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Art Law E-Book

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Yusuf, Acrylic, ink and pencil on canvas, 45 x 33 inches, 2006

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Yusuf, Acrylic, ink and pencil on canvas, 47 x 36 inches

Preface

Art in its myriad forms, has been the cornerstone of human civilisation since its very inception. Historically, it has shaped the socio-economic and cultural heritage of mankind. In the forthcoming pages, we will explore the evolution of art from being a medium of expression to a driver of social and political change to its present form of being primarily, an emerging and highly coveted asset class.

In this E-Book we explore the unique point of convergence of art and principles of law. We delve into the multi-disciplinary avenues of the law surrounding art which is but a consequence of the rise in its value and evolving mediums in which it is showcased. While Art Law has been a niche area of legal practice in many countries, it is still relatively nascent in India. With over 20 centuries of recorded artistic history, art law maps a rather untraversed spectrum of legal considerations balancing freedom of expression with the rights of intellectual property and the Constitutional obligations of maintaining socio-political harmony.

Dentons Link Legal has established a long-standing practice in intellectual property rights, asset acquisitions and dispute resolution not just in India, but across global frontiers, particularly through the combination with the global legal giant, Dentons. The foray into the emerging domain of art law was but natural. As a full-service law firm with 50+ partners spread across 6 offices in India and a global strength of 7000+ lawyers across 160 offices across the World, we are poised to provide cutting edge legal services to cater to the protection of your rights across the value chain.

Aura Art Development Private Limited ("AADPL" or "Aura Art") was incorporated in 2008 with a vision of developing the culture of creation and collection of fine art and providing a discovery platform for identifying artists of caliber, thereby bringing their art to the mainstream. In 2015, AADPL

set-up a subsidiary, Aura Art eConnect Private Limited, to leverage technology in the distribution of art by creating India's leading online marketplace for curated fine art and organizing art shows (www.auraart.in). Having demonstrated a successful model for promoting emerging artists, AADPL is now set to take on the challenge of providing Art Infrastructure Solutions (www.artinfrasolutions.com), as a one stop-shop for all needs of Art Collectors, Corporates, Artists, Museums, Foundations, Government and other Institutions (including palaces, temples, religious and spiritual organizations etc.).

In the wake of art and cultural objects receiving greater appreciation and recognition globally as the heart and soul of the cultural economy, it is imperative to create an integrated infrastructural base to manage assets of such high economic value and in furtherance of the increased sensibility of their invaluable historic representation. This calls for an integrated approach, of in-house capability enhancement, in-depth research, and regulatory compliance with collateral stakeholder collaboration.

Our endeavor through this E-Book, is to explore the complex legal landscape across intellectual property in respect of visual art (the paradigm of derivative works and moral rights of an artist); the consequences of the digital intervention into the world of art as well as the evolving forms of art. While our primary focus remains on the present and foreseen legal framework in India, we are cognizant of the reality of art transcending geo-political boundaries and hence we delve into the legislative and judicial ecosystem globally as well. We hope this acts as a relevant guide to provide an in-depth understanding of the current and prospective regulatory regime for the torchbearers of our cultural heritage. At the vanguard of the digital and social economy, Dentons Link Legal prides itself in its global expertise on art law.

Authors



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Nusrat Hassan is the Managing Partner of Dentons Link Legal. Nusrat is dual qualified attorney admitted to practice in India and England and Wales and is a recipient of the prestigious Chevening Scholarship for corporate lawyers. His practice area includes cross-border M&A, private equity investments, joint ventures, dispute resolution, strategic advisory, and ESG & Corporate Governance.

A thought leader, Nusrat is an A-list lawyer and has been recommended and recognized as a 'Leading' and 'Highly Regarded' practitioner by various leading directories including Legal 500 Asia Pacific, IBLJ, Legal Era, International Financial Law Review, Benchmark Litigation, Chambers & Partners, etc. He is a frequent speaker at national and international fora on FDI, cross-border transactions and other complex legal issues and has also authored articles for prestigious global publications and journals including Kluwer Law International, Juris Publishing, Thomson Reuters, etc.



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Nayona Roy is a Partner at Dentons Link Legal with a sector-focused practice on Media, Technology and Artificial Intelligence. She is also a part of the Global AI and Global Media thought leadership groups across the Dentons ecosystem and specializes in the intersection of technology and art forms (including performing and visual arts).

Nayona is an innovative legal counsel and brings a decade of cross-sectoral legal experience. Amongst her other experiences, she has helmed the legal team of a digital media start-up in which she has spearheaded the strategic inclusion of digital art and NFTs in the organizational roadmap.

In her last role, Nayona has also donned the hat of a founder in legal technology where she has conceptualized and built products that can be leveraged by the entertainment and art industry to solve the inherent problems in the industry. Nayona leads a dynamic team focusing on corporate advisory, media and entertainment laws, data privacy, artificial intelligence and intellectual property.



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Rishiraj Sethi co-founded Aura Art in 2008, which is well on its way to become India's leading Integrated Art House - catalysing collection building and management. He pursued his CA (all India rank holder) and CFA (US), while working for 11 years with Andersen / EY (1997-2008), in Taxation and Investment Banking. Since then, he has significantly focussed on research, creating awareness of Art as an asset class, documenting and valuing collections and promoting artists of calibre. He is now recognised as a thought leader in the art space, authoring publications "The science behind valuing art" (December 2017) and "ArTax - Managing tax risks

of artworks" (August 2018) alongwith EY, reports on "ArTrends" (October 2019 and April 2020) and report on "Art Insurance" (December 2021). He also jointly developed the first-of-its-kind IIMA-AuraArt Indian Art Index (IAIAI), which was launched in November 2022. His entrepreneurial journey has been widely featured and he has won various accolades for professionalising the Indian art market. Besides being involved in various community service projects, his other interests include dancing, singing, writing poetry and Heartfulness meditation.

The background of the page is an abstract artwork by Yusuf titled 'Mirage'. It features a vibrant yellow background with a large, dark purple, rounded rectangular shape in the upper left. Below this shape, there are horizontal bands of dark, textured lines that resemble a forest or a dense thicket of trees, creating a sense of depth and movement. The overall composition is dynamic and visually striking.

Chapter I

Introduction

Yusuf, *Mirage*, Acrylic on canvas, 36 x 59 inches

What constitutes “art” is a subjective matter often in public discourse. The dictionary meaning of “art” is the *use of skill and imagination in the creation of aesthetic objects, environments, or experiences that can be shared with others*. Visual arts encompass a broad spectrum, from traditional forms like sculpture, painting, sketches and photography, to contemporary forms of architecture and applied arts or design (including graphic design, industrial design, and fashion design)¹ whereas Fine Art is a subset of visual art, which is created by experienced and skilled artists and is coveted for its value as an investment vehicle as well as a statement of luxury.

The Black’s law dictionary defines “art” as the *methodical application of knowledge or skill in creating something*. Therefore, the application of human imagination and creativity to raw material is a necessary concomitant of the definition of art.

Fine Art

Fine art refers to the quintessential elements of art encompassed in paintings, sculptures, sketches, and photographs captured in the definition of “artistic works” under the Copyright Act, 1957.

Literary Art

This captures art that is traditionally in literary form across genres such as poetry, script, novels, and essays that use language and script to communicate and express an artist’s thoughts.

Performing Arts

Performing arts encompass live presentations to an audience capturing expression through music, opera, dance, theatre and acting. Featuring cultural promotions and ingenuity, performing arts is seen through classical periods of tribal and folk roots.

Commercial Art

Commercial art captures the gamut of artistic works created pursuant to a contract of employment or service and typically in furtherance of a commercial objective – arts created for advertising, product branding, logos, websites, applications, etc. Another popular form of commercial art includes tattoo art

which was once rooted in tribal identity but has thereafter become a style statement.

Digital Art

Technology is used as a medium to create interactive, real-time, and generative elements.² With its origins in algorithmic drawings of the 1960’s, digital art has now taken on diverse avatars – from virtual reality to interactive works that engage audiences in the creative process. By virtue of its medium of creation, it has a higher outreach than physical art.³ Listed below, are popular forms of digital art:

- Animation – Pioneered by the likes of Émile Cohl and Walt Disney,⁴ animation evolved from traditional 2D styles using classic and vector-based techniques to realistic, multi-angle visuals in 3D and found popularity in cinematography, television and gaming.
- Augmented and virtual reality – Real-life artistic experiences are created with a blend of interactive 3D visuals projected onto existing real-world spaces – an extension of immersive experiences for the audience. The Van Gogh 360°™ exhibit is an illustration of the same – a multi-dimensional experience created by projecting over 300 paintings of Van Gogh across walls and floors, allowing visitors to completely engage with the art with each piece seamlessly transitioning onto the next and tracing the life of the iconic artist.⁵ In India NMACC has taken the lead in creating and hosting such experiences at scale.⁶
- Blockchain and Metaverse – While the blockchain technology lends itself as a certification mechanism to authenticate art, establish and create immutable records of provenance, and automate the flow of royalty, the metaverse offers artists a platform to own, create and exhibit digital art experiences and virtual galleries. Digital artworks are often cryptographically tokenized on the blockchain as non-fungible tokens (NFTs).

1. <https://www.linearity.io/blog/visual-arts/>

2. <https://whitney.org/essays/histories-of-the-digital-now>

3. https://www.vam.ac.uk/articles/digital-art?srsId=AfmBOorVB_vyrjRiZsP9mGJQJIMDHBzWXyepld1FS8oSDFLDFuoshveK

4. <https://www.tate.org.uk/art/art-terms/a/animation>

5. <https://theprint.in/feature/mumbai-meets-van-gogh-360-lovely-gimmicky-underwhelming-powerpoint/1386453/>

6. <https://www.architectandinteriorsindia.com/news/watch-stories-come-alive-at-these-6-immersive-art-shows-in-mumbai>

- Generative Art – Art created by an autonomous computer-scripted algorithm which is trained on large volumes of data pertaining to existing art forms, influences, material, etc. Yet, the creation is refined by prompts created by humans. A notable example of art generated by the AI-human collaboration is “The Next Rembrandt,” where a prompt was written for the AI model to analyze Rembrandt’s works and generate a new painting in his style.



“The final step was printing the painting. Canon has a high-end, custom-made 3D printer that is especially designed to re-create existing paintings. So far, it had never been used to create a new painting. Until now. We printed thirteen layers of a special paint-based UV ink, to bring The Next Rembrandt to life.”

Sourced from <https://medium.com/@DutchDigital/the-next-rembrandt-bringing-the-old-master-back-to-life-35dfb1653597>

The Historical Categorization of Art

Having deliberated upon the different categories of art, it is pertinent to note that the evolution of artistic styles, themes and movements through the course of history offer yet another methodology in the classification of art and further lend context to the origins of art creation and collection.

Traditional Art emerged as the first medium of expression amongst cavemen and thereafter, traversed many a political and social landscape. In the Middle Ages, artists and sculptors were treated as artisans, with no credence or discretion lent to their creativity and intellect. However, the Renaissance witnessed the rediscovery of traditional art with innovations like the oil paint and the thematic perspective which elevated the status of artists. It marked a shift in the narrative around artistic works, which were now viewed as intellectual pursuits involving an understanding of mathematics, anatomy, tradition, and philosophy. Paintings, sculptures and architecture were now recognised as “liberal arts” rather than mere trades, creating the way for iconic artists like Leonardo da Vinci and Michelangelo. Art was now celebrated as a profound expression of humanism and each artwork derived its value from the uniqueness of the artist’s persona, attributed significantly to the patronage by the Medici family, during the Renaissance cultural movement.⁷ In 1508, Pope Julius II commissioned Michelangelo to paint the ceiling of the Sistine Chapel. The work not only bears religious significance but is claimed to have been intended to restore Rome’s glory and elevate the Pope’s stature.⁸

The mid-19th century witnessed a transition towards the **Realist Art** era – historical events such as the French Revolution and colonial invasion began to shape the nature of artistic expression – manifested in a depiction of (then) current events, socio-political ideology and human emotions surrounding romance. In the pursuit of casting a deep-rooted web of influence over the Indian social and political economy, the colonial rule attempted to steer the course of traditional art towards western-art aesthetics and set up multiple colleges for the study of fine art.

