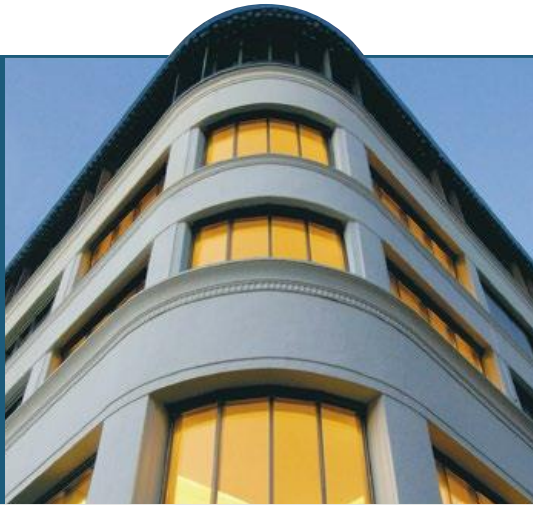


LALIVE



Due Diligence in the Art Market: The Lawyers' Case

First All and Cultural Heritage Law
Conference

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Art-Law Centre, University of Geneva, 13-14 June 2014

Outline

- I. Due diligence as a legal concept
- II. The role of lawyers in the art market
- III. Lawyers' due diligence obligations in the art market
- IV. Survey
- V. Conclusion: any need for action?

Due diligence as a legal concept (1/3)

- Due diligence as a legal concept
 - International conventions (e.g. Article 4 (4) of 1995 Unidroit Convention)
 - Statutory law (Article 87a Article 87a of the Dutch Implementation Act for the 1970 UNESCO Convention)
 - Case law (e.g. Decision of the Swiss Federal Tribunal ATF 139 III 305)
 - Soft law / professional codes (e.g. CoPat due diligence code for dealers)
- Relative concept which depends on various factors:
 - professional activity, specific knowledge, circumstances of the transaction

Due diligence as a legal concept (2/3)

Example: Article 87a of the **Dutch Implementation Act** for the **1970 UNESCO Convention** (abstract)

(1) To determine whether the possessor has observed the necessary diligence, account is taken of all circumstances at the acquisition, especially of:

- a. the capacity of the parties;
- b. the price paid;
- c. the fact whether the possessor has consulted any reasonably accessible register of stolen cultural property and any other relevant information and documentation that he reasonably could have obtained, and whether the possessor has consulted accessible agencies and institutions;
- d. the fact whether the possessor has taken all other steps which a reasonable person in those circumstances would have taken.

-

Due diligence as a legal concept (3/3)

(2) A **dealer** has not observed the necessary diligence at the acquisition of a cultural object if he has failed:

- a. to verify the identity of the seller;
- b. to demand a written declaration of the seller that he is competent to dispose of the object;
- c. to record in the register that is kept by this dealer: the origin of the cultural object, the names and address of the seller, the purchase price paid to the seller and a description of the object;
- d. to consult the registers for stolen cultural property which in the given circumstances in view of the nature of the cultural object are eligible for consultation.

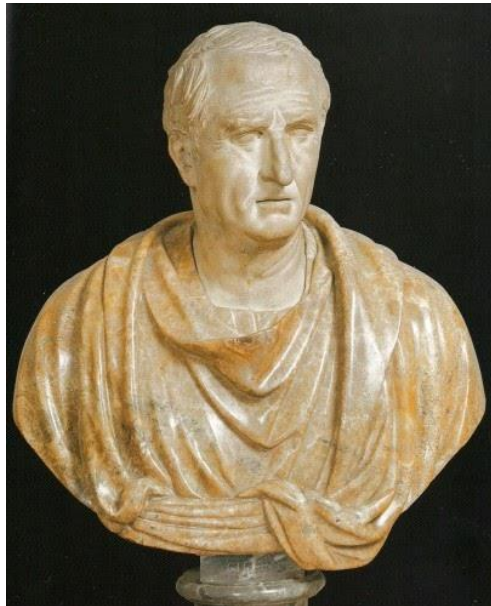
The role of lawyers in the art market (1/3)

