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GCC Commissioning Guidelines

The Art Law team at Mishcon de Reya have generously produced guidance on embedding sustainability into legal agreements. As commissions can present a potential opportunity for the contracting parties to advance environmental causes and promote better sustainable practices from the very beginning, these guidelines are specific for commissioning agreements. This may include considerations on the use of materials that may change over time, or providing consent for residual materials of the artwork to be reused by other artists.

The Art Law team at Mishcon de Reya is a long-standing supporter of the GCC. They have a long track record of advocating for innovation and sustainability in the art market. They regularly advise clients in all sectors of the market on how to incorporate sustainability into transactions and projects through commercial, creative, and strategic solutions that leave their interests and protection intact.

Much like art commissions, commissioning agreements are rarely standard. However, most commissioning agreements will include a core set of headline terms whose contents are tailored to the nature of the work being commissioned, its intended use, context, and the parties involved. Set out below are key terms that should be considered by parties to such an agreement (see Section I). A range of key commercial and strategic considerations should also be kept in mind across both the negotiation and execution of any commissioning agreement (see Section II). It is however important to note that each project will be different, and the terms and concepts discussed below are by no means exhaustive.

Sustainability considerations: A commission presents a potential opportunity for the contracting parties to advance environmental causes and promote better sustainable practices. When given careful consideration, 'Green' clauses can be incorporated into a commissioning agreement in a commercially sound and efficient manner that not only leaves parties' interests and protection intact, but importantly, systemises a commitment to protecting the environment that will, we hope, become the new norm in art transactions.

I. The contractual building blocks of a commissioning agreement

The contract between the parties is a roadmap for the project ahead. Most commissioning agreements will contain provisions that address:

- **A clear definition of the parties and the artwork** – to clearly set out the names of the contracting parties including the commissioning party, the artist and/ or their studio, and their addresses. Although this is a question of preference as to form and format, a contract can include a definitions section that sets out the intended meaning and interpretation of a range of key terms under the contract, including the artwork. In any event, a precise description of the artwork being commissioned is essential (including by cross-referring, if

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needed, to a detailed appended document or schedule describing the specifics of the artwork).

- **A preamble** – to describe, in concise terms, the central obligation to be undertaken by each party under the agreement (for example, the artist/ studio's obligation to design and/or fabricate the work, and the commissioner's obligation to pay a commission fee and/or acquire the work).
- **A clear definition of the stages of the commission** – to capture all phases of the commission which can range from concept design to fabrication and installation.
- **A project schedule and timelines** – to ensure both flexibility for the artist and accountability for the commissioner by including a schedule and provisions regarding payment terms, deliverables, delays and reporting obligations.
- **Changes and approvals** – to allow reasonable discretion for the commissioner's right to approve the final products of each stage of the commission (e.g. concept, fabrication, installation), to request changes, and/or condition checks.
- **Transfer or retention of ownership in the work** – to reflect, if intended, the transfer of title to the commissioner as purchaser and any resale restrictions, or alternatively, the artist's retention of title and, if appropriate, any right of first option for the commissioner.
- **Payment terms** – including the price for the work and/ or any standalone fees for its concept design, fabrication, and installation, and a payment schedule in the case of instalments.
- **Transfer of risk** – to address the transfer of risk for loss or damage to the work. This transfer is not systematically correlated with the transfer of physical possession of the work, and in turn impacts the responsibility to care for and insure the work.
- **Costs** – to ensure the allocation of costs between the parties and their timely payment.
- **Sustainable choice of materials, recycling and reuse** – can be integrated as an obligation of the parties to use specific pre-selected sustainable materials, to source materials responsibly, recycle or reuse them after the work is disassembled, or prioritise third-party providers that use sustainable methods of production and transport. It is essential that any obligation to make materials available for recycling and reuse is carefully drafted to incorporate, at a minimum, clear consents and releases from the artist (see Section II below for further detail on the reuse of materials).
- **Intellectual property rights** – can vest not only in the work itself but in preparatory drawings, concept designs, and any other ancillary materials. The retention of intellectual property rights by the artist, any joint or co-authorship with third-party contractors (or the exclusion thereof), and potential licensing and reproduction restrictions should be addressed as clearly as possible.
- **Warranties** – can include both standard warranties such as the transfer of a clear title in the work and fitness for purpose, and special warranties required based on the specific context or nature of the work, such as for example its ability to withstand extreme weather or other environmental conditions.
- **Considerations regarding the impact of the work on the environment** – can be incorporated into the agreement in a range of ways including an obligation for the artist to provide an environmental impact assessment either in writing or an alternative format

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agreed with the commissioner, for the commissioner to fund it, and/or for the artist to provide a warranty that the environmental impact of the work will not exceed a given threshold. Care should be taken to ensure that the reference standards and thresholds for such obligations are clearly agreed and transparent.