7. Westchester Community College, “Art 109 – Renaissance to Modern” The Role of the Artist in the Renaissance, <https://art109textbook.wordpress.com/new-online-textbook-2-2/chapter-3-the-italian-renaissance/the-role-of-the-artist-in-the-renaissance/>

8. [https://www.thoughtco.com/the-sistine-chapel-ceiling-by-michelangelo-183004#:~:text=The%20Paintings%20Were%20Commissioned%20by%20Pope%20Julius%20II,-In%201508%2C%20Pope&text=He%20felt%20that%20such%20artistic,Julius%20Orival\)%20had%20accomplished.](https://www.thoughtco.com/the-sistine-chapel-ceiling-by-michelangelo-183004#:~:text=The%20Paintings%20Were%20Commissioned%20by%20Pope%20Julius%20II,-In%201508%2C%20Pope&text=He%20felt%20that%20such%20artistic,Julius%20Orival)%20had%20accomplished.) / <https://www.britannica.com/topic/Sistine-Chapel>

The Bengal School of Art was birthed as a part of the nationalist movement, to challenge the colonial bias, nurtured by E. B. Havell and Abanindranath Tagore. The depiction of current affairs continued but with a focus on the prevailing economic conditions – exemplified by the sketches of the Bengal Famine in 1943 documented by *Chittoprasad Bhattacharya*, a Bengali artist and political activist, in his book, *Hungry Bengal*, alongside *Somnath Hore*.

The inspiration of the nationalist movement from the Bengal School itself gave an impetus to the rise of **Modernism**, with India's first art school, Kala Bhavana, being set up in 1919 as part of Visva-Bharati University conceptualized by Rabindranath Tagore in Shantiniketan. This period was marked by a deliberate deviation from the existing narrative with a strong tendency for experimentation across a multiplicity of themes. An initial champion of this ideology of modernism, Raja Ravi Varma blended Western techniques with Indian themes, carving his own take on the nationalist movement with his portraits of leaders like Dadabhai Naoroji and Bal Gangadhar Tilak along with his mythological works such as the Goddess Bhawani granting weapons to Shivaji.⁹ On one hand the artists like Francis Newton Souza, challenged conventional notions of beauty and morality, with portrayals of nude women in exaggerated proportions – a discourse relevant even in today's cultural and legislative ecosystem. M.F. Husain on the other hand, blended western strokes with bright Indian colours, and portrayed Indian mythology, folklore and religion. S.H. Raza on the other hand, resorted to landscapes and abstractionism – later picked up by Gaitonde as well.¹⁰

The post-modernist focus on socio-political realities in late 20th century India paved the way for the period of **Contemporary Art** encompassing the creations of 21st Century artists operating in a globally influenced, culturally diverse and technologically advanced world.¹¹

The advancement of technology and complex sciences naturally had their influence on aesthetics and human ideologies. **Post-Contemporary Art** emerged with experiments in innovative media like performance, video, installation, animation, digital media, fashion and now also generative art – the category of digital art that we have explored above.

9. <https://amritmahotsav.nic.in/district-repository-detail.htm?13668#:~:text=Nationalist%20Ideas%20in%20Raja%20Ravi%20Varma's%20Art&text=Furthermore%2C%20Varma%20was%20also%20supportive,themes%20to%20communicate%20nationalist%20Ideas>

10. lefa107.pdf (ncert.nic.in)

11. Contemporary Indian Art – MAP Academy

The background of the slide is an abstract artwork by Yusuf Sikkim. It features a large, irregular purple shape on the left side, which serves as a backdrop for the chapter title. The rest of the image is a complex, layered composition of dark brown, black, and white textures, with some lighter brown and orange tones. The artwork appears to be made of various materials, possibly paper or fabric, layered together to create a sense of depth and texture. The overall style is abstract and expressive, with a focus on color and form.

Chapter II

The Economics of Art

Yusuf, *Sikkim*, Acrylic, ink and pencil on canvas, 70 x 138 inches, 2006

It has been established that commissioning of art was traditionally, the privilege of the aristocrats and the ruling class who hired artists to execute a pre-determined project. The Renaissance marked a shift in the structure of the primary art market where artists were accorded greater creative discretion and their unique style found special recognition amongst the aristocrats and patrons. The monetary value of the work was derived from the reputation of the artists and the political, religious and social narratives attached to the work itself.

The services of the artist being personal and non-fungible in nature, the production of new works was limited by human mortality and physical capacity – factors that influenced the monetary value of the artwork itself. This led to the emergence of a secondary art market in the form of auctions, with rare timeless pieces witnessing a marked appreciation in value. In 1674, Baron Claes Rålamb established the first auction house in Stockholm, with major names like Christie's and Sotheby's emerging a century later.

While art continued to be collected on the premise of being a statement of one's wealth, it also started gaining prominence as an effective investment vehicle. While the first modern art fund dates to 1904, major financial institutions like Deutsche Bank and UBS hold tens of thousands of artworks today, reflecting the growing recognition of art as a valuable investment.¹² The British Rail Pension Fund also allocated 2.9% of its portfolio to art, from 1974-1999, with positive results.

Cut to today, the rising per capita disposable income in the last couple of decades has resulted in an expanding collector base. It is not just the global art economy that is proliferating. Indian artists are gaining prominence in the global market and high-net-worth individuals across the World are seeking out Indian artworks.

While there are no accurate estimates available for the present size of the Indian art market, it can be estimated to be between Rs 3,000-4,000 crores¹³ (say US\$ 400 million), which is still a small fraction of the US\$ 65 billion Global art market.

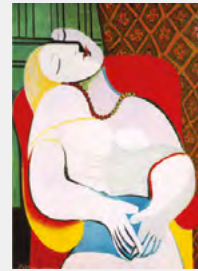
Until the late twentieth century, it was widely believed that the fluctuations in the value of art do not follow a definite and predictable pattern unlike other asset classes. However, by early twenty-first century, there was adequate data to develop art price indices, beginning with Mei & Moses (2002), which demonstrated that art price movements are somewhat predictable. More interestingly, further analysis by Aura Art has demonstrated that the art market, globally as well as in India, is in a secular uptrend. For this purpose, Aura Art plotted the highest milestone prices achieved by successive Indian paintings over nearly 25 years (also paintings by international artists for over 50 years). Based on this analysis (initially presented in 2019), as updated subsequently, the Indian art market witnessed an interesting growth rate of 23% over the 31 year period (1992 to 2023), which took the highest price painting from Rs 10 lakhs to Rs 61.8 crore. This analysis of the broad generic market trend is supported by the graphs of the growth in price of works on repeat sales of specific artworks, four of which are plotted in the graphs to follow.

12. (<https://insights.masterworks.com/alternative-investments/art-investing/a-short-history-of-art-investing/#:~:text=The%20Beginnings%20of%20Art%20Investing&text=At%20first%2C%20it%20was%20only,the%20first%20modern%20art%20fund>)

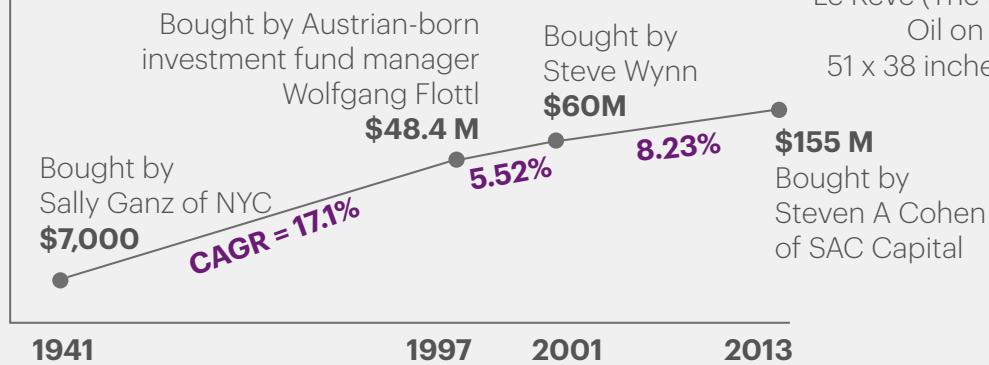
13. Aura Art estimate, inferred from various data points.

