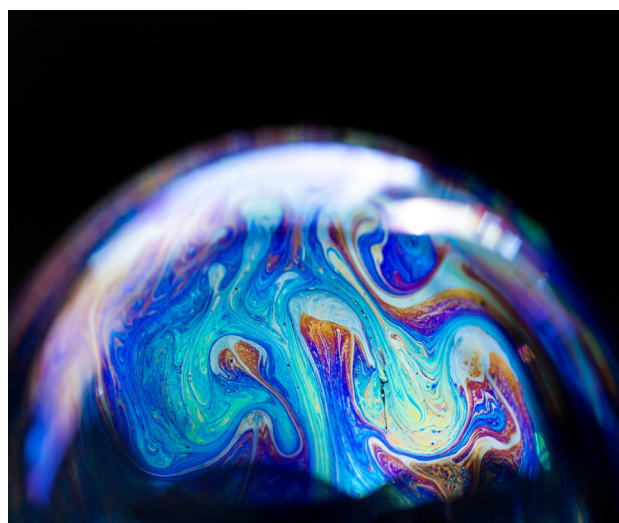
Expert's opinion

Buying works of art: due diligence and contractual matters

by **Annapaola Negri-Clementi**

Considering the relevant regulatory system and in order for the buyer to proceed with an “informed” purchase, three phases can be identified in the sale and purchase of a work of art. The first phase concerns due diligence activities, which are preliminary to the formalisation of the purchase agreement. The buyer will have to verify ‘with due diligence’ the presence of certain essential elements that may affect the identification and quality of the artwork, namely: authenticity and provenance, title of purchase, and the absence of any declaration of exceptional cultural interest by the Italian Ministry of Culture (international free movement of works of art). First of all, the buyer must verify that the artwork is accompanied by a certificate of authenticity correctly issued by foundations and archives...

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Overview

Works of art as assets and their peculiarities

by **Annapaola Negri-Clementi and Alessandro Dragonetti**

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Focus on

Generational transition in art: the role of trusts and foundations

by **Carlotta Benedet and Gianluca Floriddia**

In case of succession or donation, works of art contribute to the constitution of the inheritance assets of the deceased and are subject to the ordinary taxation rates and allowances (i.e. one million Euro allowance and 4% tax rate applied to transfers between spouses and direct descendants), except for the exemption provided for by the Italian regulation for culturally protected assets, pursuant to the Code of cultural heritage. The real challenge in preserving art collections from generation to generation, preventing them to be fragmented among multiple heirs or even sold to pay inheritance taxes, consists in a correct and proactive succession management and...

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Art has always been an expression of human ingenuity and a mirror of culture, but it has also taken on a dual significance in the modern assets context: safe assets and an alternative form of investment on the one hand, and complex assets to be managed with specific legal and tax skills on the other. An art collection is not simply a collection of valuable objects, but a dynamic entity whose ownership, transfer and valorisation require an integrated strategy. Art collectors face many challenges and opportunities, especially during the delicate phase of succession planning, where inadequate planning can even compromise the integrity of the collection and give rise to significant costs (not just tax) and family disputes. It is therefore advisable to properly understand the regulatory framework, tax implications, and the most advanced legal tools to ensure that a passion for art can translate into a lasting and well-managed legacy.

Framing an art collection as an actual asset class means recognising the peculiarities that set it apart from traditional financial instruments.

Unlike the more common financial investments, artworks are illiquid, heterogeneous assets whose value is determined by a complex interplay of factors: authenticity, provenance, state of preservation, historical and artistic importance, and, last but not least, changing market trends. This intrinsic specific nature requires a multidisciplinary management approach that takes into account both the legal and tax implications and the ownership and provenance of the work of art, as well as any restrictions that may limit its circulation should the work be considered of historical or cultural interest.

Art lawyers and art wealth managers thus become key professionals, alongside legal and tax advisors. Through legal and artistic due diligence, they actually guide collectors towards informed and secure sound, which are fundamental in terms of succession planning.

Thorough due diligence (preferably upon purchase) is essential to ascertain the ownership and provenance of the artwork and ensure that it is not the result of theft, despoiling or illegal exportation. Documents such as certificates of authenticity, expertise, and a solid chain of ownership (provenance) are not mere accessories, but rather integral elements of the work of art's value and legitimacy.





From a tax perspective, while the Italian lawmaker has introduced significant incentives for investing in works of art (such as reducing VAT to 5% and exempting capital gains from taxation in the case of sales of artworks purely for cultural purposes and personal enjoyment), on the other hand, an incorrect management and asset planning of the collection can lead to significant tax and other consequences.

