Law and contemporary art: rights and issues concerning site specific art works.

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1. Introduction

Intended as an activity performed by human intellect and governed by experiences and academic rules, art is, among the vary nuances that it can represent, a pleasure, a delight and a nourishment for mind and soul. Along with the most common and numerous artistic expressions such as painting, sculpture and photography, contemporary art has developed new particular languages artists interpret using new means, through the creation of installations or by performances, often unique and conceived for a particular type of event, site or collector: these works are called *site specific.*

More precisely, site specific representations may consist of performances, i.e. artistic pieces consisting of an action of an individual or a group, in a determined place and time[i]. As far as contemporary law is concerned, such performances include the following elements: (i) the involvement of artist's body; (ii) the involvement of the audience; (iii) the uniqueness of place and time in which they are executed.

This article is meant to examine the legal relevance of art installations and performances. Now, in fact, following an increasing trend, the spectator of such performances, for instance, being or not an art professional, may be requested to enter a contract before assisting or observing such art works, frequently characterized by their exclusivity and rarity.

It is only rarely, though, that contemporary art operators are requested to enter such contracts. Nonetheless, continuing with the above example, spectators might be informed of representations' features by means of wide revealing signals. By participating in the performance, the interested parties implicitly accept the rules, entering the contract by *facta concludentia.*

Art is firstly an emotional exchange, and subsequently of obligations. The obligations are governed by law. Now, what happens when these installations or performances are exclusive? What rights is the artist entitled to? What are the limits to these rights? And above all, what rights do the spectators have? *Quid iuris* when the exhibition site changes?

This article would like to investigate some of the new issues surrounding art and the law, and, in particular, those relevant to contemporary art. Changes in art happen at a higher speed than the law; nonetheless law must offer answers.

2. The contract

Usually, according to Italian law, the instrument to regulate the aforementioned relationships is the contract, pursuant to article 1321 of the Italian Civil Code. In fact, the rapports this relationship encompasses are vary and complex. In order to avoid an improper regulation or, even worse, to avoid that a judge is called to regulate them (in course of a lawsuit, interpreting parties' intention), the most secure and proper solution still remains to stipulate a contract in writing, better if drafted by a professional.

These relationships can also be amended in accordance to the site of the exhibition, as a consequence of the internationalization of art and of all the transactions arising from it, and the plurality of parts they entail.

Nonetheless, similar to what happens in the world of business, a contract is rarely adopted, therefore the gallery or the foundation inviting the artist might also enter the contract through correspondence exchange, consequently not regulating artist's, art works' and gallery's rights and obligations in a unique contract.

To what interests here, site specific exhibitions represent a peculiarity as they do not only consist in an installation (i.e. goods created in occasion of an exhibition using different static materials or other technologies, e.g. video), but they can also consist in a performance, a piece interpreted by actors. In practice, a gallery may contract an artist to exhibit an art work, also pursuant the scheme provided by articles 2222 and ff, Italian Civil Code. The artist, in fact, undertakes to produce a site specific art work[ii], created for a precise setting, as the name describes. Typically, the author takes into consideration the exhibition's position in conceiving and creating the art work.

Moreover, the artist is not bound to the principal as an employee but he is entitled to use the material the latter can furnish. The art work ownership might remain to the artist or it can be transferred to the gallery or to a collector. In this case, whether the work consists of a performance, the title is transferred to the collector, who can have it performed infinitely, under the artist's specifications.

Another contractual relationship to take into consideration is the one binding the artist or the gallery, with the spectator-visitor. More precisely, according to Italian law, the contract binding the former to the latter would be hardly found in one specific category provided by the Italian Civil Code: nevertheless, as commonly known, the parties are free to determine their contractual provisions, within the limits provided by the law and provided their interests worth protection (art. 1322 of the Italian Civil Code).
The spectator might not only stop and stare at the art work as a painting in a museum, he might become part of the work itself, contributing his rights in the exhibition: hence, it might be affirmed that in the site specific art work, the contract entered between artist and spectator is an atypical one.