"Le Reve" by Pablo Picasso

CAGR over 72 years
(1941-2013) is **14.91%**



Le Reve (The Dream)
Oil on canvas
51 x 38 inches, 1932



"Police Gazette" by Willem De Kooning

CAGR over 41 years
(1965-2006) is **19.92%**



Police Gazette
Oil on canvas, 1955

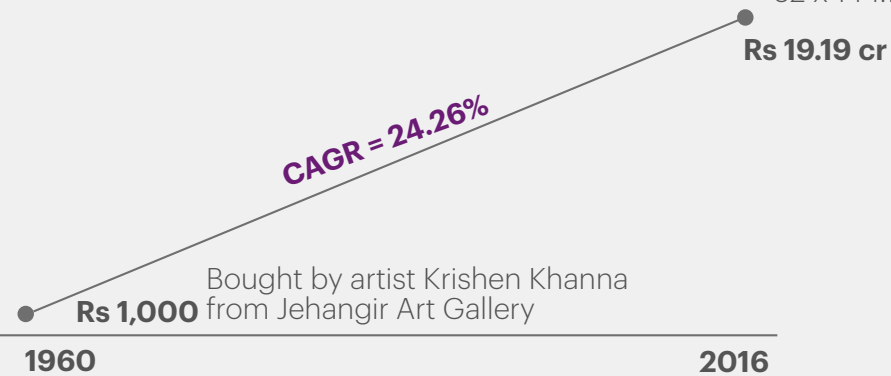


"Greek Landscape" by Akbar Padamsee

CAGR over 56 years
(1960-2016) is **24.26%**



Greek Landscape
Plastic emulsion on canvas
52 x 144.1 inches, 1960

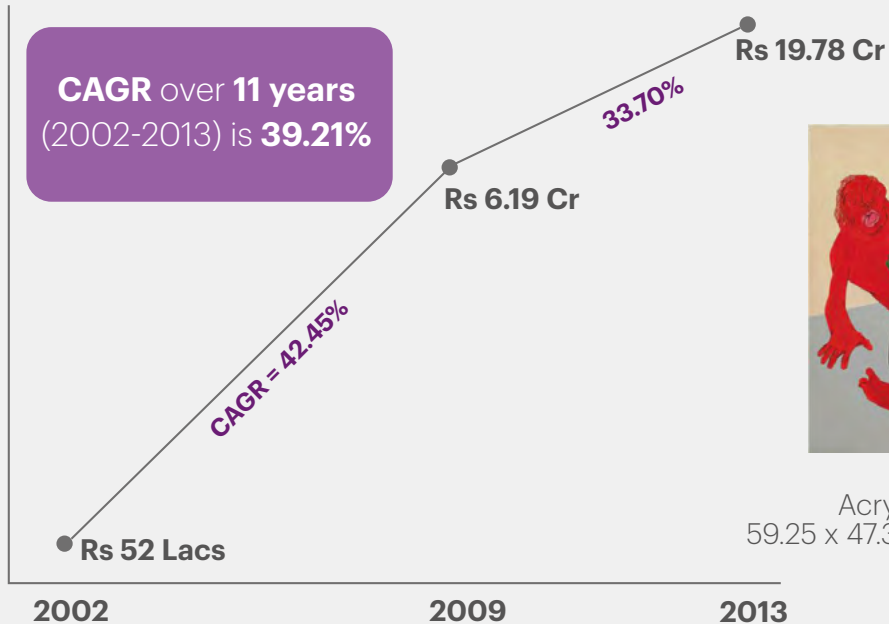


"Mahishasura" by Tyeb Mehta

CAGR over 11 years
(2002-2013) is **39.21%**



Mahishasura
Acrylic on canvas
59.25 x 47.3 inches, 1994

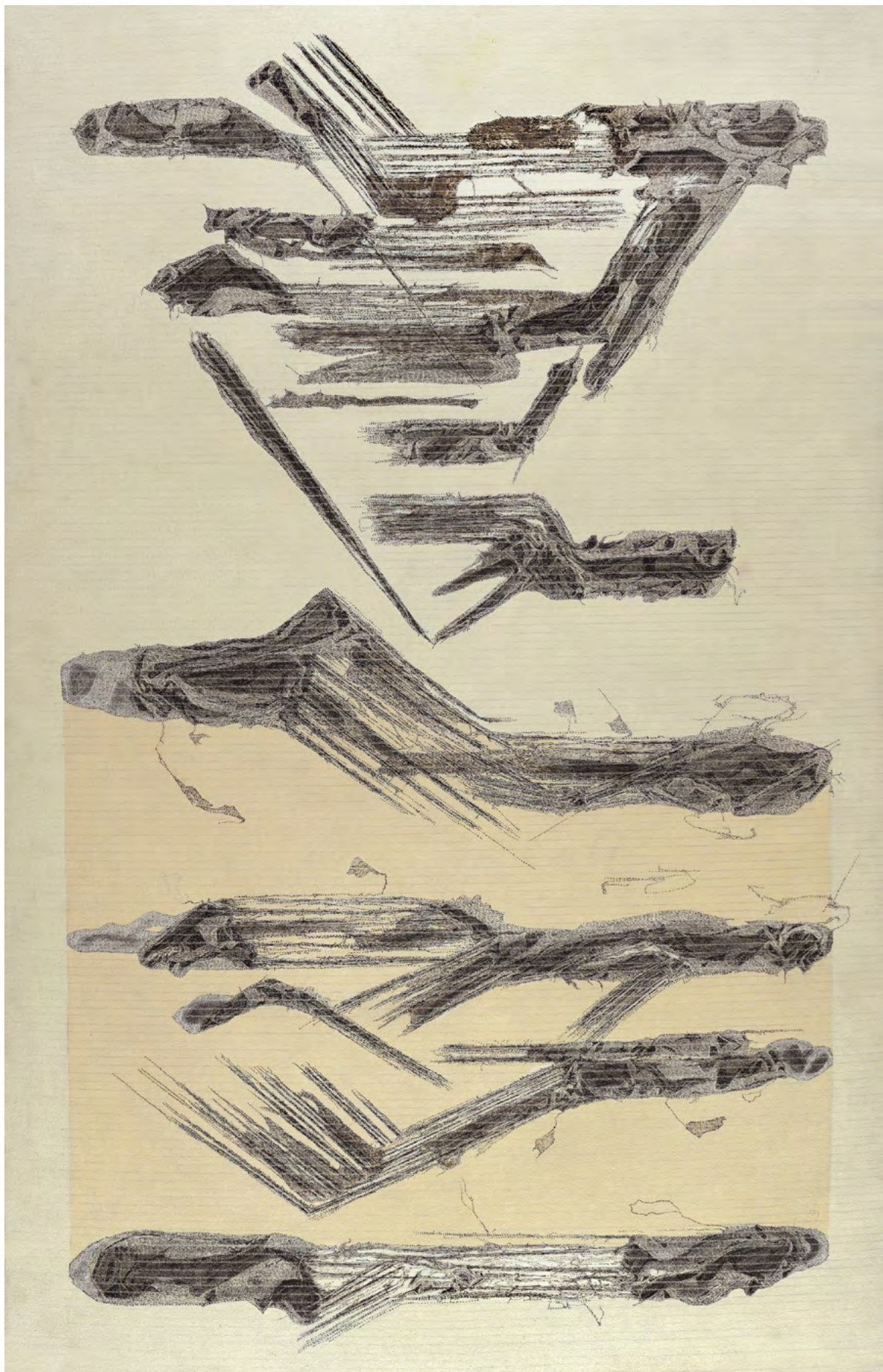


An investment in art is based on a perceived future value which cannot be ascertained by any mathematical formula. Therefore, to some extent, it is a bet on an uncertain future value which is derived from a multiplicity of factors – sentiments in relation to the artist, political and cultural developments, and evolution of aesthetics.

Further, it is pertinent to note that investment in art is subject to the same risks as an investment in any other illiquid asset – the vulnerability to damage and destruction as well as the cost of insurance, storage,

transportation, valuation reporting, cataloguing and/or exhibiting and taxation in transactions. However, in comparison to other assets such as real estate, art bears certain other unique risks:

- Risk of procurement of fraudulent copies of the original work owing to the failure of human experts to identify and trace its provenance; and
- Market risk of unpredictable and adverse conditions on account of which, the amount invested may get blocked for incomprehensible durations.



Yusuf, *Quanta*, Acrylic, pencil, pen and ink on canvas, 67 x 43 inches, 2000

An abstract artwork featuring a large, dark purple, rounded rectangular shape on the left side. The background is a complex composition of horizontal bands of color, including yellow, orange, blue, and white, with a textured, almost woven appearance. In the lower right, there is a large, bright orange shape that resembles a stylized face or a large letter 'C'. Within this orange shape, there is a small, dark, circular element that looks like a pupil or a button. The overall style is modern and expressive, with a focus on bold colors and organic forms.

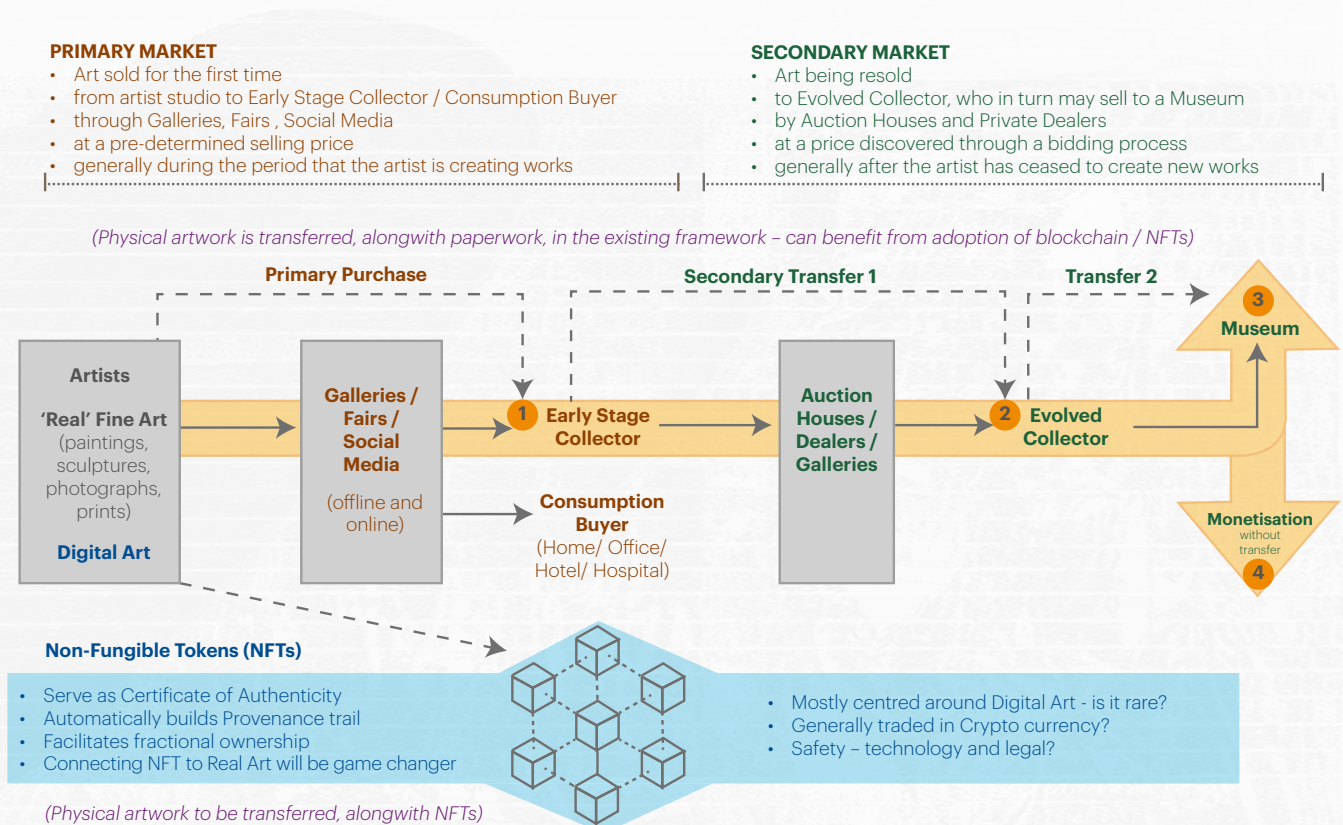
Chapter III

The Value Chain of the Art Industry

Yusuf, Acrylic on canvas, 36 x 60 inches, 2021

The graphical representation of the value chain of the art industry depicted below can broadly be divided into the primary and the secondary art market.

Art Market framework – Primary & Secondary



Let us now decode the constructs within this complex ecosystem by which art is created and acquired in both the **Primary** and **Secondary** markets.

Step 1: The Creation

The artist sits at the heart of the ecosystem and creates original works of art that set the value chain in motion. Distinct from the performing arts space, majority of the works created in the space of visual art are **non-commissioned** in nature. The artist independently creates pieces without a specific buyer or mandate in mind. Such works are not bound by specific timelines and their value depends on multiple variables such as the reputation of the artist, the prevailing price offered for the said genre, the scarcity and availability of the type of work, the market sentiments towards the aesthetic and cultural connotation that the artist provides.

On the contrary, **commissioned** artworks are created by an artist under an employment or contract from an individual, gallery, private NGO, corporate house, etc. The work is created specially

for the commissioning entity contractually and often, exclusively where the creative discretion of the artist is curtailed to a large extent by the specifications of the mandate received. Commissioning a painting offers collectors an opportunity to own a bespoke yet original piece of art for their home, office, or other spaces or even as a gift, as against purchasing an already created piece from the shelf. The painting is tailored to the needs of the client including size, colour, and aesthetic preferences.¹⁴ Pablo Picasso had created his renowned painting *Guernica* to commemorate the bombings of Guernica, following a commission from the Spanish Republic Government. Today, it stands as one of his most famous works representing the anti-war philosophy. Da Vinci's "Mona Lisa," too was a commissioned portrait of Lisa del Giocondo.¹⁵ Typically if the commissioned artwork is created under an

14. <https://laasyaart.com/commissioning-artwork/>

15. <https://www.singularart.com/en/blog/2020/05/27/the-history-of-art-on-commission/#:~:text=For%20example%2C%20Leonardo%20da%20Vinci,request%20of%20Pope%20Julius%20II>

employment arrangement, such works would be bound by covenants of exclusivity in favour of the employer. Works including designs and artistic creatives by employees of an advertising company, graphic designs made by designers operating under employment, user-interface designs generated by web designers under an employment mandate from the client or even artistic works on buildings and architecture under a contract of service would exemplify such artworks. Emerging custom-tattoo studios are also a form of commissioned art where the tattoo artist is engaged to create a design customized to the brief of the client and may have multiple iterations before the same is finalized for execution.

An engagement with a studio on the other hand, could be either an employment arrangement or real-estate licensing arrangement. In the former, the artist is employed by the studio to create specific works (as work-made-for-hire) that are produced by the studio as exhibit collections. All rights and ownership in the artworks would rest with the studio, unless provided to the contrary in the agreement. In the latter, the artist rents the space in the studio against a fixed license fee and retains complete autonomy over the artwork. The rights of the studio owner are restricted to the rights over the premises and regular maintenance thereof by the artist in accordance with the terms of the agreement.

Step 2: Acquisition in the Primary Art Market

Art created independently by an artist in the absence of an agreement of commissioning or employment would be marketed and sold by the artist directly. The transaction could therefore be structured in any of the following ways:

Direct Sales to individual buyers or galleries

The artist would directly approach individual buyers or list the artwork on a digital platform or a social media network. The price would be offered by the artist and either purchased at the same value or negotiated between the parties (depending on the stature of the artist). If the artist uses a studio to create the artworks, in most cases, the arrangement with the studio owner is simply one of leave and

license for the space and the studio owner retains no rights to the artwork created or any part thereof

Agency Agreement

Similar to exhibition agreements, artists often engage agents or agencies who may not be owners of gallery premises but are engaged to provide holistic services including representing artists before galleries, auction houses and potential buyers. The agent would render services of identification of the gallery that provides optimal visibility to the specific collection of the artist, strategize pricing and promotions, marketing and publicity of the artist's works and engagement with high net-worth individuals for purchase of the artworks. Depending on the terms of agreement, the agent may also render after-sales services such as ensuring transportation and delivery with appropriate precautions to prevent damage to the artwork. As in the case of exhibitions, the agent too would typically draw a commission at an agreed rate from the transaction.

Exhibition or Consignment

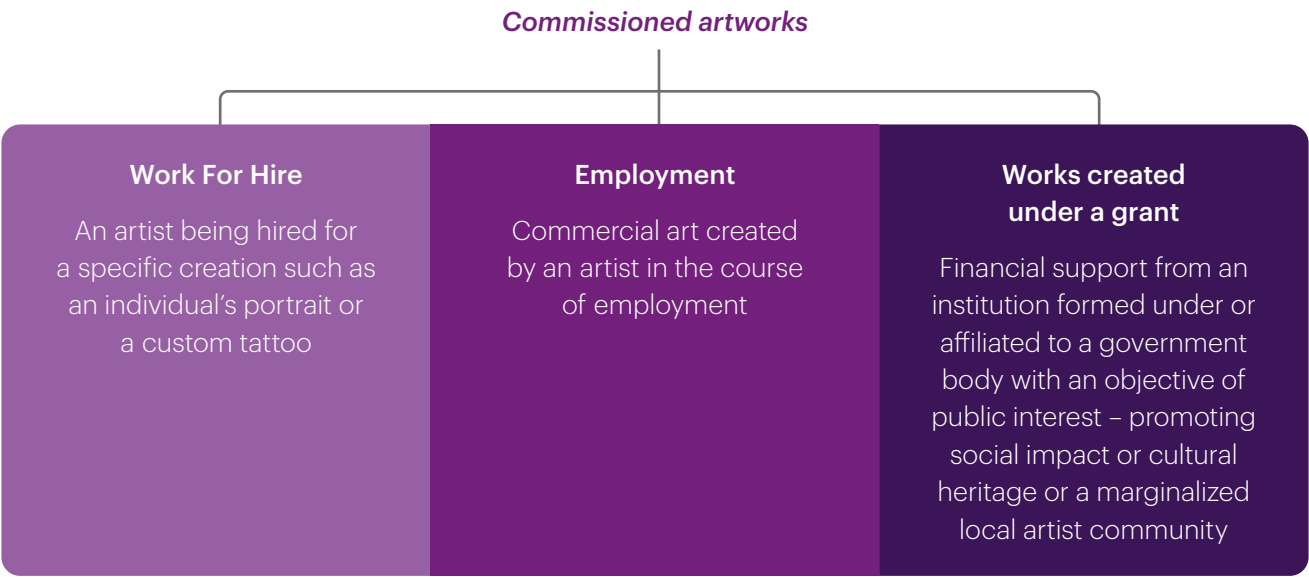
The artist would enter into an agreement with a gallery who would curate the collection for the artist, host an exhibition to provide the artist with a platform to showcase the artworks to potential buyers and orchestrate the sale thereof which includes services of marketing, publicity, event and logistics management, price determination, etc. basis the brief from the artist. The artist would retain ownership of the artworks until the sale occurs. In case the artwork does not sell for a certain period of time, the gallery can return it to the artist. The gallery would, in turn, take a fixed service fee or a commission (which forms an agreed percentage of the value of the artwork sold) as consideration for the services of exhibiting and marketing the work.