It is actually in the context of succession planning that the greatest complexities arise: the transfer of an art collection by inheritance (mortis causa) or donation can give rise to significant liabilities in terms of inheritance and gift tax.

Although the law provides for specific exemptions for listed cultural assets, access to these benefits is subject to specific conditions, which require careful and advanced planning and a lengthy administrative process for recognising the asset's cultural interest.

The absence of a clear strategy can lead to the fragmentation of the collection among multiple heirs, forced sales to pay taxes and, ultimately, the dispersion of a heritage built with passion and expertise.

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Considering the relevant regulatory system and in order for the buyer to proceed with an “informed” purchase, three phases can be identified in the sale and purchase of a work of art.

The first phase concerns due diligence activities, which are preliminary to the formalisation of the purchase agreement. The buyer will have to verify ‘with due diligence’ the presence of certain essential elements that may affect the identification and quality of the artwork, namely: authenticity and provenance, title of purchase, and the absence of any declaration of exceptional cultural interest by the Italian Ministry of Culture (international free movement of works of art).

First of all, the buyer must verify that the artwork is accompanied by a certificate of authenticity correctly issued by foundations and archives, or by appraisals drawn up by universally recognised experts. It is also important to check that the artwork originates from transactions or other transfers (special or universal right), tracing back the previous owners as far as possible to the moment the artwork was created (original ownership), ensuring that the seller is entitled to dispose of the artwork and that the latter is not subject to pledges, seizures or disputes.



Last but not least, it should be verified that the artwork can circulate outside of Italy, as it is not subject to restrictions by the Italian Ministry of Culture due to its status as cultural heritage.

The second step concerns the drafting of the sale and purchase agreement, which has to include certain important clauses for the protection of the purchaser. Specifically, it must contain specific warranty clauses, whereby the seller expressly guarantees to the buyer, among other things, the authenticity of the artwork, its full and exclusive ownership and availability (also for the purposes of art. 1483 and following articles of the Italian Civil Code), and that the artwork is free from defects that make it unfit for its intended use or that significantly diminish its value (art. 1490 and following articles of the Italian Civil Code), as well as from pledges, encumbrances, restrictions, or third-party rights of any kind.





Finally, a few words should be said about two further important aspects that are often overlooked. On the one hand, warranty clauses relating to copyright and, in particular, to economic exploitation rights. It may actually happen that the purchaser acquires not only the artwork, but also individual economic exploitation rights that can circulate separately from the material ownership of the asset. These include the right to reproduce the image of the artwork in exhibition catalogues, merchandising materials, websites or social media profiles for promotional purposes. It is important to remember that the reproduction of an image of a work of art constitutes one of the exclusive economic exploitation rights granted to the author by the Copyright Law. Unless otherwise agreed in writing between the parties, this right is not automatically transferred with the sale of the artwork. Therefore, if the relevant reproduction right was not transferred with the purchase, the new owner cannot authorise its use by third parties (such as museums or galleries). Instead, the latter will have to request a specific licence from the artist or their successors and assigns in order to legitimately use the artwork's image.

On the other hand, the warranty clause relating to the condition of the asset and, therefore, the recommendation to attach a condition report to the agreement.

This report is a document defining the state of conservation of a work of art, containing all information on its physical condition, including a description of any damage, restoration and repairs that may have been carried out. It helps to avoid disputes over the condition of the artwork and any damage it may have suffered prior to the transfer of ownership.

Finally, going back to the legal analysis of the sale and purchase, the third and final phase concerns possible contractual irregularities, the management of which depends, once again, on its drafting. Indeed, if, after the sale, the artwork is found to be "inauthentic," i.e. if there is any "discrepancy between the asset transferred and the asset described in the contract," the buyer may avail themselves of various legal remedies depending on whether or not they have included an authenticity guarantee clause. In short, the buyer may request the termination of the agreement for default of contract for delivery of aliud pro alio, if 'authenticity' was guaranteed by the seller, or may bring an action for annulment due to defects in the agreement, if the sale of the work of art took place without the seller's guarantee of its authenticity. These actions have different limitation periods and different amounts of compensable damages.





Focus on

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In case of succession or donation, works of art contribute to the constitution of the inheritance assets of the deceased and are subject to the ordinary taxation rates and allowances (i.e. one million Euro allowance and 4% tax rate applied to transfers between spouses and direct descendants), except for the exemption provided for by the Italian regulation for culturally protected assets, pursuant to the Code of cultural heritage.

The real challenge in preserving art collections from generation to generation, preventing them to be fragmented among multiple heirs or even sold to pay inheritance taxes, consists in a correct and proactive succession management and planning for such works.

