Response from the Institute of Art and Law to the Department for Digital, Culture, Media & Sport's Public Consultation regarding Strengthening the Process for Retaining National Treasures (December 2018)

22 February 2019

The Institute of Art and Law

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Q1) Do you agree with the proposal to introduce a legally binding mechanism into the export control system for national treasures in the UK?

Yes, subject to the comments and caveats below, the introduction of a legally binding mechanism is a generally positive step. However, there are several aspects of the proposal that should be moderated in order to ensure that the rights of exporters are sufficiently respected.

Q2) Do you have any views on how the proposal to introduce a legally binding mechanism into the export control system would affect individuals applying for a licence to export a cultural object? Please provide evidence to support these views.

When a similar legally binding mechanism was proposed in both the Quinquennial Review of 2003[1] and the Goodison Review of 2004[2], the DCMS, having sought Counsel's opinion on the matter, decided not to adopt the proposal.[3] This decision by DCMS was made on the premise that the proposal created too great an imposition on the contractual and property rights of the exporter.[4] While those same fears need not condemn the current proposal outright, consideration will need to be made in order to ensure that the proposal adequately respects the rights of exporters.

The UK's export control system for works of art and other cultural objects has until now provided significant safeguards to the rights of exporters. The latest Arts Council *Guidance* makes this clear at para. 61 where it is stated that 'If an owner receives an offer to purchase from a public body, they are free to accept or reject it'.[5] In contrast to countries such as Italy and France, the UK has no compulsory acquisition procedure or 'right of pre-emption' in favour of the State. This has allowed the system to function relatively smoothly over the years. The express protection of the

[1] Quinquennial Review of the Reviewing Committee on the Export of Works of Art, DCMS, 8 December 2003.
[2] Sir Nicholas Goodison, *Securing the Best for our Museums*, January 2004.
[3] *Response to the Quinquennial Review of the Reviewing Committee on the Export of Works of Art*, DCMS, 16 December 2004.
[4] Edward Manisty, 'UK Export Licensing for Cultural Goods' (Dec 2007) XII *Art Antiquity and Law* 317 at pp 322-23.
[5] UK Export Licensing for Cultural Goods: Procedures and guidance for exporters of works of art and other cultural goods, Arts Council England Notice, Issue 1, 2018, para 61.

exporter's freedom of choice is likely to have been one of the main reasons why exporters have not sought to challenge the export control system in judicial review.[6]

A natural or legal person's right to peacefully enjoy their property is enshrined in Article 1 of the First Protocol to the European Convention on Human Rights (ECHR) and, in domestic UK law, through the Human Rights Act 1998. The ECHR does, however, permit States to deprive a person of his or her possessions if the deprivation is in the public interest and is subject to conditions provided for by law. It is important that any State seeking to make such an interference demonstrate that (a) the interference is lawful, (b) the interference pursues a legitimate aim and (c) the interference strikes a fair balance between the demands of the general interest and the requirements of protecting the person's rights.[7]

When assessing a State's right of pre-emption (the compulsory purchase by the State from an individual of a nationally important work of art) against the right to peacefully enjoy one's possessions in Article 1 of the First Protocol to the ECHR, the European Court of Human Rights has held that 'the control by the State of the market in works of art is a legitimate aim for the purposes of protecting a country's cultural and artistic heritage': *Beyeler v Italy*, para 112. The Court further pointed out in this respect that 'the national authorities enjoy a certain margin of appreciation in determining what is in the general interest of the community': *Beyeler v Italy*, para 112. In *Beyeler v Italy*, Italy had used its right of pre-emption to acquire a nationally important Van Gogh from the painting's owner. Though Italy's interest in pre-emption was considered acceptable to the European Court, the methods used in effectuating such an interest were considered disproportionate and unduly burdensome on the owner's right of peaceful enjoyment. Thus, should a State want to compel an owner to sell an artwork, it must do so in a proportional manner that strikes a fair balance between the State's interest and the rights of the individual.