Commissioned artworks, on other hand, establish a direct relationship between the artist and the client or buyer or employer at the outset itself. The Copyright Act, 1957 ascribes first ownership to the author of a copyrighted work and further states that the ownership can only be transferred by way of a contract of assignment against sufficient consideration. In *V.T. Thomas vs Malayala Manorama*,¹⁶ the court ruled that the artist retained ownership of a cartoon created

16. AIR 1989 Ker 49 [the Kerala High Court ruled that the artist retained ownership of the characters Boban and Molly, which were created prior to his employment, and the publishing house could not claim copyright over them after his contract ended. The case distinguished between work created during the course of employment and characters developed prior, which extends the artists rights over them pose contract termination]

before employment, despite its use by the publisher during his tenure. Therefore, unless created during and in the course of employment (in which case the law clearly accords ownership to the employer), the ownership of the copyright would continue to

vest with the author of the works. The agreement is structured as a work-for-hire or employment or grant agreement with minor variations in the structure in each instance. The key components of an agreement for commissioned art are listed below:



- Rights Management** – Upon the execution of the agreement, the ownership of the work gets transferred to the commissioning entity or employer accompanied by a representation to the effect that the artist has been duly remunerated for the rights so transferred. A well-drafted rights management clause should essentially call out all the underlying rights in the concerned artwork – while rights to use and display the artwork in personal and professional spaces and the right to sell the same for a valuable consideration, may be granted by way of assignment, the artist as the author, always retains certain inalienable moral rights which must be carved out explicitly – right to paternity (to be credited as the author at all times and in all modes, media and instances of display of the artwork) and right of integrity (to ensure that the work is never mutilated or modified by the owner or assignee thereof).
- Representation of Originality and Indemnity** – The agreement must capture a representation and warranty from the artist to the effect that the artwork is an original creation of the artist, that it does not constitute an infringement of a third party’s intellectual property right and that the artist has all rights to create and monetize the same. A clause for indemnification of the employer or client should also be incorporated in the agreement, in the event of a claim or action claiming infringement of third-party rights by the artist.
- Consideration** – The artist is remunerated for the services of creation of the artwork by way of a fixed and pre-determined service fee or salary or a statutory grant. The payment could be made entirely in advance at the time of execution of the arrangement or in tranches with a segment being payable at or after delivery. Further, the arrangement may include services post conclusion of sale such as restoration and maintenance for a certain specified period of time and under specified conditions.
- Exclusivity** – Art is generally commissioned under arrangements of exclusivity whereby the artist agrees to not create an infringing work for another client or otherwise in future (except as permissible within the doctrine of fair use under applicable laws). In case of art created under employment, there may be additional embargos on a salaried artist to not make any other work for commercial exploitation during the term of employment.

Step 3: Acquisition in the Secondary Art Market

The value chain for the art market does not end with the first acquisition of an artwork from its creator by the mechanisms illustrated above. The demand for previously owned artworks comes from an appreciation of the unique style of an artist. Consequently, with the availability of the art being constrained by the lifespan and activity of the artist themselves, its value becomes directly proportional to its rarity.

Auction houses are the primary players in the secondary art market and provide the platform for re-selling of previously owned artworks through a competitive bidding process. Auction houses may also qualify as intermediaries under the Information Technology Act, 2000 if they provide a digital/ online platform to connect buyers and sellers of artworks, prominent ones being Christie's, Sotheby's, Bonhams, Pundole's, Saffronart, and AstaGuru.

Auction houses lend credibility to the transaction in respect of provenance of the artwork which is verified by a team of experts, who collate and map the artwork to the particulars of the name of artist, title, medium, measuring size and critically, all relevant records including but not limited to invoice or other record of purchase, authentication certificate, provenance documentation, condition report. Further, auction houses enable price discovery by having the collection appraised by a qualified valuer and play a crucial role in setting the pricing precedent for a particular artist or artwork. While the auction house would issue a certificate of authenticity, the same often comes with caveats advising the buyer to conduct their own due diligence. To secure the transaction a unique serial number to each artwork is allotted on the basis of their categorization and generally the auction house mandates registration for participating and the registration process may often involve the payment of a minimum registration deposit and the execution of a term sheet or contract detailing the terms of payment post auction.¹⁷

However, it must be noted that auctions of artworks are only one form of reselling arrangements. Previously owned artworks may also be resold in a private transaction wherein the seller engages a dealer or approaches a gallery to find a buyer for the artwork, provided they are able to furnish authentication certificates and/ or purchase invoices tracing the provenance of the artwork to enable the sale.¹⁸

Resale agreements are structured on a commission model where the auction house, agent or gallery facilitating the sale takes a pre-determined commission which is either a flat fee or a percentage of the value of the transaction, as may be agreed between the parties. In gallery sales, there are instances where a restriction may be imposed on further sales by the buyer, either as a lock-in for a definitive period or a right of first refusal being granted to the same gallery owner.¹⁹ However, it is pertinent to note that purchasing from a gallery or auction house offers several advantages, since these institutions take the following measures to ensure the preservation of the artworks, while in their custody:

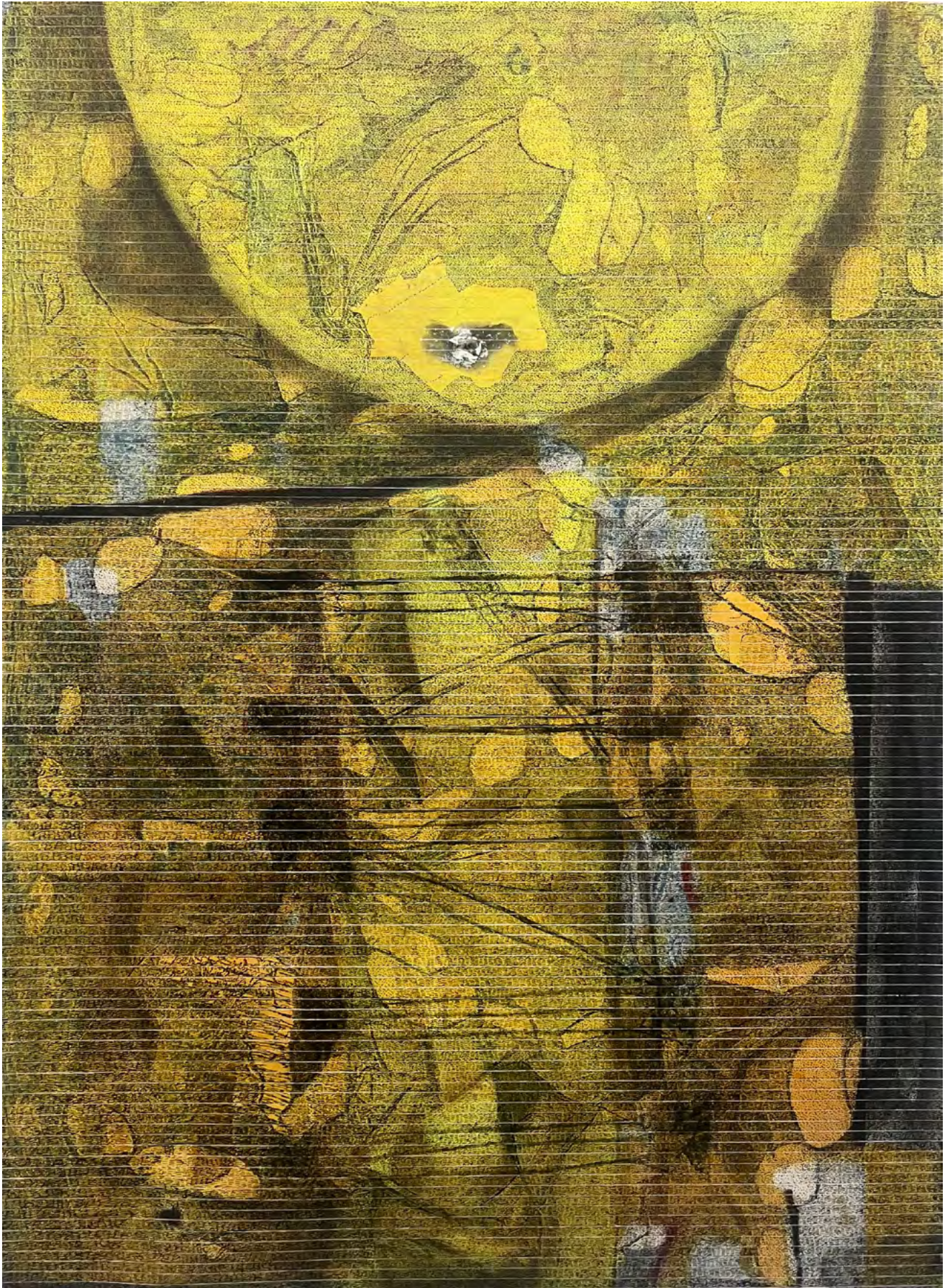
- Maintaining well-ventilated display areas and preventing sharp fluctuations in temperature and humidity.
- Utilizing climate-controlled storage facilities that are protected from risks such as fire, flooding, and pest infestations, including professionally managed storage when necessary.
- Physically tagging each artwork for identification.
- Implementing a comprehensive inventory management system to track the movement of artworks between locations.
- Ensuring that artworks are properly packed for transport, using professional shippers experienced in handling art.

These practices underscore the benefits of working with reputable galleries or auction houses for the acquisition and long-term care of valuable artworks.

17. <https://www.aarnalaw.com/publications/the-art-law-review/>

18. [https://www.artsper.com/us/cms/collector-guide/buying-artwork-online/how-to-resell-artworks#:~:text=Over%20the%20counter%20\(galleries%20and,offers%20you%20a%20better%20guarantee](https://www.artsper.com/us/cms/collector-guide/buying-artwork-online/how-to-resell-artworks#:~:text=Over%20the%20counter%20(galleries%20and,offers%20you%20a%20better%20guarantee)

19. <https://www.theartnewspaper.com/2023/06/13/resale-rules-have-become-the-art-world-norm-what-are-they-and-are-they-enforceable>



Yusuf, Acrylic on canvas, 48 x 36 inches

An abstract artwork on a light beige canvas. The composition features several large, overlapping shapes. A large, solid purple shape dominates the upper left and center. Below it, a bright red shape curves along the bottom right. A dark, textured band of horizontal lines, possibly created with charcoal or fine acrylic strokes, runs across the middle of the canvas, partially obscured by the purple and red shapes. In the upper right, there is a dark, elongated, teardrop-like shape. Another similar dark shape is located in the lower right corner. The overall effect is one of bold, gestural abstraction.

Chapter IV

Art Financing

Yusuf, Acrylic on canvas, 36 x 59 inches

Having established art as a collectible asset and a valuable appreciating asset, the question arises as to how it is financed – an aspect that has significant bearing on the transactions for acquisition of art discussed in Chapter III.

Art financing mirrors real-estate financing in that the asset itself is hypothecated against the financial assistance procured until the charge on the asset is made good along with applicable interest. However, akin to other real assets, a sound infrastructural ecosystem is needed to be developed – professional (and perhaps, technological support) in assessing authenticity and provenance of the work, ascertaining the valuation of the asset in undisputable terms, climate-controlled art acquisition and storage facilities, supported by broader investment strategies and tailored lending options from financial institutions desirous of catering to this emerging market comprising high-net-worth individuals.²⁰ In this Chapter we explore the various options for art financing which make their way into the transactions for acquisition of art at various stages of the value chain discussed above.