3. Artist's rights

According to Italian law[iii], the artist, as interpreter or executor in site specific art work, is subject to the provisions set forth by L. 22 April 1941 n.633, dealing with copyright and other rights connected to its practice.

The rights provided in this act are wide and can be widened: there is no provision limiting, directly or indirectly, the artist's possibility to enter contracts to protect his rights or interests concerning his interpretation[iv].
In particular, pursuant to article 80 L.633/1941, the artists, interpreters and executors are entitled to exclusive financial rights that can be subject to separated contractual transactions. The author is also entitled to ask for a compensation for his live interpretation or to regulate his exclusive financial rights with a third person (e.g. art gallery), also regarding the use. This opportunity must be completed in writing, pursuant to article 110 L.633/1941.
Also article 80 L.633/1941 *lett. a)* is applicable to site specific art work's interpreter: he will be entitled of exclusive right to register and reproduce his artistic performances and therefore also the right to oppose any recording or unplugged reproduction of his performances, if not authorized: this illegal practice is called *bootlegging*[v].

Article 80 L.633/1941 also provides that the artist-interpreter is also entitled to provide *"authorization and the communication to the public, in any form or way, included the access on demand for the public, regarding his unplugged artistic performances, as well as the communication by air and via satellite, except if they are executed in function of broadcasting or they are already regulated or registered in order to be distributed" (let. c)).*
The author can also authorize the access of his registrations of his artistic performances and the related reproductions to the public, so to allow everyone to have access to it in the place and moment chosen individually *lett. d)*; as well as authorizing the distribution of the artistic performances' registrations (*lett. e)*).

The artist is also given the possibility to authorize the rent or the lease of the artistic performances' registrations and related reproductions, provided the right of a fair compensation in case a rental agreement has been entered into by the producer with other third parties. The provision also sets forth that any other stipulation, contrasting to this principle, is null and void (*lett. f*).

In site specific art works, the author is often the one performing the piece. Nonetheless, we might be in front of a bipartition of rights: on one side the author, entitled to his own and distinct rights, to whom it will be recognized specific privative rights in case of interpretation by a third; on the other side, the financial and exclusive right of the artist-interpreter, who can oppose the misuse and reproduction of his work.

The aforementioned rights, also defined as professional personality rights, are regulated (partially) by art. 82 L.633/1941, which only makes reference to those *"*

1. *performing a highly artistic importance part, although if other artist and executor is present;*
2. *orchestra directors and chorus;*
3. *orchestral and coral bands, provided that the orchestral or coral part has an artistic value itself and not only simply meant as accompaniment".*

This latest provision appears to be highly limitative as it does not take into consideration a variety of nuances and ramification today present in contemporary art. Nevertheless, said provision is deemed to be analogically applicable for site specific art work authors as well.

4. Spectator's rights

An interesting legal position is the one involving the spectator's rights in site specific performances. Recently, in the inaugural exhibition of *Modernikon* at Turin's Fondazione Sandretto Re Rebaudengo, Russian artist Elena Kovilyna performed an art work at the entrance garden: once close to a table prepared for the exhibition, before starting the banquet, she invited four persons to join the meal. Chosen among the public and placed by the artist around the table, they took part to the performance.

What kind of rights the spectators are entitled of? Do they implicitly waive their rights in favor of the artist?

The spectator-visitor entering an art gallery should be normally informed about the applicable rules during his visit, what can be photographed, filmed, touched, also describing what is going to happen with or without his active featuring, from an artistic point of view: the spectator, in fact, could also become or take part of the art work. Consider the latest Ai Weiwei's work *"Sunflower seeds"*, actually exposed in London, Tate Modern Gallery[vi] or the numerous performances executed in different sites in Turin, during the latest edition of Artissima 2010.

In order to inform the spectator which will be the rules to respect inside the gallery, some entities expose billboards describing the regulations at their entrances. Typically, no written contract is provided to the spectator who could always ask the "cultural mediators" for information before and during site specific performances.