In terms of the current proposal, there appears to be a legitimate interest in the UK in having a legally binding mechanism of the nature contemplated. However the contemplated mechanism must be proportional and not unduly burdensome on the exporter's right to peacefully enjoy his/her property. This proportionality is more likely to be met if the following factors are taken into account:

- *Duration of first deferral period* – The duration of the first deferral period should be kept relatively short and should ideally be capped (at, for instance, two months). This way, the initial process does not drag on longer than it must, prior to the exporter signing the option agreement.

- *Duration of second deferral period* – As suggested in the proposal (at page 11), the duration of the second deferral period should also be capped in order to provide the exporter with sufficient certainty as to when the option in the agreement must be exercised. Too much flexibility as to the duration of the second period would appear to create a disproportionate interference with the exporter's property rights. The proposed duration of six months (again at page 11) appears reasonable, provided museums and funders agree that this is sufficient time to raise the necessary funds, or to know for certain that such funds cannot be raised.

[6] The one known exception is the attempted judicial review brought by the John Paul Getty Trust in regards to its attempted export of Canova's *Three Graces*: *R. v. Secretary of State for National Heritage, ex parte John Paul Getty Trust*, Divisional Court, 13 Sept 1994, Court of Appeal, 27 Oct 1994. Leave to seek judicial review was denied by the Divisional Court and by the Court of Appeal.
[7] See *Beyeler v Italy* (2000) European Court of Human Rights, App. No. 33202/96, paras 108-119.

- *Determining fair market price* – The process by which the Reviewing Committee on the Export of Works of Art (RCEWA) arrives at the fair market price should be amended to allow further transparency as to valuation in cases where the exporter's initial valuation has not been accepted. If the binding offer mechanism is introduced, the price at which the exporter must accept the future purchaser's offer could become especially contentious. The current *Guidelines* do not allow the exporter an opportunity to challenge a final valuation recommended by the RCEWA to the Secretary of State where the exporter's initial valuation had been rejected (see para. 55, *Guidelines*)[8]. In order to keep the process fair to the exporter, the exporter should have the express power to challenge, in cases of disagreement, the valuation proposed by the RCEWA prior to a valuation being selected by the Secretary of State.

- *Single potential purchaser* – In order to respect the legitimate expectations of the exporter, the predictability of the system should be preserved. As such, there should be no more than one potential purchaser capable of signing the option agreement with the exporter. If the option agreement is signed with a purchaser, it is to that purchaser and that purchaser only that the exporter should be bound. Allowing a third party to benefit from the option agreement (even indirectly) would render the outcome of the proposal uncertain and unfair towards the exporter.

- *Transfer of funds to exporter* – After the option in the agreement has been exercised, the purchaser should have a set (and relatively short) period of time to ensure all funds are transferred to the exporter. If this period is not provided for in advance (or remains indefinite), the system could become unfair to exporters if full payment of the purchase price takes more than a reasonable amount of time (e.g. up to six months).

- *Guarantee of licence* – If the offer is not made by the end of the second deferral period, or if the purchaser has revoked the option (as provided in clause 8.1.2 of the option agreement), the exporter should have a guarantee that a licence will be issued forthwith. The language in the proposal is that the licence shall 'usually be granted' (at page 13), which is insufficiently precise to provide the requisite certainty to the exporter.

In addition to the above, one relatively common situation which the current draft of the option agreement does not appear to cover is that which arises where a Seller has already entered into a provisional sale agreement with an overseas buyer which is conditional upon the grant of an export licence. In this situation, the Seller would not be in a position to give several of the warranties required under clause 9 (for example, freedom from Encumbrances at 9.4.1 and 9.1.5).[9]

[8] For a commentary on the shortcomings of the current system for establishing a fair market price, and a suggestion for improvement, see Petra Warrington, 'Saving Art for the Nation: Export Controls in the United Kingdom' (July 2016) XXI *Art Antiquity and Law* 117, in sections marked 'Fair market price' and 'Improving consistency in pricing'.