Fractional Art Ownership

Fractional ownership refers to a model of shared ownership of an asset whereby each owner holds rights over a definite segment of the asset and can trade their ownership rights on a trading platform. In 2021, Sygnum Bank and Artemundi tokenized Picasso's *Fillette au Béret* on a public blockchain, offering credited investors the opportunity to buy and sell digital shares.²¹ This investment opportunity is operated and regulated under FINMA regulations in compliance with KYC and other mandates for its investors.²²

Masterworks, launched in 2017 and based in New York City, is one of the first and leading firms for investing in shares in multi-million dollar, blue-chip works of art by artists like Basquiat, Picasso, Banksy etc.²³ A couple of players in India, who are developing fractional ownership solutions for real estate and start-ups are also considering broad-basing the exposure to Indian art. While these platforms offer increased accessibility to ownership of artworks, what they essentially provide is access to diversified investment in art while hedging the risks of volatility in the artwork. It is pertinent to note that the cultural significance of owning an original creation of M.F. Husain is lost in fractional ownership, as the possession of the artwork remains with the platform and the fractional owners are simply given a certificate of ownership recording their investment.

Further, the market for fractional ownership being an emerging one, it is yet to be seen how the secondary market for fractional ownership will develop, although the international market through Masterworks has seen good traction on this front.²⁴

SEBI recently with its 2024 amendments to Real Estate Investment Trusts Regulation 2014 notified specific regulation for fractional ownership under the real estate regime.²⁵ However, fractional ownership of art has not particularly been dealt with in the Indian legal landscape and must be interpreted in the context of existing provisions of Contract law.

20. <https://www.ennessglobal.com/luxury-asset-finance/art-finance>
(<https://privatebank.jpmmorgan.com/nam/en/services/lending/specialty-lending/fine-art-financing>)

21. <https://artemundi.com/>

22. <https://www.sygnum.com/news/sygnums-digital-asset-trading-facility-otf-gets-regulatory-clearance-from-finma/>

23. <https://www.masterworks.com/about/how-it-works>

24. <https://insights.masterworks.com/alternative-investments/art-investing/understanding-fractional-art/>

25. https://www.sebi.gov.in/legal/regulations/mar-2024/securities-and-exchange-board-of-india-real-estate-investment-trusts-regulations-2014-last-amended-on-march-8-2024-_82430.html

Art Funds

Analogous to mutual fund investments, art funds pool in resources from multiple investors for trading and acquiring artworks, aiming potential financial returns on the appreciating value of art, while offering diversification of investment within the art market. In India, however, art funds underperformed on account of high impact costs in entry and exit (transaction cost, liquidity impact), significant holding costs (packing, storage, insurance), lack of transparency and have been subject to speculation as regards transparency and investor protection. Between 2000 and 2005, the Indian art market surged, prompting the launch of art funds like Osian and YatraFund.²⁶ However, after the 2008 financial crisis, these funds faced valuation issues and many couldn't return capital to investors'.²⁷ The Securities and Exchange Board of India ("SEBI") in 2008, issued a press release cautioning investors against putting their money into art schemes not registered with SEBI.²⁸ Therefore, collectors have primarily used personal wealth to acquire art. In a noteworthy incident, the Indian Fine Art Fund set up by Hoffman Group, was an international fund that raised \$25 million to acquire high value artworks to invest in contemporary Indian art.²⁹

In 2013, SEBI recognized art funds for the first time as Collective Investment Scheme ("CIS") and brought them within the regulatory ambit under Section 11AA (2) of the Securities and Exchange Board of India Act, 1992 ("**SEBI Act**") which mandates the registration of such funds in accordance with the SEBI (Collective Investment Schemes) Regulations, 1999 ("**CIS Regulations**").³⁰ However it is pertinent to take note of the matter of Osians Connoisseurs of Art Pvt. Ltd. Vs. Securities and Exchange Board of India and Ors.³¹ in which the Supreme Court mandated that a CIS can only be operated by a registered collective investment management company.

Art Price Index

The Art Price Index ("**API**") is a mathematical and scientific index that enables a fair value of an artwork to be determined by an analysis of the average price of similar artworks – comparing pieces with matching details like size, style, theme and age.³² Given volatility of the art market, a want of objective parameters to predict or ascertain the future value of a piece and the complexity to the pricing of artworks on account of numerous social, political and cultural influences, these indices became the need of the hour.

Art price indices aims to deliver insights into art valuation trends over time considering various market factors and auction data that reflect the dynamics of a rapidly evolving art market.³³ Sotheby's Mei Moss, Artnet and Wondeur are some of the leading art price indices. Artnet, founded in 1989, is based on an extensive historical price database covering 340,000 artists and 1800 auction houses across various art forms. The Mei Moses Indices, acquired by Sotheby's in 2016 on the other hand, tracks art price trends through repeat auction sales, focusing on works sold multiple times to reflect true price changes. Wondeur focuses on non-auction pricing patterns and captures the influence of market sentiments on art valuation derived from galleries and museums.³⁴ It is pertinent to note, however, that these indices are based on inherently volatile and subjective parameters and more importantly, only on data sets from public auctions which globally constitute only half of the total auctions conducted. This raises questions on the reliability of such indices.³⁵

26. <https://www.visionsarts.com/art-funds-can-make-you-rich/>

27. <https://www.mondaq.com/india/financial-services/1154756/art-funds-regulation-in-india>

28. https://www.sebi.gov.in/media/press-releases/feb-2008/sebi-issues-advisory-on-art-funds_5845.html

29. <https://economictimes.indiatimes.com/wealth/personal-finance-news/hoffman-raises-25-mn-indian-fine-art-fund/articleshow/2706254.cms?from=mdr>

30. https://www.sebi.gov.in/enforcement/orders/may-2021/order-in-the-matter-of-osian-s-connoisseurs-of-art-private-limited_50313.html

31. MANU/SC/0211/2020

32. <https://www.artprice.com/indicator/howto#:~:text=Artwork%20price%20index%3A%20an%20index,as%20the%20work%20being%20valued>

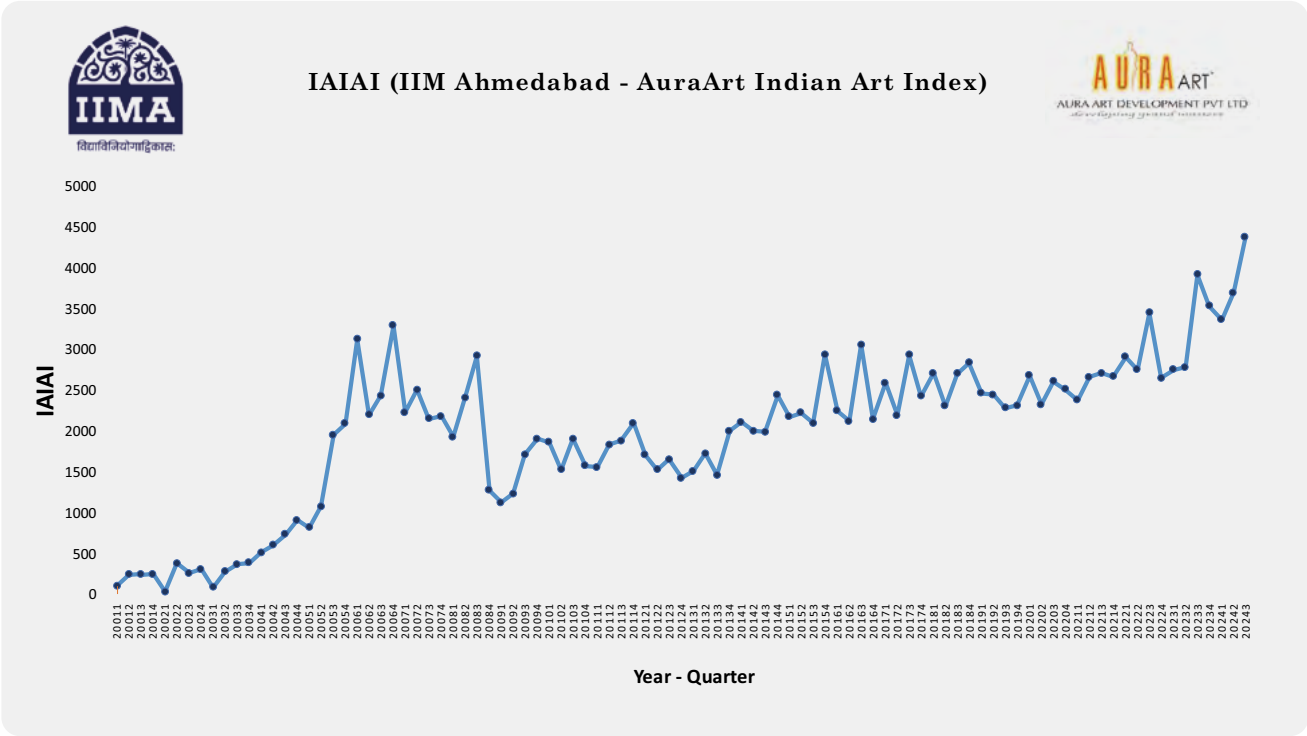
33. <https://som.yale.edu/news/2016/06/history-of-the-art-market-in-35-record-breaking-sales>

34. <https://www.morganstanley.com/articles/art-market-indices>

35. <https://itsartlaw.org/2015/11/16/art-price-indices-op-ed/>

Aura Art, in collaboration with IIMA created the IIMA-AuraArt Indian Art Index (IAIAI) in 2022, which is a hedonic pricing model offering a quarterly price index. The index includes works of Indian art auctioned in Pundoles, AstaGuru, Saffronart, Christie’s and Sotheby’s amongst others. Their initial analysis focused on the 25 artists with the

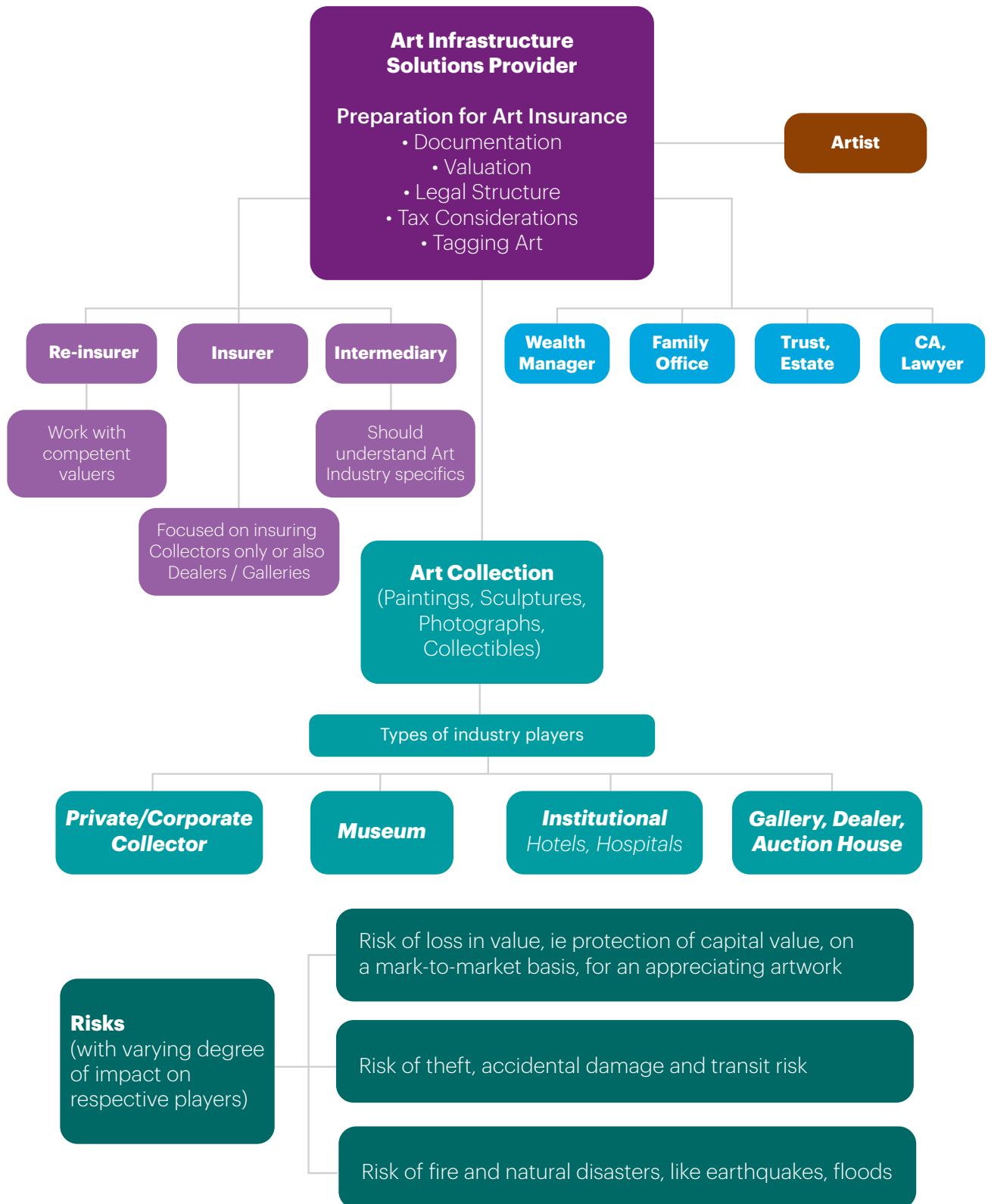
highest auction volumes in their dataset. These top artists collectively achieved a total auction value of INR 45 billion for the entire sample period. This price index would benefit various stakeholders in the art market to analyse risk data and historical performance aiding their investment strategies and also help financial institutions for underwriting.



