

MEMORANDUM

Consumer Protection and Brexit

Background

In the aftermath of the Brexit referendum, PALAM decided to offer its collective expertise as a resource to the British government. It is in the interest of our members and their clients that after Brexit, the British art market continues to thrive.

We want to continue to attract talent and to ensure that the British art community remains as creative and entrepreneurial as ever. There is also an opportunity to improve the competitiveness of the British art market on the world stage. This will happen only if the government makes informed legislative decisions and continues to offer appropriate incentives. We believe that PALAM can add value to this process.

We recognise that the diversity of PALAM's membership means that it is not appropriate for PALAM to make specific recommendations, or to seek to influence the government's agenda in the interest of a specific interest group within the art community. Our objective is to offer impartial advice, and to help government make informed decisions.

We have identified several legislative issues affecting the British art community which may benefit from reform, with a view to enhancing creativity, commerce and international trade once the UK has left the European Union. PALAM members have volunteered to prepare a memorandum on each of those issues. Drawing on our members' expertise, the memoranda are intended to provide technical information. Any opinion expressed in the memoranda is the opinion of the author of the memorandum, rather than PALAM's opinion or that of its membership.

The memoranda are not intended to replace legal advice and the reader should not rely upon any technical and legal information they contain.

The memoranda are dated August 2017. They will be reviewed from time to time and updated if appropriate. It is understood that the situation may evolve in the meantime and that the memoranda may not always reflect the latest position.

1. Executive summary

Relatively new developments in the area of consumer protection, namely the enactment of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (hereafter "the Regulations") and the Consumer Rights Act 2015 (hereafter "the Act"), have significant implications for the art trade. Reasonable minds would agree that these laws are necessary to protect consumers of goods sold on the high street, but unfortunately these laws do not discern between high street consumers and consumers of fine art, antiques and collectibles – often sophisticated buyers guided by expert advisors. Because consumer protection laws apply equally to washing machines and Old Masters, British art dealers and auctioneers have had to reconsider the ways in which they conduct their business to minimise the risk of financial loss and penalties and are forced to adopt unusual and inconvenient business models that place them at a competitive disadvantage compared to, for example, their competitors in New York.

Brexit presents an opportunity for the Government to revisit some of the more troubling aspects of consumer protection laws, which largely derive from EU Directives, to strike a reasonable balance between protecting the rights of art collectors and promoting the legitimate business interests of the British art trade.

2. The Statutory Framework

Below we outline the relevant provisions of the Regulations and the Act. The outline below is by no means an exhaustive summary of these legislations, but instead gives an indication of some of the key challenges arising therefrom for the art market.

(a) The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013

The Regulations apply to the sale of goods and the provision of services between traders and consumers. Sales amongst professionals are not caught by the Regulations. For the purposes of this paper, we focus exclusively on sales by traders to consumers.

The Regulations consider three different types of trader-to-consumer sales: on-premises sales, distance sales and off-premises sales. Pursuant to the Regulations, each category of sale is subject to its own rules. The main issues under the Regulations for dealers and galleries selling art, antiques and collectibles are:

- the consumer's right to cancel the sale without giving any reason or incurring any costs (other than those specified in the Regulations), and
- the obligation of the dealer selling on consignment for another dealer to provide the consumer-buyer with the identity and address of the consigning dealer.

(i) On-premises sales

The Regulations define an "on-premises contract" as a contract between a trader and a consumer that is neither a distance nor an off-premises contract. This is a rather unhelpful definition because whether a sale is concluded at a distance or off-premises is not free from doubt. It is safe to say that dealers and galleries selling artworks from their own premises are not required to offer consumers the right to cancel, nor are they under any obligation to disclose the identity of the seller if acting on behalf of another dealer. Before the sale is agreed, however, the dealer must furnish the consumer-buyer with certain information provided in Schedule I of the Regulations.

(ii) Distance sales

Section 5 of the Regulations define a distance contract as "a contract concluded between a trader and a consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded". Sales on online platforms provided by third parties qualify as distance sales because they are concluded under an organised structure. We take the view that one-off sales concluded by email or telephone do not, even though they are concluded 'at a distance', because such sales are not concluded "under an organised distance sales or service-provision scheme".