- **Liabilities and indemnities** – to provide clarity on the extent of liability parties accept and/or limitations on the same, and the indemnities parties will owe each other in the case of breach, negligent performance or non-performance of the agreement.
- **Death or incapacity of the artist** – to clearly set out the effect of the artist's passing or incapacitation on the progress of the commission including, if intended, authority being granted to the artist's representatives (their studio, estate, or other) to oversee the completion of the work (or negotiate a way forward for the same in good faith).
- **Termination and post-termination** – to define the grounds that give the parties the right to terminate the agreement with or without notice, and the effect of such termination.
- **Boilerplates** – a varying selection of recurrent clauses found at the back end of the agreement. Consideration of these clauses should not be overlooked. Boilerplate clauses typically cover a range of matters from confidentiality obligations to variations to the agreement, applicable law, and the choice of jurisdiction for the resolution of disputes.

II. Key commercial and strategic considerations

Clarity on the nature of the contractual relationship

A simple but crucial consideration is maintaining clarity on the basis on which the artist is engaged to produce the commission. A transfer of ownership in the work or elements of the work, or a transfer of intellectual property rights in the same, are not implicit.

- **Artists** should ensure that, if intended, the contract reflects that they are retained on a service basis, for example by being paid a fee for the concept design, production, and or installation of the work. This does not exclude the possibility of providing for the sale of the work in the same agreement or negotiating it after completion.
- **Commissioners** should think ahead if they have an interest in acquiring the work or a right of first option to do so – if not initially envisaged, a sale can, of course, be agreed after the work is produced, however making this intention clear and reserving a right of first option to protect it in the commission agreement will facilitate later negotiations for a sale.

Third parties and collateral agreements

The nature of the work and the artist's creative process will guide the need for the involvement of third parties from engineers to foundries, technicians, and assistants. This will most often be dealt with by way of collateral agreements between the artist/their studio and the third party. The involvement of third parties should be clearly integrated into the commission agreement itself by addressing, at a minimum, which of the parties is responsible for engaging third parties, whether this will indeed be done by way of collateral agreement, who of the artist/studio or commissioner will be responsible for the costs of this engagement, the exclusion or assumption of liability for the actions and defaults of third parties, and if intended, provisions to effect a

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retention by the artist and/or commissioner of intellectual property rights in the materials provided by the third party, the artwork and derivative materials.

- **Artists** should ensure that they have the commissioner's consent to delegate or outsource elements of the work's production to third parties.
- **Commissioners** should ensure that they are informed of third parties involved and related costs in a transparent and timely manner.
- **Third-party contractors** should ensure that they have clarity, at a minimum, on the basis on which they are retained, that the person or entity engaging them contractually has authority to do so, that there is no confusion as to the retention or waiver of intellectual property rights in their work product and their co-authorship or joint authorship of the artwork (or exclusion thereof).

Planning considerations

Commissions installed in public spaces will often require planning permission being obtained from the relevant local authority. This may require preliminary inspections and consultations.

- **Commissioners, artists, and third parties** should all take planning permissions into consideration at the outset, when the project is being scoped out. It may result in an impact on the timeframe for delivery or modifications to the design.

Insurance

A wide range of liabilities can arise during production, installation, while the work is exhibited, and while it is being uninstalled, relocated, or recycled. Such liability might be to the public, any contracting parties including the artist, third-party contractors, the commissioner, and the work's subsequent purchaser/owner.

- **Third-party contractors** engaged through collateral agreements should ensure that they have clarity over the level of recourse they have against the party engaging them and how both their safety and work is insured, and their own liability for delays or non-completion.
- **Commissioners** might expect the artist to indemnify the third-party contractors engaged under collateral agreements for liability arising during performance, and/or provide warranties in the commissioning agreement against defaults and non-completion by such third-party contractors.
- **Artists**, if they are the party engaging third-party contractors, should ensure that liability between them and those sub-contracted third parties is apportioned clearly and that theirs is limited, as much as possible, to what is within their control.

Recycling a commissioned work

Subject to the form and type of work, the potential end of the work's life should be discussed at the outset of the commission, with key distinctions being drawn.

The difference between the materials from a recycled work being industrially recycled (i.e. in a recycling plant or similar) or recycled by being reused by another artist in a subsequent work is crucial. The law does not draw a clear line between what makes a fragment of a decommissioned work a material akin to a "raw material" that is no longer linked to the author of the original work, and a fragment that, to the contrary, remains considered an artwork in its own right or a component of one that retains a link to the original author. The distinction is largely conceptual, always case-specific, and best addressed by the original author.