As everyone knows, art galleries do not usually allow visitors to film or photograph art works, even more if the representation is unique and not repeatable. An extraordinary example is given by Tino Sehgal's works of art[vii].
This contemporary artist performs his works in an extremely original way: works are not described in the informative papers of the gallery, there is no a describing press release and filming and photographing the works is not allowed. No trace is voluntary given. The works of art consists in immaterial activities, often performances, encompassing the visitor who takes part to them unconsciously. The works may also consist in choreographies, without any objects, in which the public faces unusual and surreal situations performed by dancers, actors and even museum's security guards.

In this case, visitors does not know about the physical aspects of the work nor about its performance in that specific time: he becomes aware to have turned out to be part of the work during the performance itself, or at the end of it. No document is exposed or signed at the entrance, nor is a consent requested in order to use his image. This practice could be considered illicit, in accordance with the privacy rules provided by different States in which the work is performed. From a evidential point of view, in particular, in the case of sale, the presence of witnesses or a notary public might offer a possible solution. As a matter of fact, as it can be easily understand, the immateriality and the possible art work imitation might render difficult to sell such a work. Moreover, the spectator might be requested to sign a document[viii] in which he undertakes not to disclose the work's features. Still, the issue remains open.

5. International private law aspects

Contemporary art transactions become increasingly international. According to Italian international private law system, besides L. 31 May 1995 n. 218 instituting the subject matter's domestic system, the Rome Convention on applicable law to contractual obligations, dated 19 June 1980, represents a starting point to a European approach to the matter. The main principle, expressed by the Convention, which came into force with L. n. 975 of 1984, is the freedom of choice given to the parties regarding the governing law to contractual obligations (art. 3[ix]).

To that end, when the rights related to art works entail the negotiation and the formation of a commercial transaction with a foreign counterpart, it is necessary to draft a contract in order to manage the international aspects involved. Nevertheless, as mentioned above, contracts in writing are seldom adopted to regulate site speficic art works. In their mutual relationships, foundations, art galleries, artists and visitors enter contracts implicitly, also by the mailbox rule, without the adoption of a specific contract to regulate precisely their mutual obligations.
In absence of such an instrument, in cases the art work is considered a tangible and material asset and an international sale is executed, it is firstly necessary to refer to the aforementioned Rome Convention on applicable law to contractual obligations, whose art. 4[x] prescribes that the contract shall be governed, in absence of choice by the parties, by the law of the country with which it is most closely connected; secondly to the United Nations Convention on contracts for the international sale of goods (CISG), dated 11 April 1980, ratified in Italy with L. n. 765 of 1985, entered into force 1 January 1988.

Essentially, the international sale of goods is disciplined by uniform rules developed following commercial practice which have been adopted by numerous countries, Italy included. According to Italian law, international sale is regulated by the CISG, elaborated by UNCITRAL, and by Italian domestic law, precisely by articles 1470 ff of the Italian Civil Code, for matters in which the Convention does not apply. The CISG applies to all sales of moveable goods among parties resident in different countries which have ratified the Convention. The Convention does not apply to labour and services excluded nor to the sale of goods bought for personal, family or household use (art 2[xi]).

As far as the applicable law is concerned, it is necessary to distinguish whether the counterpart belongs to a State which ratified the Convention: in the positive, the application is automatic, in the negative the CISG will applies only if the international private law rules entail the application of a contracting State's law.

In case of site specific performances, the situation is slightly different and the applicable law in absence of parties' specification could be the one which is "…*is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence...*" (art.4, par. II, Rome Convention). The interpretation in this case might differ and, for instance, the artist's residence law might be applicable: in any case, in absence of an expressed indication by the parties, it will be only the judge to decide which law is applicable, solving the possible conflict in the case. This information often escapes to art galleries and foundations which organize performances by a mere exchange of correspondence, in the conviction, not always grounded, never to incur in a dispute.

Unquestionably, there might be artists particularly reluctant to enter a contract regulating their own performances, perhaps since they might be afraid that a contractual negotiation could disclose the originality of their works or could cause the loss of part of their rights. Consider Tino Sehgal who does not communicate any information at all concerning his exhibitions: in his case, art galleries only have the necessary information to organize the event, but no communication is published through boards, bills nor even on the informative documentation of the site. Visitors become spectators and "live" speficic experiences, composed by actual and common gestures which assume different meaning during the performances. Nevertheless, whether the originality must be protected by an entire secret, the risk not to regulate the exhibition is taken into consideration. The choice not to legalize the interests, the secrets and the originality of the work is, with regards to the contract, comparable to the entrepreneur's choice not to deposit and register a specific proceedings, keeping an industrial secret.