(iii) Off-premises sales

A contract is said to have been concluded "off premises" if it is concluded face to face with the consumer outside the trader's normal place of business. Hence, if a dealer takes the consumer-buyer out for a meal, a football match or the theatre and negotiates and concludes a contract with them at that venue, then such a contract will be deemed as an off-premises sale. A sale concluded with the consumer-buyer at

their residence also qualifies as an off-premises sale. Similarly, a sale concluded during an excursion organised by the trader with the aim or effect of prompting and selling a work of art to a consumer, is deemed an off-premises sale.

(iv) Right to cancel

Pursuant to the Regulations, consumer-buyers have the right to cancel distance and off-premises sales during the statutory cancellation period – 14 days from the day on which the consumer-buyer or their agent take possession of the artwork – without giving any reason and without incurring any liability, except in limited circumstances. As in the Act, the Regulations have carved out an exemption for property offered for sale in live auctions where the consumer-buyer is able to attend in person, and in such instances the right to cancel need not be offered.

Where the right to cancel is properly exercised by the consumer within the statutory period, the trader must reimburse the consumer for any sum received from them for the artwork. Unless the contract provides otherwise, the trader must meet the cost of returning the artwork. Where the right to cancel applies and the trader fails to inform the consumer of this right, the Regulations automatically extend the cancellation period by 12 months.

In the context of distance and off-premises sales, a trader must disclose to the consumer-buyer certain information listed in Schedule II of the Regulations, including but not limited to the identity of the seller if he is acting on behalf of another trader. This obligation can present a serious conflict for many art professionals and can lead to loss of future commissions. It is unusual, and contrary to art market practice, for a dealer (or auction house) selling on behalf of another professional to disclose to the buyer the identity of that professional. To avoid disclosure, some art dealers and auction houses purchase the artwork from the consignor immediately before transferring ownership to the consumer-buyer, hence doing away with the need for disclosure.

(b) The Consumer Rights Act 2015

The Act works alongside the Regulations and consolidates the many fragmented pieces of legislation that affect consumer rights. With some narrow exceptions, the Act applies wherever there is a written or oral trader-to-consumer contract. One of those exceptions is when the consumer buys second-hand goods at public auction, but this proviso only applies to a live auction that the consumer can attend in person and does not extend to online-only auctions. The Act also sets out the remedies available to consumers for breach of their statutory rights, including but not limited to the right to reject the goods for a full refund or obtain a price reduction. It is important to point out that the consumer's right to reject the goods under the Act is distinct from the consumer's right to cancel sales concluded at a distance or off premises pursuant to the Regulations. The Act further consolidates the law on unfair contract terms in consumer contracts, and introduces the right for aggrieved consumers to bring competition infringement proceedings against traders in the courts.

3. The PAIAM Survey

In March 2017, PAIAM (Professional Advisors to the International Art Market) sent a questionnaire to its UK members (including lawyer, accountants, tax advisors, logistics professionals, insurance brokers) on some of the issues raised in this note. The questionnaire was sent to 182 UK PAIAM members. 82 of these members responded to the questionnaire. Where appropriate, a reference to the answers to the questionnaire by participating UK PAIAM members is made in the footnotes.

4. Possible Improvements

Having outlined the statutory framework, below we make a few suggestions on the alterations the Government might consider making to the Regulations and the Act.

- (a) The Regulations
 - (i) Public auctions exception

The Regulations provide for a “public auction” exception, whereby the many rights afforded to consumers under the Regulations are inapplicable, including but not limited to “the right to cancel”. The Regulations define a “public auction” as “a method of sale where (a) goods or services are offered by a trader to consumers through a transparent, competitive bidding procedure run by an auctioneer, (b) the consumers attend or are given the possibility to attend in person, and (c) the successful bidder is bound to purchase the goods or services.” Given the growing advent of online-only auctions, we believe that the definition of public auction in the Regulations is too narrow. Specifically, the current definition places too much emphasis on whether a consumer has the opportunity to attend the auction in person and not nearly enough on whether he has the opportunity to inspect the goods prior to the auction. The purpose of providing consumers with the right to cancel is to afford them the opportunity to cancel the sale, if after inspecting the goods, they determine that the goods are not as they expected. Where a consumer is given the opportunity to inspect the goods before the sale, the right to cancel should not be available to the consumer. The test should be whether consumers have the *opportunity to inspect* the lots before bidding at auction, not whether they have, in fact, inspected the goods. If they have the opportunity to inspect, and simply choose not to do so, that is a matter for them and they should not have the right to cancel simply because they failed to take advantage of the opportunity to inspect. The same test (the consumer having the opportunity to inspect the goods before the auction) should apply irrespective of whether the auction is a live or an online-only auction.¹

The chart below enumerates some auction models and our views on whether the right to cancel should apply.