[9] See the suggestions made in this regard in relation to the 2003 proposal to introduce a legally binding mechanism by Edward Manisty, 'UK Export Licensing for Cultural Goods' (Dec 2007) XII *Art Antiquity and Law* 317.

Q3) Do you have any views on how the proposal to introduce a legally binding mechanism into the export control system would affect public institutions such as museums and galleries? Please provide evidence to support these views.

Should the proposal be adopted, public institutions are likely to respond by delaying all fundraising to acquire a piece until the signing of the option agreement and the commencement of the second deferral period. Any fundraising undertaken ahead of this point is likely to be considered premature. This is why we have proposed, in response to Q2, that the first deferral period be kept short and ideally capped. Allowing this first deferral period to drag on would merely elongate the overall process for no apparently good reason, and with a presumably detrimental effect on the rights of the exporter.

Q4) Do you have any views on how the proposal to introduce a legally binding mechanism into the export control system would affect the UK art market? Please provide evidence to support these views.

Since very few objects would be caught in such a procedure, the overall effect on the art market would seem to be rather minimal. Of course, regular exporters and overseas buyers are likely to be frustrated by the legally binding mechanism, but if their rights are respected in the process (as we recommend in the answer to Q2) then any impediments would be considered reasonable and balanced.

Q5) Do you have any views on how the proposal to introduce a legally binding mechanism into the export control system would affect organisations that fund public art acquisitions? Please provide evidence to support these views.

As set out in our answer to Q3, it is likely that such organisations will not become significantly involved in the process until the second deferral period has begun. As a result, keeping the first deferral period short and capped seems logical.

As the proposal includes a suggestion to cap the second deferral period at six months, the views of such organisations should first be solicited in order to verify that this is a reasonable period for raising the necessary funds.

Q6) Do you have any evidence to show what effect the introduction of a legally binding mechanism into the export control system would have on the number of national treasures retained in the UK per year?

Strictly speaking, the number of national treasures retained in the UK would remain the same, since no new export possibilities are available under the proposed mechanism. But in terms of the number of objects acquired by UK institutions that otherwise would not have been so acquired, based on our awareness of past cases of application withdrawals for national treasures, we would estimate that one additional object might be acquired every two or three years.

Q7) Do you have any views on an appropriate process for applying the option agreement where more than one relevant purchaser puts forward an expression of interest by the end of the first deferral period? Please provide evidence to support these views.

Only one party should be capable of signing a binding option agreement with the exporter after the first deferral period. Otherwise, the process would engender great uncertainty for the exporter and for the system as a whole. The process needs to remain fair and predictable throughout.

From a practical perspective, if more than one public institution is attempting to raise funds to make a fair market offer, public funds and other funding sources would be stretched unnecessarily thin. Both/all potential purchasers will effectively enter a competitive fundraising situation on commencement of the second deferral period. This risks precisely the same waste of time, effort and fundraising credibility for the institution not selected as prevails under the current system. It also means that the potential purchasers will not be able to reap the benefits, from a fundraising perspective, of certainty of purchase. Such parties would have no guarantee, or even any indication, as to whether they will be selected as the preferred buyer.

Instead, if there is interest from multiple prospective purchasers in the first deferral period, such purchasers should be encouraged to combine their energies into a single expression of interest, under the banner of a single institution, with a view to making a single fair market offer during the second deferral period. This would allow public funds and other funding sources to be consolidated in order to have maximum impact. In such a case, the several prospective purchasers could have an agreement between themselves providing for a sharing arrangement for the object should it be acquired (along the lines of the V&A and National Galleries of Scotland arrangement to share Canova's *Three Graces*).