6. Insurance

Insurance for site specific works of art is a topic hard to define. In fact, the art work is not intended here in a classical meaning: on the contrary it may consist of installations as well as performances. A proper insurance should

take in consideration of the double essence of the works: from one side a tangible, moveable good, on the other side physical representations. Moreover, the policy must identify the loss to forestall: in case of an installation, the policy should cover fire and robbery along with damage, in case of exhibitions, and therefore liability for torts. Performances might frequently involve numerous persons or use dangerous materials, and the risk, though remote, to cause damage always subsists.

Losses may occur when art works are still in a precise site (consider the specific place in an art gallery) or when they are moved from one place to another (the movement phase as well as in case of performances)[xii]. Insurance policy should always be negotiated in order to avoid total covering policies which eventually do not identify the losses nor the amount to reimburse in event of casualty.

Furthermore, the art work appraisal is imperative while entering an insurance policy. It represents a relevant contractual solution since art works evaluations, especially contemporary art ones, fluctuate considerably; it is therefore necessary to negotiate a proper clause[xiii] with the insurance company, in order to prevent objections while liquidating the amount in case of casualty. Adopting such a clause, the company will compensate the damage in consideration of the value attributed by the parties *a priori*. According to Italian law, the aforementioned appraisal has a contractual nature given by the parties and it is substantially different from the declaration of valuation, according to article 1908 of the Italian Civil Code. The latter is a mere scientific statement in which the indemnity principle for loss insurances is utterly affirmed, i.e. it is not possible to assess to perished things a higher value in respect to what they had at the moment of casualty.

For the more delicate cases, e.g. where the insured art work consists of an exhibition, it could be useful to insert an arbitration clause in order to have the disputes which may arise from the contract solved by means of an arbitration. Generally, it could grant faster procedures in respect of the an ordinary lawsuit and therefore (although not on a regular basis) lower legal costs as well; furthermore, in these cases, the additional value represented by the arbitration procedure could be the one to point out an art expert as arbitrator who has deeper knowledge in the field in respect of an ordinary judge. Precisely, the participation of an expert could entail a more rapid dispute solving process, despite the aforesaid issues could be unraveled, during an ordinary lawsuit, by means of a technical appraisal or, where the prerequisites are satisfied, by a pre-hearing assessment pursuant to article 696 bis Italian Civil Procedure Code.

7. Conclusions

Encompassing art in law in art might appear a nonsense. Nevertheless referring to precise, though general and abstract, rules is necessary to grant protection of rights to art world operators.

Throughout this short article, without any intention to be conclusive, a general overview has been provided of some of the issues concerning art works. Contemporary art, as stated in the beginning, travels at a higher speed in respect of the law: thus, precise answers are necessary for new forms of expression, also for those which escape any kind of categorization, as some artists do. On one side, new expressions take turns in art dimensions, whereas on the other side, law does not provide accurate regulation consequently allowing the most careful party to better grant its interests, especially where no agreement is adopted among the parties.

In this scenario, professionals (not only lawyers, but also economists, art advisors and specialized technicians) play a major role to protect those operators, who become more and more exigent and careful to understand the dynamics of an exceptionally complex system, since, but not only, the increasing internationalization entails a wider openness and a significant renewal, even in art world. International rules and harmonization are required, for instance consider the eternal *vexata questio* of the *droit de suite*, i.e. resale rights. The two dimensions of art and law might nonetheless get closer. Those who believed that Art merely consisted in the classical one, "hard to do but easy to understand", for the reason that appears immediate and direct, are now called to face a new challenge, that to accept and respect the contemporary art, "easy to do but hard to understand", forcing its presence tentacularly with any new conceivable form, idea and tool.

Maurizio Nannucci states correctly "*All art has been contemporary*[xiv]": will the law boast the same?