Auction model	Should the consumer – buyer have the “right to cancel”?
A traditional live auction model where consumers have the opportunity to inspect the goods prior to the sale and to attend the auction in person.	No
An auction where consumers have the opportunity to inspect the goods prior to the sale, but can only record their bids via means of distance communication (i.e., consumers can only place bids via the internet or telephone)	No
An auction where consumers are afforded the opportunity to attend the auction in person, but are	Yes

¹ 70.59% of PAIAM UK participating members believe that the definition of “public auction” as provided in the Regulations should be expanded to include online-only auctions if consumers are afforded the opportunity to inspect the goods in person prior to their online sale.

not afforded the opportunity to inspect the goods prior to the sale.	
A pure online auction where consumers do not have the opportunity to inspect the goods prior to the sale or attend the auction in person.	Yes

Another important point of note is that the right to cancel prejudices sellers of unique, high value and easily identifiable lots at auction. Once such lots are offered for sale at auction, if they do not sell or the sale is cancelled, the lot is ‘burned’. This means that the lot cannot be re-offered at public auction for a period of years and in the meantime, its fair market value is depressed. Furthermore, the lot is ‘tainted’ because publicly available databases will typically record the fact that the lot was offered at auction but the sale was cancelled, thereby raising questions over issues such as the condition of the lot, its ownership and its authenticity. The fact that the right to cancel can severely prejudice the seller of high value art, antiques and collectibles does not appear to have been taken into account, and we suggest that it should.

(ii) Cross-border sales

While we know that British and EU consumers are protected under the Regulations, these protections may or may not extend to consumers beyond the EU – any such analysis is complicated, may vary from country to country and is not beyond doubt. More clarity is needed as to the applicability of these Regulations when, for example, a UK-based online trader sells to a US-resident consumer via his UK website. In those circumstances, would the US-resident consumer have the ability to enforce the rights and remedies available under the Regulations? The Regulations do not provide any guidance on this issue and a clearer definition of a “consumer” is, therefore, warranted.² UK and EU-resident consumers only should be given the benefit of the rights and remedies enshrined in the regulations.

(iii) Disclosure of other dealer’s identity and address

Pursuant to the Regulations, where a distance or off-premises trader-to-consumer sale is concluded and the trader is acting on behalf of another trader, prior to the conclusion of the sale, the trader must disclose to the consumer-buyer identity and the geographical address of that other trader.³ This is a rather unattractive proposition for fine art dealers, whose business models rests on brokering deals between two parties who do not know one another and keeping the parties from learning each other’s identity. Thus, the identity disclosure requirement jeopardises the dealer’s ability to earn a commission on future sales, where the parties are likely to bypass the dealer to avoid paying him a commission and make direct contact with each other. Whilst auctioneers selling by public auction are exempt from such disclosure obligations (but not when they sell by private treaty), online-only auctions do not enjoy these exemptions, even though like public auctions, their business model rests on confidentiality. The Government should seriously consider altogether doing away with this disclosure requirement for all traders dealing in fine art, antiques and collectibles.

² 79.41% of UK participating PAIAM members believe that more clarity is needed on whether and to what extent the Regulations apply to consumers outside of the EU.

³ 48.48% of UK participating PAIAM members believe that the Regulations should be revised to eliminate this disclosure requirement for all traders dealing in fine art, antiques and collectibles, 42.42% of UK participating PAIAM members do not believe that the Regulations need to be revised and 9.09% of UK participating PAIAM members did not know whether the Regulations needed to be revised.

(b) The Act

Pursuant to the Act, an individual is not treated as a consumer for most of provisions in the Act, if the goods are second-hand and bought at a public auction that the individual could have attended in person. As a result, with the exception of the rights afforded under the Sale of Goods Act 1979 and the Unfair Contract Terms Act 1977, the majority of the rights and remedies in the Act do not apply to consumers who buy second-hand goods at public auction. The definition of public auction in the Act, like the Regulations, erroneously places the emphasis on the opportunity given to the consumer to attend the auction in person over the opportunity to inspect the goods prior to the auction.

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