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- **Artists** should ensure, if intended, that there is no ambiguity as to their consent for the subsequent use of elements from their work by other artists, and where appropriate provide the relevant instructions regarding credit lines, and limitations on the permitted use. Further, when providing consents or instructions regarding the future use of their work or its elements, artists should take care to pre-empt confusion regarding elements of a work that can be considered as akin to "raw" materials no longer bearing a connection to the artist, and those that cannot be used freely.
- **Commissioners** should in all circumstances take care not to inadvertently assume that an artist's consent to the disposal of their work through industrial recycling includes consent for the reuse of materials by other artists. Separately, whether it is the original artist or a subsequent artist who wishes to reuse materials from the commissioned work, and depending on circumstances such as the level of costs the commissioner has borne as part of the commissioning project and/or whether they have acquired the work, the commissioner may in turn wish to retain a level of control over the works' future use. This can include requiring permission before the work is recycled, credit, or a monetary contribution towards material costs.

Commissioning a work using recycled materials

An artist can make use of components created by third parties in the commissioned work, subject to ensuring that the intellectual property rights of the original author are not infringed.

- **Artists and commissioners** should both keep in mind the licences, consents, and crediting required for the use of recycled materials, unless the author of the original work has provided a clear indication that any fragments of their decommissioned work can be freely used as raw material.
- **Artists** commissioned to create a work using recycled materials should keep in mind that commissioners may expect and require the artist to have obtained relevant permissions for the use of third parties' materials in the commissioned work.

Using sustainable materials

A commission may involve the use of natural materials such as wood, flowers, or wax that are intrinsically prone to deterioration or are by their nature ephemeral. Some artists may consider that their work should not be regenerated past its first natural deterioration. This is especially important to consider where a work is installed outside and vulnerable to weather and the elements and may deteriorate quickly.

- **Commissioners** should think ahead about obtaining instructions from the artist for repairs and replacements that they can arrange independently, and those repairs and replacements, if any, that may require the artist's approval. This is done both by establishing efficient communication channels and incorporating instructions and consents either in contractual clauses or annexed conservation and/or maintenance manuals. If they acquire an ephemeral work, commissioners should consider whether they are purchasing the concept of the work, or only its first material manifestation, and bear in mind the assignment of intellectual property rights and permissions required to recreate the material manifestation of a concept.
- **Artists** may prefer not to be involved in the upkeep of the work after the sale, however it is good practice to retain clarity on this with the commissioner and to consider the future of the work as early as possible carefully. This will help to avoid the risk of alterations or repairs

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to the work made without the artist's input or consent leading to damage to its integrity and a need to disavow it or pursue an action for infringement of moral rights.

Relocating a public commission to preserve it and prevent its loss (or waste)

If any doubt exists regarding the work's site-specific nature, it is key to pro-actively obtain clarification and, if appropriate, the artist's consent to relocate the work and/or their approval of the new location to avoid an infringement of moral rights. If the work is structurally complex (e.g. an installation made of multiple elements or complex technological equipment), the artist can often provide an installation manual, relocation instructions and parameters for the choice of new locations.

As a rule of thumb, it is important to think ahead, and continuously, about how, and to what extent, the artist and their studio remain involved in the life of the work after the completion of a commission.

Termination prior to the completion of the commission

A party may have valid grounds under the contract to terminate the commissioning agreement prior to the completion of the commission. This means that expenses may have been incurred, materials will have been used, the artwork may be mid-production and unfinished, and ancillary materials and documents such as sketches and permits may have been produced. The contract should address ownership of materials (both as regards physical ownership and intellectual property rights), whether such materials should be destroyed or delivered to either contracting party, and whether, depending on the ground for termination, one party should reimburse the other for certain costs borne by them to the date of termination.

Due diligence on contracting parties

Parties should consider at the outset of a transaction whether they fall within a regulated sector in the relevant jurisdiction. For example, in the UK, parties must consider whether they fall within the regulated sector for anti-money laundering compliance under the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, within the scope of the Proceeds of Crime Act 2002, whether they should consider sanctions regimes, and ensure that they fulfil all potential compliance obligations and due diligence enquiries accordingly. Due diligence should be completed at the outset and the warranties provided in the contract can require parties to warrant their compliance.

Due diligence on funding

It is key for the commissioned party to conduct due diligence on the source of funds not only for the purpose of compliance with regulatory regimes, but to ensure that they are comfortable with the source of the funder/commissioner's wealth. This could involve ethical and importantly environmental considerations.