[i] S. SEGNALINI, *Dizionario Giuridico dell'Arte*, Ginevra-Milano, 2010, 165 e ss.

[ii] P. FRANK, *Site Sculpture*, Art News, Oct. 1975. The term "*site specific*" was created by Californian artist Robert Irwin, although the first technical use and the consequent diffusion arrived in the mid-1970s by young sculptors, such as Lloyd Hamrol and Athena Tacha, who had started executing public commissions for large urban sites. *Site specific environmental art* has been also defined as a "*movement*", such as the architectural critic Catherine Howett ("*New Directions in Environmental Art*," Landscape Architecture, January 1977) or art critic Lucy Lippard ("*Art Outdoors, In and Out of the Public Domain*" Studio International, March/April 1977).

[iii] Italian law will be applicable within boundaries of the Italian territory or, also, to regulate the relationships of parties in presence of other elements of extraneousness, according the parties' choice as provided by the Rome Convention on contractual obligations, 1980. Moreover it will apply consequently to the domestic provisions pursuant to procedural rules solving conflict of laws, as set forth by L. 31 May 1995, n. 218 dealing with international private law.

[iv] A. S. GAUDENZI, *Il nuovo diritto d'autore*, Dogana (SM), 383 ff.

[v] *Ibidem.*

[vi] Chinese artist AI WEIWEI is the creator of "*Sunflower seeds*", a huge carpet 10 centimeters high made by 150 tons of porcelain seeds, manufactured and hand made by crafters from Chinese city Jingdezhen. Sunflower seeds represent to the artist the millions of Chinese victims caused by Mao Zedong famines. Spectators visiting Tate Modern are given the possibility to walk over the carpet, to touch and to manipulate the seeds, as well as to create little temporary figures with them as on the beach with sand (N. DEGLI INNOCENTI, *Il sole24.it*, 11 October 2010 – Art section).

[vii] Artist TINO SEHGAL (1976) became famous for his works of arts, hardly documented, involving the spectator directly in the performance. During the exhibition held in March 2010, New York's Guggenheim Museum has been completely emptied from its Kandinsky, Picasso, Chagall paintings to allow artist's immaterial works to take place. In particular, the work "*Progress*" merits to be taken into consideration: a little girl approaches the visitor questioning him about the sense of progress; visitor is then accompanied by other different "persons", as older as the Museum spirals got higher. The work ends with an inner, ironic and scornful dialogue with an elderly lady, concluding the work.

[viii] The moment of the request is nonetheless very important: whether this occurs *ex ante*, before, the visitor might be totally informed about what he is going to live as far as the artistic experience is concerned. Legally speaking, he would be informed adequately although the originality of the work might be affected, as the visitor could be "prepared" to assist something atypical, and therefore lacking the "surprise effect". Whether the request is asked *ex post*, i.e. once the performance is over, the visitor will have already assisted the performance so that the consent might also not be given.

[ix] Article 3 - Freedom of choice
1. A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.
2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties.
3. The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called "mandatory rules".
4. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 8, 9 and 11.

[x] Article 4 - Applicable law in the absence of choice
1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.

2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.
3. Notwithstanding the provisions of paragraph 2 of this Article, to the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property it shall be presumed that the contract is most closely connected with the country where the immovable property is situated.
4. A contract for the carriage of goods shall not be subject to the presumption in paragraph 2. In such a contract if the country in which, at the time the contract is concluded, the carrier has his principal place of business is also the country in which the place of loading or the place of discharge or the principal place of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country. In applying this paragraph single voyage charter-parties and other contracts the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods.
5. Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.

[xi] Article 2
This Convention does not apply to sales:
(a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;
(b) by auction;
(c) on execution or otherwise by authority of law;
(d) of stocks, shares, investment securities, negotiable instruments or money;
(e) of ships, vessels, hovercraft or aircraft;
(f) of electricity.

[xii] S. SEGNALINI, *Ibidem*, 36 ff.

[xiii] In this case, according to Italian law, *"polizza stimata"*.

xiv M. NANNUCCI, 2000, at *GAM – Civic Gallery of Modern and Contemporary Art*, Turin - Italy.