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Advice across borders

Estate planning tips from the US and Canada

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ADVISING FAMILIES ACROSS GENERATIONS



HANDLE WITH CARE

As the Latin American art scene matures, Sandrine Giroud and Alexandre Zielinsky Arregui advise how to ensure high-value assets are not mishandled

From Brazil to Colombia, the art of Latin America (LatAm) is gradually asserting its own space on the global art scene, supported and promoted not only by artists, but also by curators, museums and collectors.

Since 1979, when Sotheby's held its first LatAm art sale, the sector has experienced steady growth. According to Deloitte and ArtTactic's *Art & Finance Report 2017*, ultra-high-net-worth individuals (UHNWIs) in LatAm accounted for accumulated wealth of USD997 billion in 2016.¹ The report noted that, despite a market downturn in 2016, the contemporary art sector reported its strongest year to date, and that Mexican and Colombian artists were gaining in market share in 2017.

ASSET PROTECTION

Art can be a passion, a lifestyle product, an investment – or all of the above. Whatever the reason, art and other luxury investments make up a growing part of UHNWIs' portfolios. In 2017, wealth managers estimated that 46 per cent of their clients in LatAm owned a number of luxury investments, such as art, wine or classic cars, compared to a global trend of 37 per cent.² New art collections are being formed in LatAm (the biggest examples being Brazil, Colombia and Mexico), and existing ones continue to expand. At the same time, clients are looking for a more holistic approach to wealth management, which includes support for art-related issues and, more importantly, estate planning. The particularity of the LatAm context, marked by political and financial instability, as well as major fraud scandals, increases the need for careful planning and asset protection.

The estate planning tools available in LatAm require careful consideration. Many countries in South America have not incorporated fiduciary structures into their domestic legislation, with some exceptions such as the civil-law Mexican

fiduciary institute (*fideicomiso*) and the Brazilian *fideicomisso* (a regime similar to an inheritance trust). Additionally, most of them do not recognise foreign trusts, and there is a general perception that trusts are both expensive and limited in what they can offer in terms of estate planning. In this context, the most common estate planning scenarios involving artworks include:

- donating to descendants and other family members, often with disadvantageous tax-related consequences;
- gifts to museums, charities and philanthropic institutions;
- creating one's own museum or foundation; or
- placing the art in a foreign trust, with all of the challenges that involves.

As promising and fascinating as the art market is in LatAm, it is also exposed to risks of money laundering and terrorist financing. In the Brazilian Petrobras scandal, the individuals involved also enjoyed art. The 2015 exhibition *Works Under Guard* at the Oscar Niemeyer Museum displayed 48 artworks seized from allegedly corrupt businessmen who took part in the kickback scheme at the state-owned oil company.

The absence of specific regulation for the art market, as well as its lack of transparency, makes it a challenging market to handle. It is therefore of utmost importance that the trust and estate planning industry remains vigilant when handling complex assets such as art.

PREVENTATIVE MEASURES

Schemes such as the Responsible Art Market Initiative (RAM) could be a useful tool in navigating this difficult

sector. With the aim of raising awareness of the risks facing the art industry and providing practical guidance on establishing responsible practices to address these risks, RAM recently published its Art Transaction Due Diligence Toolkit.³

Due diligence forms an essential part of art transactions. Investigating and obtaining as much information as possible about the parties to the proposed transaction, the artwork and the transaction itself protects collectors and their advisors, and helps manage reputational, financial and legal risks. RAM's toolkit is a non-exhaustive compilation of verifications aimed at mitigating risks that can arise in art transactions. It is designed as an aide-memoire of the key areas of inquiry when conducting due diligence, identifying various checks that could be considered and/or carried out regarding:

- the parties involved in an art transaction;
- the artwork; and
- the transaction itself.

Identifying whether or not artworks are looted Peruvian antiquities, or if a buyer is a politically exposed individual with unexplained wealth, can go a long way to avoiding legal troubles.

With the number of collectors increasing in LatAm, a careful understanding of the LatAm context is critical. Practitioners should take into consideration the lack of trust-fiduciary culture and supporting domestic legislation, and implement responsible art market practices.

¹ p76, see bit.ly/2GBapMV

² *Id.*, p60

³ Available at bit.ly/2lrekfy



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