Art Insurance

Given the high value of art assets, and their appreciation over time in the secondary art market, art collectors have become increasingly conscious of the physical and market risks associated with their collections, thereby leading to the proliferation of the art insurance market. While providers and agents are well equipped to service the market with various offerings, collectors need to be cognizant of ancillary issues in respect of documentation, valuation and insurance, besides addressing related tax and legal considerations.

The following diagram sums up the Art Insurance framework, the perspectives that influence decision making and the inter-play between the market participants.



Steps for Art Insurance

- Assess what part of the Collection needs to be insured and when (if in phases)
- Assess risks to be covered and the related exclusions
- Locations where collection is displayed / stored (with the corresponding monetary limits)
- Beneficiaries of the Insurance Policy
- Declare safe keeping measures being adopted (security, locking system, fire extinguisher, CCTV etc.)
- Select Insurers based on expertise in art, financial stability, history of claim servicing, network of appraisers / restorers, suitability etc. (certain Insurance companies only cover Collectors and not Dealers / Galleries)
- Shortlist Insurer with the most favourable pricing and terms
- Review the draft Policy for description of artworks, value, locations covered (with limits)
- Check risks covered and exclusions and necessary safe keeping measures declared to / expected by Insurer
- Ensure that any required changes are agreed by Insurer in writing before the premium is paid

An abstract artwork on a canvas, featuring a large, dark, textured shape on the right side that resembles a torn piece of paper or a dark, organic form. The background is a light, warm tone. A large, solid purple shape is overlaid on the left side of the image, partially obscuring the artwork. The text 'Chapter V' and 'Certification of Art' is written in white on the purple shape.

Chapter V

Certification of Art

Yusuf, Acrylic on canvas, 48 x 71 inches

Closely intertwined with the economics of the art market and efforts towards bringing investment in art within the organized investment landscape, certification of art acquires centerstage. Owing to the multiple factors influencing the valuation of art, including its rarity and the market sentiments associated with the concerned artist, originality becomes the core determinant of the value of the work. Unfortunately, technology has been an enabler for the creation of infringing works with the lines of distinction from the original being more blurred. Collectors therefore need to conduct necessary due diligence to ensure the authenticity of their acquisitions and trace the provenance thereof before an investment. Authentic certification not only enables reliable valuation but also enables the collector to procure necessary finances for the acquisition or investment. This section delves into the different certification mechanisms and their evolution with technology.

Traditionally, art authentication is conducted by certified experts, typically associated with reputed auction houses and galleries who establish and certify the authenticity of the artwork basis an in-depth assessment. The common methodologies of authenticity assessment include chemical analysis of the pigments matched with regions or periods where such work was found,³⁶ or radiographic techniques which evaluate the layers of paints used in the piece (the paint distribution and composition) as well as organic and inorganic materials used application styles.³⁷ A complete artwork provenance record includes the following particulars³⁸:

- The artist's biographical information - name, date of birth and death (if applicable), nationality, influences, etc.
- The chain of ownership and custody including the date of completion and first publication; dates and names of exhibitions in which the artwork was displayed; names and particulars of each of the previous owners mapped to the respective period of ownership, galleries and museums; records of each transaction (price at which the artwork is sold, dates of the relevant auction or acquisition, dealers and intermediaries involved, etc.).

- Particulars of restoration or conservation work performed on the piece, including the dates of such restoration activity, the person in whose custody the artwork was kept at the time of restoration, details of the individuals who executed the restoration, the specific element restored, the technique(s) used for the restoration.

With the advancement of technology, artificial intelligence and tokenization create a sound infrastructure for certification of art, though the same is yet to be conclusively established. Provenance, as we have seen above, is determined by historical data sets pertaining to specified parameters. Algorithms of artificial intelligence can be trained on these existing historical data sets to identify patterns and identify unique nuances of a specific artist's style. This can then be used to detect anomalies and inconsistencies and scientifically identify forged artworks with greater precision than a human expert. Hephaestus' AI is one of the pioneering tools developed with the help of eminent astronomers at Princeton University, the University of London and the Australian National University. It uses a "scattering transform" technology to detect more than 1 million dimensions (such as the pressure with which a paintbrush is applied to a canvas, the average distance between objects, the spacing of strokes, etc.) and reduce them to a 100-dimensional "fingerprint" contour. The degree to which the work fits into this contour determines the likelihood of its attribution to the artist.³⁹

Once the provenance is traced and authenticity is established, tokenisation on the blockchain enables certification of the said provenance. Physical artworks can be tokenised on the blockchain by attaching a non-fungible token (NFT) to the said artwork. Each NFT is a unique asset in itself which records a set of transactions through an immutable and decentralised ledger. The transfer of ownership of the artwork is concluded only upon a smart contract being signed for the transfer of the NFT. As a result, every transaction gets recorded on the blockchain, thereby lending an enhanced credibility to the artwork in itself.⁴⁰

36. https://digitalcommons.buffalostate.edu/cgi/viewcontent.cgi?article=1040&context=museumstudies_theses

37. <https://ajronline.org/doi/pdf/10.2214/ajr.140.2.215>

38. <https://2b.rocks/everything-you-need-to-know-about-art-provenance/>

39. Artificial Intelligence and Art Authentication | News

40. | Blockchain in the Art World: Ensuring Authenticity and Ownership

The background of the page is an abstract artwork by Yusuf. It features a large, dark purple, angular shape in the upper left corner, which partially obscures the text. The rest of the image is a complex, layered composition of dark, textured brushstrokes in shades of blue, black, and grey, set against a light beige background. The overall effect is one of depth and complexity, with visible textures and a sense of movement.

Chapter VI

Legal Framework

Yusuf, Acrylic on canvas, 48 x 71 inches

Collectors of art must not only understand the synergies between valuation, certification and financing of art but also navigate the complex web of legal provisions that influence the ownership, authenticity and transfer of artworks. Join us, as we decode the key legislations that shape the art market and provide you with valuable insights on your journey as a collector.

The Indian Copyright Act, 1957 ("the Copyright Act")

The Copyright Act was enacted to protect the rights of artists and creative persons in India and enable them to derive a fair monetization of their works and was brought into force after the invention of technologies such as the printing press which made publications and reproduction of works at scale, possible.

The Copyright Act defines "artistic work" to mean *a painting, sculpture, drawing (including a diagram, map, chart or plan), an engraving, or a photograph (whether or not any such work possesses any artistic quality); a work of architecture; and any other work of artistic craftsmanship*. Originality of creative expression is a necessary prerequisite for copyright to be granted in an artistic work. In *Camlin Pvt. Ltd. vs. National Pencil Industries (1985)*,⁴¹ Delhi High Court distinguished artistic designs made on product packaging as lacking originality and hence, *not* being copyrightable as it was produced mechanically. Similarly in the matter of *Ritika Pvt. Ltd. v. Biba Apparels Pvt. Ltd.*,⁴² the Supreme Court ruled that artistic work reproduced on fabric and applied on mass scale may be capable of protection under the Designs Act 2000 but not under copyright law

The artist being the creator of the work, is deemed by law, to be the first owner thereof until such ownership is proactively transferred by the artist to another by way of an assignment or license. However, a caveat must be drawn in respect of works created under employment or commission in which case the first ownership lies with the employer or commissioning entity.

The advent of digital artworks and artificial intelligence raises a pertinent debate on what constitutes valid authorship for a work to receive copyright. The Copyright Act attributes authorship exclusively to natural persons and this position has been further fortified by the Indian Copyright Office's *Practice and Procedure Manual (2018)*⁴³. In the landmark judgment of *Eastern Book Company vs. D.B. Modak*⁴⁴ the issue of originality was raised in respect of a software copying elements from a copyrighted journal. The Supreme Court observed that mere existence of labour is not sufficient to qualify for originality and the persistence on demonstration of creativity. Therefore, the Hon'ble court adopted a balanced approach the Canadian test and clarified that the author's work must reflect their skill and judgement for the work to constitute an original piece of work.

While digital art (such as NFTs) may well be attributed to a human author who has simply used a digital medium for his original artistic expression, the distinction is not as clear for generative art created using AI. The matter therefore becomes a subjective one where the proportion of human effort in generating the output must be assessed. In a landmark incident in 2020, the Copyright Office, for the first time recognized an AI tool, "*Raghav*", as a joint author of an artwork produced by Raghav along with its human developer and granted a registration⁴⁵, but the same was later redacted. The modalities of transactions for the acquisition of art have been dealt with in Chapter III of this E-Book.

41. MANU/DE/0365/1985

42. 2016) SCC OnLine Del 1979

43. https://copyright.gov.in/Documents/Public_Notice_inviting_reviews_and_comments_of_stakeholders_on_draft_guidelines/Literary_Work.pdf

44. *Eastern Book Company & Ors vs D.B. Modak & Anr.* AIR 2008 SUPREME COURT 809, 2008 AIR SCW 49, 2008 AIHC NOC 873, 2008 CORLA(BL SUPP) 129 SC, 2008 (1) JKJ 41, 2008 (1) SCC 1, 2007 (2) COPYTR 487, 2007 (14) SCALE 191, (2008) 1 CIVILCOURTC 553, (2008) 1 MAD LJ 361, (2008) 1 CALLT 69, (2007) 14 SCALE 191, (2008) 2 MAD LW 278, (2008) 1 RECCRIR 415, (2008) 1 RECCIVR 599, (2008) 36 PTC 1, (2008) 1 ANDH LT 670, (2008) 2 ANDHLD 1, (2008) 2 ICC 206

45. <https://www.livelaw.in/law-firms/law-firm-articles/-artificial-intelligence-intellectual-property-indian-copyright-act-singhanian-co-llp-238401>

The copyright ascribed to the owner of the work not only includes the right to publish the work (in 2D or 3D formats), store it electronically and issue copies of it but also encompasses the economic rights of selling the work for monetary gain, incorporation of the work in a cinematographic film, or creating an adaptation of the work. While these rights can be transferred through the value chain of the art market, there are certain inalienable rights of the artist, categorized as “special rights” under the Copyright Act. These rights are moral rights which vest in the author, independent of the ownership in the copyright include the right to be credited (or claim authorship) for the work and for the work to not be distorted or mutilated or modified in a manner that would cause disrepute to the artist. In the case of *Amar Nath Sehgal v. Union of India* (2005)⁴⁶, the Delhi High Court upheld right to moral integrity of the artist which was deemed to be prejudiced by the destruction of the artwork. The court read mutilation to include its utmost extremity of destruction which consequently affected the reputation of the artist adversely. This was further upheld by the Hon’ble Court in a subsequent matter of *Raj Rewal v. Union of India & Ors* (2019).⁴⁷ The copyright statutorily lasts with the owner of the work for a period of sixty years following the year in which the author dies.

An exercise by any person of any of the rights that collectively constitute copyright in an artwork without a legitimate license or transfer through any of the modalities discussed in Chapter III, would constitute infringement of the copyright. An infringement would not only entitle the owner of copyright to civil remedies of damages, injunctions and orders of specific performance, but would also make the perpetrator liable for punishment with imprisonment for a term of 6 months which may extend up to 3 years and with fine of at least Rs. 50,000 but which may extend up to Rs. 2 lakhs, if it is proven to have been done intentionally.

Antiquities and Art Treasures Act 1972 (“Antiquities Act”)

The Antiquities Act explores the same artwork which forms the subject of copyright from the perspective of regulating its export and trade and preventing smuggling of and fraudulent dealings in the same.

“Antiquities” are defined in the Antiquities Act to include *any coin, sculpture, painting, epigraph or other work of art or craftsmanship; any article, object or thing detached from a building or cave; any article, object or thing illustrative of science, art, crafts, literature, religion, customs, morals or politics in bygone ages; any article, object or thing of historical interest; any article, object or thing declared by the Central Government, by notification in the Official Gazette, to be an antiquity which has been in existence for not less than one hundred years.*

Further, “art treasure” is defined to mean *any human work of art, not being an antiquity, declared by the Central Government by notification in the Official Gazette, to be an art treasure having regard to its artistic or aesthetic value: Provided that no declaration under this clause shall be made in respect of any such work of art so long as the author thereof is alive.*

It is therefore established that this legislation focusses on the historical relevance of an artistic work or the aesthetic value of an art treasure after the lifetime of the artist and the Act focusses on legitimate monetization of such artworks, recognizing them as being an essential element of the cultural economy. Registration of works as antiquities or art treasures is a power that lies with the Central Government. Such registration is mandatory not just for exporters and sellers but also owners of antiquities and art treasures.