Additionally, as appears from our answer to Q2, once the option agreement is signed and the second deferral period begins, no third party should be able to benefit (even indirectly) from the option agreement. The exporter should be bound only towards the purchaser with whom he or she has contracted.

Q8) Do you have any views on the proposal to introduce a value threshold which would mean that export deferred items with a value equal to or below £100,000 would not be subject to the 'binding offers' system? Do you have any views on setting this value threshold at £100,000? Please provide evidence to support these views.

Having a threshold value is a good initiative so that the rather intricate binding offer mechanism does not apply in relation to too many export applications, which would use up precious public resources at the Arts Council and elsewhere. Based on the cases that have given rise to this proposal, it would seem, however, that the proposed threshold is unduly low. Since the matter arises only when funding poses a challenge in the first instance, and since it would be overly burdensome on the Arts Council/DCMS to manage a system with too many binding offers at any one time, the proposal should apply only to those objects of the greatest national importance. Such a threshold could possibly be set at £1 million.

Q9) Do you have any views on the impact of the proposal to allow Sellers who purchased the cultural object in a currency other than sterling to require the purchase price to be specified in (or by reference to) that currency? Please provide evidence to support these views.

The only purchase price available should be in Sterling. Allowing a foreign currency price will frequently lead to disparity and disagreement. Only very rarely in the past does this seem to have raised a major issue and this was because the deferral period stretched over the Brexit Referendum and its immediate aftermath. Bear in mind also that currency fluctuations can help, as much as hurt, overseas buyers.

Q10) Do you have any views on the impact of the proposal to allow Buyers to choose the mechanism by which exchange rate fluctuations are mitigated under the option agreement? Please provide evidence to support these views.

For the reasons stated in the answer to Q9, this appears an unnecessary salve to a practically non-existent problem.

Q11) What are the practicalities involved for interested institutions purchasing an object in a currency other than sterling?

See our previous two answers. This aspect of the proposal should not be taken up.

Q12) Do you have any views on the impact of the proposal to cap the length of the second deferral period? Please provide evidence to support these views.

As mentioned in our response to Q2, it would be wise to cap the second deferral period at a reasonable duration (i.e. six months), provided this is acceptable to the institutions and funders canvassed. Such a cap would assist in ensuring the balance and predictability of the system.

Q13) Do you have any views on the clauses in the option agreement concerning the preparation of condition reports and the consequences where damage is shown to have occurred, and the impact of those provisions on the process and parties (see clauses 2 and 8)?

Given the consequences which flow from damage having occurred between the First and Second Condition Reports (reduction in Consideration, 8.1.1 / right for Buyer to revoke Exercise Notice and subsequent lapse of Option, 8.1.2) we consider that a materiality threshold on the level of damage required to trigger such consequences should be imposed. That threshold should be established in consultation with relevant experts.

Q14) Do you have any views on whether the warranties set out in clause 9 of the option agreement (and repeated in clause 4 of the form of Transfer Deed at Annex 2 to the option agreement) are sufficient?

See the final paragraph in our answer to Q2 above as regards the ability (or not) of a Seller to give the warranties as to freedom from encumbrances. One option may be to consider making the warranty at clause 9.1.4 a future obligation (i.e. that the Seller 'will, as at the date of Completion, have all right title…'). By this stage, any conditional contract with a potential overseas purchaser would have had to have been cancelled or annulled.

The 'full title guarantee' required by clause 3.2 of the option agreement (and clause 2 of the Transfer Deed) may also raise potential difficulties for a Seller. Such a 'guarantee' implies an undertaking on the part of the Seller that the Seller has a right to sell the goods, that the goods are free from any charge or encumbrance not disclosed or known to the Buyer before the contract is made, and that the Buyer will enjoy quiet possession of the goods. Such a term is ordinarily implied in a contract for the sale of goods in accordance with the Sale of Goods Act 1979, section 12. This provision, however, also allows for the sale of a limited title (section 12(3)–(5)), which, of course, would generally command a much-reduced price, because, for a Buyer, it would involve potentially significant risk. A Seller aware of potential encumbrances on title, for example, gaps in provenance, would therefore not be in a position to provide such full title guarantee, but there may still be good reason for a

Buyer to wish to go ahead with the purchase. For the protection of a Buyer, it may be wise to retain the warranty as drafted, such that any uncertainties over title would require specific disclosure and negotiation on a case-by-case basis.