In fact, just waiting for succession is not the best strategy to follow, also for the recognition of the historical-cultural interest of the work, which is the basis for the exemption from the payment of inheritance tax, since the procedure is not limited to ascertaining the existence of the objective requirements provided for by the regulation (work older than 70 years by a deceased artist), but also requires a declaration of cultural significance to be issued by the Ministry, so it is far from straightforward.

Therefore, it is crucial for the collectors to decide on the future of their collections: should they be maintained jointly? Should they be managed by a specific heir – perhaps more passionate? Should they be available to the public? Answering these questions allows identifying the most appropriate legal instruments to safeguard and transfer works of art.

A simple will, in fact, could not be sufficient to solve potential conflicts or ensure a uniform management of collections. Disputes between heirs for the division of assets often lead to selling off important works to meet legitimate shares, thus destroying the cultural and economic value of the collection as a whole.

Planning is not only aimed to mere tax optimization but is also the highest act of protection of one's passion and cultural legacy, ensuring that future generations can enjoy them according to the collector's vision.

To overcome some limitations of traditional instruments, such as will (which remains a crucial and unavoidable succession planning instrument, to be accompanied by more protective instruments for some specific assets, such as work of arts or collectible items) or joint heirship, the Italian regulation offers more sophisticated and flexible options to manage and transfer collections of works of art and/or of collectible items in general, such as trusts and foundations.





In fact, these allow “segregating” collections from the collector’s personal wealth, entrusting its management to a third party (the trustee, in the case of trusts, or the board of directors in the case of foundations) in the interest of the designated beneficiaries and for the achievement of a specific purpose, which is defined at the beginning by the collector or later by the persons in charge of carrying out the collector’s wishes (i.e., the trustee).

Trusts have Anglo-Saxon origins but are not fully recognised in Italy and stand out for their high flexibility. The collector (executor) transfers their work to a trustee (either a trusted person or a professional trust company), who manages them according to the rules included in the trust deed. Therefore, the executor can give scrupulous instructions on the management, maintenance, valorisation, and any sale of works, as well as on the use by the beneficiaries (e.g., children, grandchildren, or a group of enthusiasts). The trust allows achieving multiple objectives:

- It maintains the collection integrity, thus avoiding its fragmentation among heirs (the trustee manages the artistic heritage as a unique entity, according to the collector’s vision);
- It ensures a professional management of the collection and/or of the trusted assets in general, as it gives the possibility to appoint as trustee or protector (who supervises the trustee’s activities) experts in the field;

- It offers asset protection: trusted assets constitute separate wealth and cannot be seized by the executor’s creditors or by the trustee’s or the beneficiaries’ creditors;
- It ensures favourable taxation in terms of inheritance or gift tax, since, according to the current regulation, the contribution of works of art to a trust – unless otherwise provided – is subject to a fixed tax and only when the asset is assigned to the beneficiaries the inheritance and/or gift tax is applied proportionally, based on the family relationship between the executor and the beneficiaries, applying the rates and allowances being current at the moment of assignment of the assets.

Given the current tax regulation, if the art collections transferred to the trustee are never assigned to the trust beneficiaries, they can be jointly handed down from generation to generation without paying the inheritance and/or gift tax and ensuring a joint management of the assets, based on the will of the executor-collector.

As an alternative to the trust, a foundation can be established, such as the so-called “family foundation”, i.e. a not-for-profit legal person.





If the purpose of the collector is not only to safeguard their artistic heritage, but also to enhance its value for the benefit of the community (e.g., by opening the collection to the public, organising exhibitions, supporting young artists, etc.), the foundation can represent the best choice, as it allows fixing the founder's will in a by-law, ensuring the perpetuation of their vision over time (besides ensuring, similar to the trust, a joint management of the collection and its entrustment to a skilled board of directors made up, for example, of professionals in the field). From a tax perspective, similar to trusts, foundations can benefit from a preferential regime, especially if they are qualified as Third Sector Organisations.

The choice between trust and foundation depends on the collector's specific purposes: trusts ensure higher confidentiality and flexibility in the management and attribution of assets and is often preferred for the safeguard of purely family interests; foundations have a more publicistic and philanthropic orientation, which is ideal for those who intend to leave a lasting impact on the community. Both instruments can also be used together, i.e. the trustee can establish a foundation upon the occurrence of certain circumstances (such as the lack of heirs among the trust beneficiaries). In both cases, a specialized legal and tax advisory is essential for building a tailor-made solution that can protect and enhance the value of a unique heritage as an art collection.

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