To regulate export of antiques and art treasures, the Antiquities Act makes it mandatory for an exporter or seller of such work to procure a license from the Central Government or an agency authorized by the Central Government. Such license is issued for a period defined under the Antiquities and Art Treasure Rules, 1973 upon thorough examination of multiple factors including the historical data of the applicant’s trade in antiques, particulars of the place of business and the level of saturation of antique sellers in such place. Any export done in violation

46. MANU/DE/0216/2005

47. MANU/DE/1817/2019

of this mandate is liable to be punished with imprisonment for a minimum term of six months but which may extend to three years and with fine notwithstanding any additional liabilities that may accrue under the Customs Act 1962. In the case of *Department of Customs v. Sharad Gandhi* (2019),⁴⁸ the Supreme Court emphasised on the need for a harmonious interpretation of the Customs Act and the Antiquities Act. Customs Act is referred to determine prosecution for antiquities or art treasures, but to determine whether an item is an art treasure or antiquity falls under realm of Antiquities Act. Further, the Central Government is accorded the discretionary power to conduct the sale of antiquities and art treasures in a place for a duration that it deems fit and to the exclusion of other sellers therein; or to compulsorily acquire any antiquity or art treasure in a public place for the purpose of preservation on payment of compensation.

In the case of *S.R. Kiran vs. Central Bureau of Investigation* (1999)⁴⁹ where the petitioner (accused) was found to be in possession of articles that were over a century old without due registration, the Karnataka High Court laid emphasis on the intent of the accused. Since the accused was found to be genuinely unaware of the mandate for registration and had not misused any of the articles in any manner, the Hon'ble Court simply directed the petitioner to apply for registration and further directed the articles to be returned to him if the legal requirements for registration were duly met.

As per the Notification dated December 1, 1976, the Central Government declared the artworks of the following artists as 'national treasures':

1. Rabindranath Tagore
2. Amrita Sher-Gil
3. Jamini Roy
4. Nandalal Bose

Additionally, in the Notification dated August 10, 1979, the artworks of the following artists were also designated as 'national treasures':

1. Raja Ravi Varma
2. Gaganendranath Tagore
3. Abanindranath Tagore
4. Sailoz Mookerjee
5. N. Roerich

Consequently, the artworks of these nine artists, often referred to as the "Nine Gems" or Navaratnas, are prohibited from being exported outside the country.

Trademarks Act, 1999 ("Trademarks Act")

While the Copyright Act protects the artistic element of an artwork, the Trademarks Act protects the intellectual property in a work that creates a resonance with its brand and is the gateway to protect the economic rights of the creator or brand owner. The Trademarks Act to include *a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof* and therefore refers to printed or other visual representation of the mark. Interestingly, the same piece of work may be registered as a trademark as well as a copyright and a composite cause of action could arise under both legislations as determined by the Supreme Court in the matter of *Dhodha House vs. S.K. Maingi* (2005).⁵⁰

In relation to artistic works, the trademark of an artist not only signifies the prima facie attribution of a work to the artist but also creates a prototype of his style that distinguishes his work from another. For instance, Jamini Roy's unique portrayal of eyes or the signatures of an artist which is essentially a part of the artwork itself, or any unique style that recurs across the works of an artist such that these elements become associated with the artist or a brand in the public's perception, the same could have the potential of being registered as a trademark. Public association with a mark is crucial for it to be registered as a trademark.

48. MANU/SC/0295/2019

49. MANU/KA/0092/2000

50. MANU/SC/2524/2005

The Indian Penal Code, 1860 (“IPC”) and Bhartiya Nyaya Sanhita, 2023 (“BNS”)

We have explored the legal framework from the perspective of infringement of intellectual property rights. The relevance of IPC and BNS to the art economy can be explored from dual angles – the culpability of the artist in respect of the nature of content as well as the culpability of players across the value chain in respect of transactions.

Regulation of content that incorporates artistic expression of any form has always trodden very thin lines, particularly on account of a highly diverse social, cultural and economic demography. Much of this regulatory supervision is centred around controlling obscenity in the interest of public morality and harmony. Yet nude modelling and consequent depictions of nudity and the bare human body have been prevalent subjects of fine art. Thus far, the Indian Penal Code, 1860 was the primary legislation defining and governing all substantive aspects of criminal law while the Code of Criminal Procedure, 1973 laid down the procedural framework for action to be taken in respect of offences identified under the IPC. Considering the archaic nature of the provisions of the IPC in the present day, particularly with the socio-cultural and digital revolution, the IPC was replaced by the recent enactment of the BNS that came into effect in 2024.

In both legislations, any work is deemed obscene if it contains sexually explicit content that is “*lascivious or appeals to prurient interest*” or if (in part or in whole), it has the potential to naturally deprave or corrupt the mind of its audience. However, the section carves out an exception for works created while imparting education, or in the interest of art, literature, or science. Even from a prima facie review of the provision, it is understood that a balance is drawn between the right to freedom of expression of the artist and the Constitutional duty to protect decency and morality.

While there have been multiple perspectives adopted by Indian courts, accorded to the subjectivity of the concept of obscenity, the recent judgment in the matter of *M/s BK Polimex India Private Limited vs Union of India (Writ Petition 14437 of 2024)* brings to light an interesting position of law. The petitioner challenged the confiscation and imposition of penalty by the Assistant Commissioner of Customs (“ACC”) on the artworks by renowned Indian artists FN Souza and Akbar Padamsee, labeling them as “obscene”, despite applicable taxes being paid. The Division Bench of the Supreme Court struck down the impugned order of the ACC as being “perverse” and devoid of merit. The Court emphasised the need to take expert opinions in such situations in order to avoid subjective biases and curtail fundamental rights.

Having discussed the issues of culpability of an artist, let us examine the critical issue of culpability of malicious players in the course of transactions in art. Art being an investment vehicle of high asset value, forgery and deception in sale of artworks has been an inevitable vice for the industry for decades. The offence of “*forgery*” has remained consistent in both BNS and IPC – penalising the creation of a false document or electronic record with a malicious or fraudulent intent to cause harm to another person or the public at large or to establish a claim or title to property or induce a person to part with the said property.

While there are no statistics to demonstrate the quantum of fakes, it is widely believed that a significant proportion of the works sold in the Indian art market are fake, particularly those of old Bengal masters and progressive artists who have passed away.

Forged paintings of Rabindranath Tagore being exhibited in a government college of Kolkata was the subject of the case of *Shri Tapas Sarkar v. Union of India*,⁵¹ leading to a seizure of the paintings. The Calcutta High Court refused to pass a final order, claiming that a determination of the originality of the paintings was outside the scope of its writ jurisdiction.

51. (2012) SCC OnLine Cal 12577

Further, the offences of “Criminal breach of trust” and “Cheating” have also remained consistent under the IPC and BNS.

A dishonest misappropriation of property by a person entrusted with such property or a conversion of such property for their own use or a transaction or disposal of such property in violation of applicable law or in breach of an existing contract would essentially constitute criminal breach of trust. Cheating on the other hand, refers specifically to an act of fraud or deception by an individual which results in another person being induced to either deliver a property or engage in any act or omission which they ordinarily would not have engaged in had they not been so deceived. It is important to understand that while the former focusses on the intent, the latter focusses on the consequence.

The case of *Sheetal Mafatlal vs. State of Maharashtra*,⁵² made headlines when the accused was found to have criminally misappropriated 48 paintings from her own family’s home and replaced the original paintings with duplicates and filed false reports. Not only this, but she also filed false claims against her friends to deceive investigating authorities. In another recent instance reported widely in the media, a senior finance professional filed a complaint with Tardeo police alleging that he had been sold 11 paintings by leading Indian artists worth ₹ 17.90 crore which turned out to be fakes, by a Mumbai-based art dealer, on the advice of a leading solicitor. It is further reported that the Enforcement Directorate⁵³ (ED) conducted searches at six locations in Mumbai as part of a money laundering case involving the art dealer and others who were accused of selling fake artworks and is said to have found evidence which showed operations of a cartel engaged in trading of fake artwork, generation of fake authenticity and provenance certificates, transfer of money through cash and involvement of other prominent art galleries and individuals.

Indian Contract Act, 1872 (“Contracts Act”)

A transaction in any stage of the value chain of the art market is essentially a contract and is governed by the Contract Act. For the contract to be legally enforceable, it must fulfill the essentials for a contract as per statute – there must be a valid offer and acceptance, a fair consideration, a legitimate objective and mutual consent between the parties in exercise of sound mind and in the absence of influence or intoxication. In other words, if the concerned transaction is induced by fraud, coercion, misrepresentation or undue influence or if the consideration is not a fair and reasonable one, the contract would be deemed to be voidable at the instance of the party who suffered such coercion or misrepresentation. Therefore, if an artistic work is purchased under a misrepresentation as regards its originality and provenance, or if an art piece has been sold fraudulently, the purchaser may choose to claim compensation re-instating him to his financial and reputational position prior to such purchase. In the event such compensation is also claimed from the art gallery that facilitated the transaction, the gallery could be protected from liability for indemnification provided it can demonstrate the exercise of adequate and reasonable due diligence to ensure that no such misrepresentation was made.

The Sale of Goods Act, 1930 (“Sale of Goods Act”)

Not only would a transaction involving the collection of art constitute a contract, but also a sale of movable goods under the Sale of Goods Act which governs the conditions of the contract – time and conditions of delivery etc. It is a law of warranty which empowers the purchaser to repudiate the contract if a contractual condition is breached but grants no implied warranty in terms of the quality of goods transferred, unless the same is specified in the contract.

52. Cr.WP/3902/2016 (<https://bombayhighcourt.nic.in/generatenewauth.php?bhcpair=cGF0aD0uL3dyaXRlcmVhZGRhdGEvZGF0YS9jcmItaW5hb-C8yMDE5LyZmbmFtZT1XUDM5MDIxNjAyMDQxOS5wZGYmc21mbGFuPU4mcmp1ZGRhdGU9JnVwbG9hZGR0PTAyLzAOLzlwMT-kmc3Bhc3NwaHJhc2U9MjUxMDIOMTU0ODUxJm5jaXRhdGlvbj0mc21jaXRhdGlvbj0mZGlnY2VydGZsZz1OJmludGVyZmFjZT0=>)

53. <https://timesofindia.indiatimes.com/topic/Enforcement-Directorate>

The Consumer Protection Act, 2019 ("Consumer Protection Act")