The warranty as to attribution (clause 9.1.8 (b)) provides wide protection for a Buyer, but may encounter some resistance from Sellers, particularly in light of the indemnity at clause 9.2 of the Option Agreement and clause 5 of the Transfer Deed which provides the Buyer with an express right to repudiate the contract in the event the Buyer becomes aware of a breach of the warranty as to attribution within 12 months of the date of the transfer. A Seller may well require some reasonable safeguards in relation to this warranty (for example, to define more clearly how the indemnity might work in practice, e.g. the circumstances in which a Seller might be considered to be in breach of the warranty that, to the best of his/her knowledge, information and belief, the Works were created by [X]).

Q15) Do you have any views on the approach of allowing for the parties to agree, on a case by case basis, the provisions in relation to delivery and transfer of risk (see clause 8.3.3)?

We consider a case-by-case approach to these issues to be sensible given the potential factual and logistical variances which may apply.

Q16) Do you have any views on the approach of allowing for the parties to agree, on a case by case basis, the provisions in relation to storage, security and viewing arrangements during the Option Period (see clause 5.2)?

We consider a case-by-case approach to these issues to be sensible given the potential factual and logistical variances which may apply.

Q17) Do you have any other comments about the drafting of the option agreement, in addition to the points covered in questions [13 to 16]?

As discussed in our answer to Q2, it would be necessary, in order to keep the overall process fair, for a set period to be imposed upon Buyers to transfer the necessary funds to Sellers. As such, the option agreement should specify exactly when a potential Buyer will be deemed to have secured the necessary funding (e.g. up to six months of the option being exercised).

Clause 10.5: final line, ‘responsible’ should read ‘responsibility’.

Clause 12.2: As discussed above, the agreement should specify exactly when a potential Buyer will be deemed to have “secured the necessary funding”.

Clause 21: Rather than having a generic jurisdiction clause, it should be considered whether an alternate form of dispute resolution may be beneficial. An exporter might not want to sign the option agreement if there is any fear that potential litigation in a public forum could lead to his or her identify being revealed. Arbitration may be considered, since this is a private, and arguably faster, method of resolving disputes. However, should arbitration be prescribed it must first be verified whether the arbitrator would have the necessary powers to order specific performance of the agreement.

Should the jurisdiction remain with the civil courts, the process of seeking to enforce the option agreement against a recalcitrant exporter/Seller could potentially be quite

time consuming, depending on the complexity of the case and the defences raised, and depending on the time available at the High Court.

In relation to choice of law, it would be respectful to Scottish and Northern Irish institutions and/or exporters/Sellers to include the possibility of choosing their domestic laws in the option agreement.

Q18) Do you have any views on the scenarios outlined above detailing circumstances in which an export licence would or would not be granted? Please provide evidence to support these views.

Our views on these scenarios have largely been explained elsewhere in our answers.

Q19) Do you have any other comments about the proposed introduction of a legally binding mechanism into the export control system for cultural objects?

At page 9 of the proposal, the possibility of applying the binding mechanism in favour of a private purchaser is assumed. In this scenario a private purchaser ('Ridley purchaser') who shows a serious expression of interest within the first deferral period would be able to enter into a binding option agreement with the exporter. This should not be possible. The purpose of the proposal is to assuage the frustrations of public institutions and funding bodies, not to facilitate purchases by private individuals and entities. Such private individuals and entities are not reliant on public funding and donor support in the same way as public institutions and so their inclusion in the proposed mechanism is strictly unnecessary.