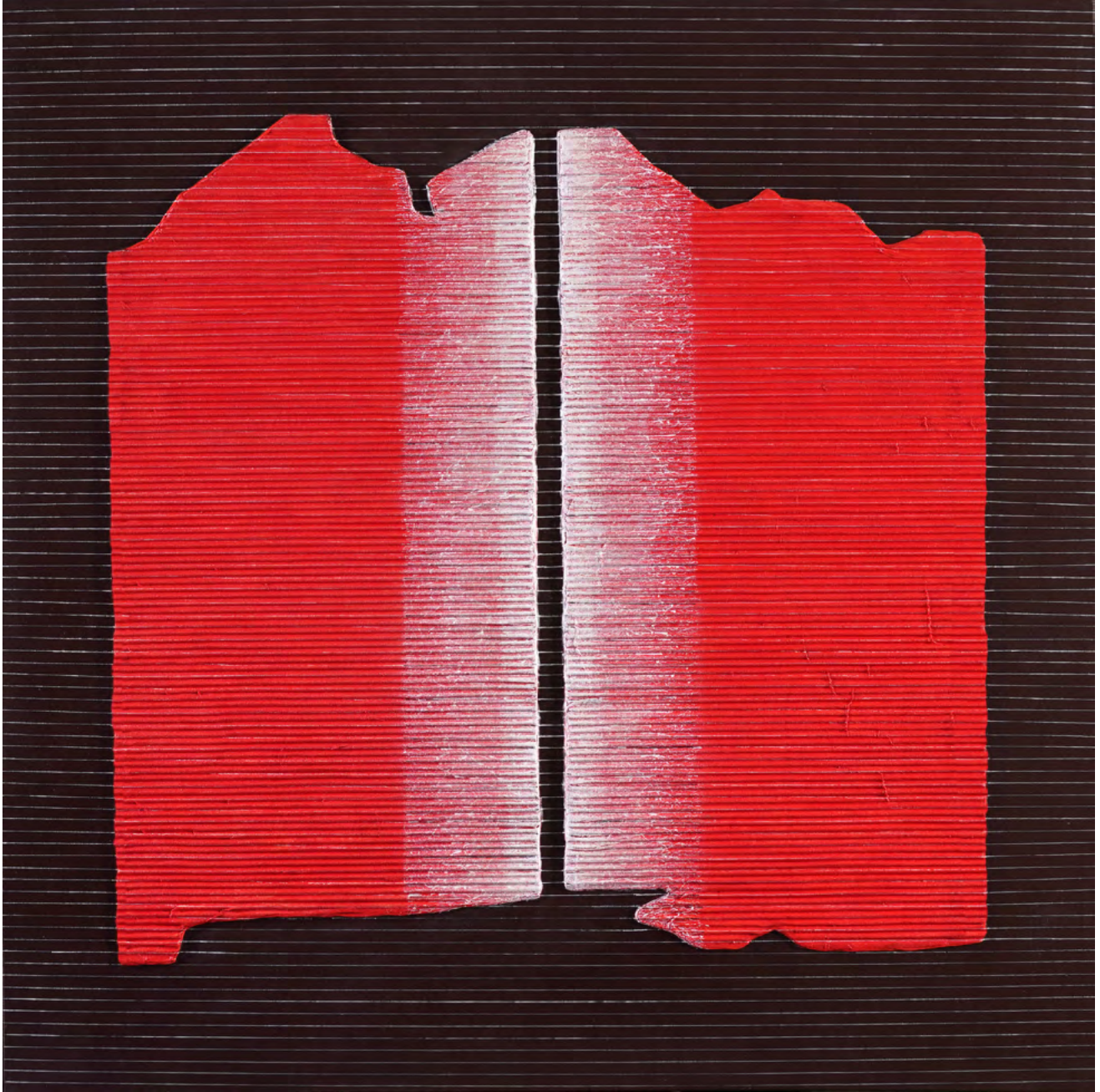
Closely connected to the Contracts Act, is the Consumer Protection Act, which is aimed at protecting the interests of consumers in respect of sub-standard goods sold or deficient services rendered or unfair trade practices that have adversely impacted such interests. It is pertinent to note however, that in defining the profile of a 'consumer', the payment of a monetary consideration or a commercial purpose is essential under the Consumer Protection Act. Therefore, it does not extend to claims arising out of gifts or services rendered *pro bono*.

In the context of transactions pertaining to artworks, a counterfeit work passed off as original and sold or a work sold without necessary title thereto would constitute a defective product under the Consumer Protection Act. Similarly, a certification procedure conducted negligently or fraudulently would constitute a deficient service. Such acts would be liable to be punished with fine or imprisonment or both basis the nature of the impact thereof.

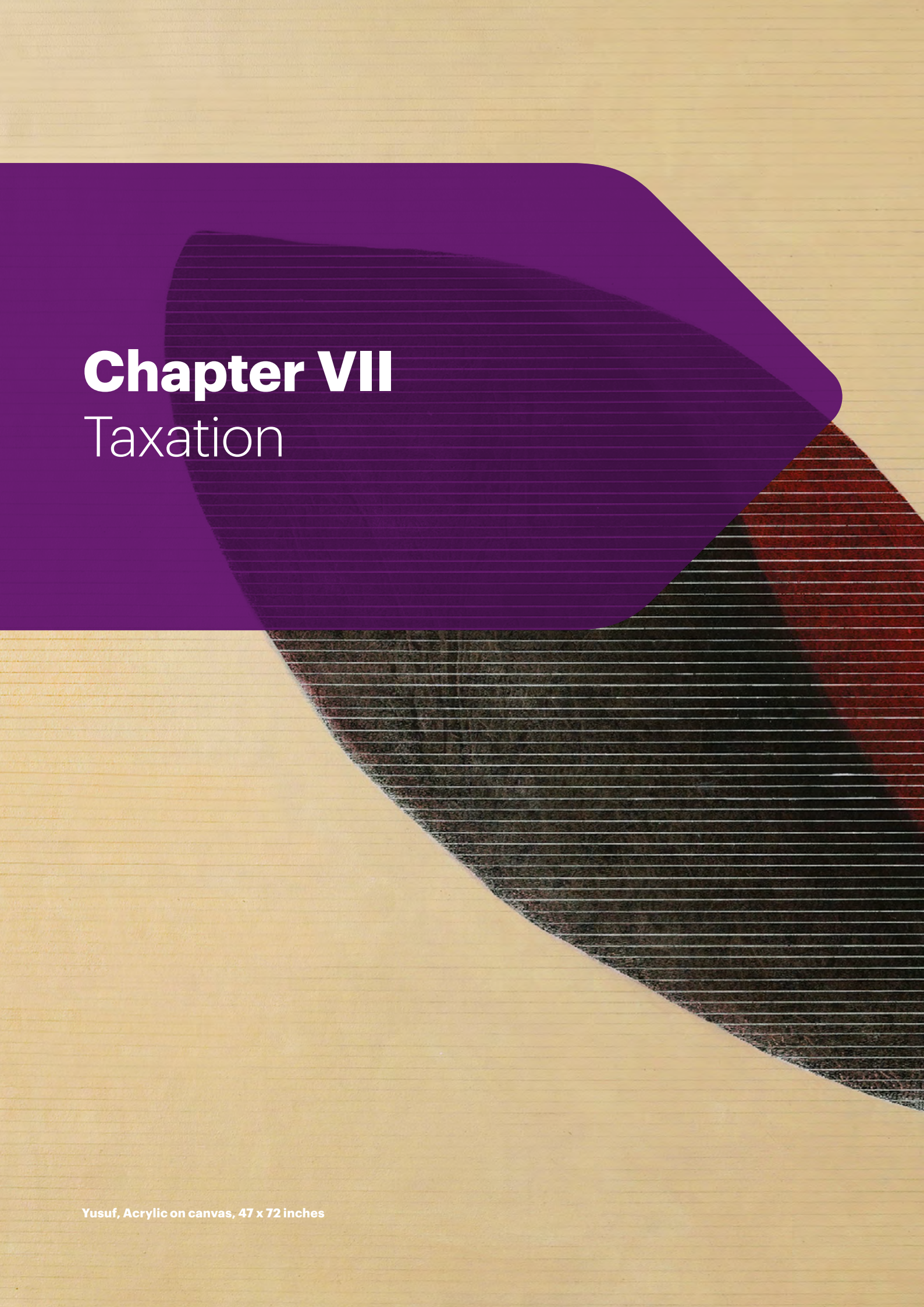
Information Technology Act, 2000 ("IT Act")

With the digital era growing, auction houses and galleries are recording and storing data relating to sales and bids along with an electronic representation or thumbnail of the concerned artwork. The Delhi High Court in the case of *Maqbool Fida Husain Vs. Raj Kumar Pandey*,⁵⁴ dismissed charges of obscenity and hurting religious sentiments filed against the artist. The fundamental right to freedom of expression under the Indian Constitution was upheld along with an observation that provisions in respect of obscenity under the IT Act and IPC need to be read in light of contemporary and subjective standards that apply to a work of art.

54. MANU/DE/0757/2008



Yusuf, Mix media on canvas, 36 x 36 inches



Chapter VII

Taxation

Yusuf, Acrylic on canvas, 47 x 72 inches

Under the Income Tax Act, 1961, an individual selling or transferring artwork is required to pay capital gains tax on the income derived from such a transaction. The nature of the capital gain depends on the holding period of the artwork:

1. Short-term capital gain (STCG) applies if the artwork is sold within 24 months of acquisition.
2. Long-term capital gain (LTCG) is applicable if the artwork is sold after 24 months, taxed at a rate of 12.5%.

Additionally, TDS (Tax Deducted at Source) of 10% is applicable on royalty income of artists.

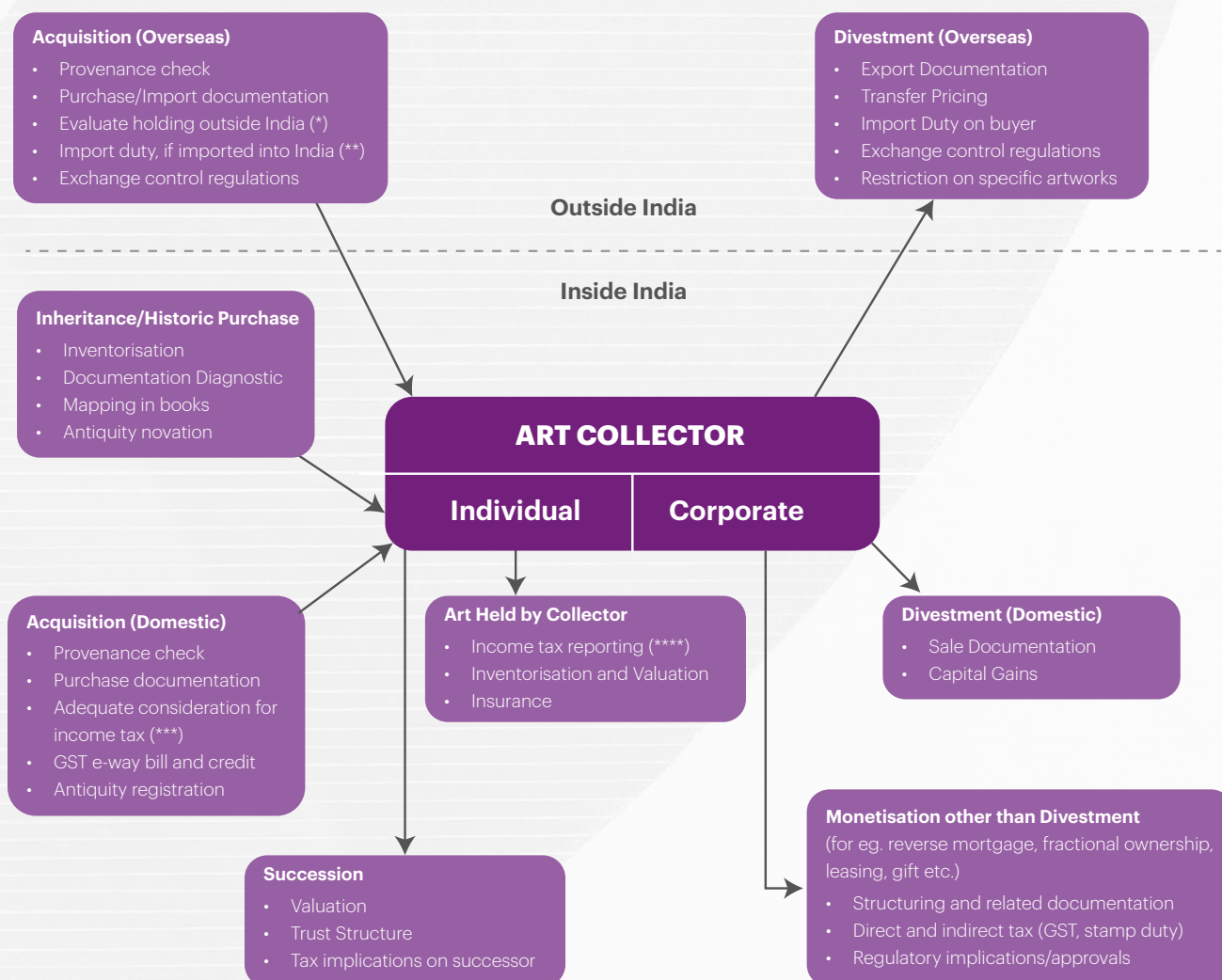
Separately, as per the Goods and Services Tax (GST) Act, 2017, sale of art by a registered dealer

in India attracts GST to the tune of 12% which is typically borne by the buyer [also referred to as IGST (Integrated Goods and Services Tax) on inter-state supply of goods and services in India]. In case of import of art into India, an effective duty of 22% gets levied on the buyer (including 10% Customs Duty along with the 12% of IGST) plus applicable cess. The importer however may be able to avail input tax credit in respect of IGST and cess.

Additionally, the buyer may also have to incur GST on ancillary services as follows:

1. 18% GST on framing services
2. 18% GST on other art-related services, including valuation, restoration, etc.

Legal, Tax and Regulatory considerations and related assistance during life cycle of Art Collection



* Specifically relevant for a collector with overseas presence and intention to flip works in near future. Certain collectors also evaluating off-shoring existing collections which are currently held in India.

** Evaluation possibility (albeit low) of obtaining duty waiver for important artworks of national importance.

*** Specified artworks (archaeological collections, drawings, paintings or any work of art) received / acquired without / for an inadequate consideration, may be taxed in the hands of the recipient at fair market value.

**** Specified assesses having total income over INR 5 million are required to disclose cost data of various classes of assets – including, archaeological collections, drawings, paintings, sculpture or any work of art – in their return of income.

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Yusuf, Acrylic, pencil, pen and ink on canvas, 36 x 30 inches

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On the cover: **Yusuf, Acrylic, ink and pencil on canvas, 70 x 34 inches, 2006**

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