- Specificities of the art market
 - Variety of actors and interests
 - Complex international transactions
 - Art as an investment
 - Illicit traffic, fakes, money laundering:
 - The black market of cultural objects constitute one of the most persistent illegal trade in the world (together with the trafficking in drugs and arms).
 - According to scholars, 80% of Etruscan and Roman antiquities on the market today have illegal provenance
 - In 40 years, the Italian *carabinieri* have recovered 800,000 stolen or illegally excavated artifacts (quantity of unresolved reports must exceed this number⁶)

Source: UNESCO, Information Kit on the 1970 Convention, 2011

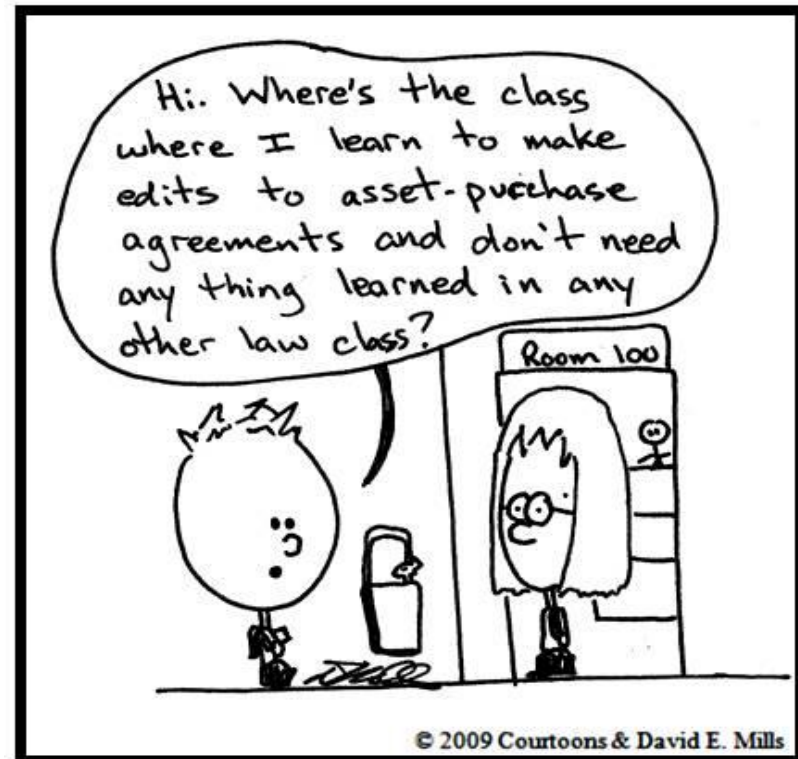
The role of lawyers in the art market (2/3)

- Representation



Cicero, Offices Gallery,
Florence

- Advisory



Future associate in the corporate group.

The role of lawyers in the art market (3/3)

- The lawyers' role has various dimensions:
 - Protecting clients interests
 - Protecting his/her own interests
 - Protecting the art market?



*Honoré
Daumier,
Lawyers'
consultation*

Lawyers' due diligence obligations in the art market (1/4)

- Source of lawyers' due diligence obligations:
 - Contractual relationship: scope of the contract
 - Statutory law
 - Professional rule
 - Relative concept which depends on various factors:
 - Scope of the contract, specific knowledge, circumstances of the
- ABA Model Rules of professional Conduct: **Rule 1.3 Diligence**
A lawyer shall act with reasonable diligence and promptness in representing a client.

Lawyers' due diligence obligations in the art market (2/4)

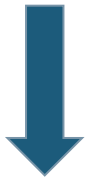
- Specific issues
 - Suspicious transactions (criminal offence, anti-money laundering, financing of terrorism)
 - Authenticity/ownerships issues
 - Export/customs regulations
 - Tax fraud
 - International sanctions



Honoré Daumier - *Two Lawyers Conversing*, about 1862 - Black chalk, stumping, with gouache in white and gray, and pale pink, yellow and brown watercolour - © The Pierpont Morgan Library, NYC

Lawyers' due diligence obligations in the art market (3/4)

**Duty of
confidentiality**



Due process &
good administration
of justice



**Duty to
report**



Duty to protect
against organised
crime

Lawyers' due diligence obligations and the art market (4/4)

■ **Risks** facing lawyers

- Violation of contractual obligations
- Violation of statutory/professional rules

■ **Possible sanctions**

- Civil liability claim
- Criminal sanction
- Administrative sanction
- Sanctions from professional associations

Survey (1/4)

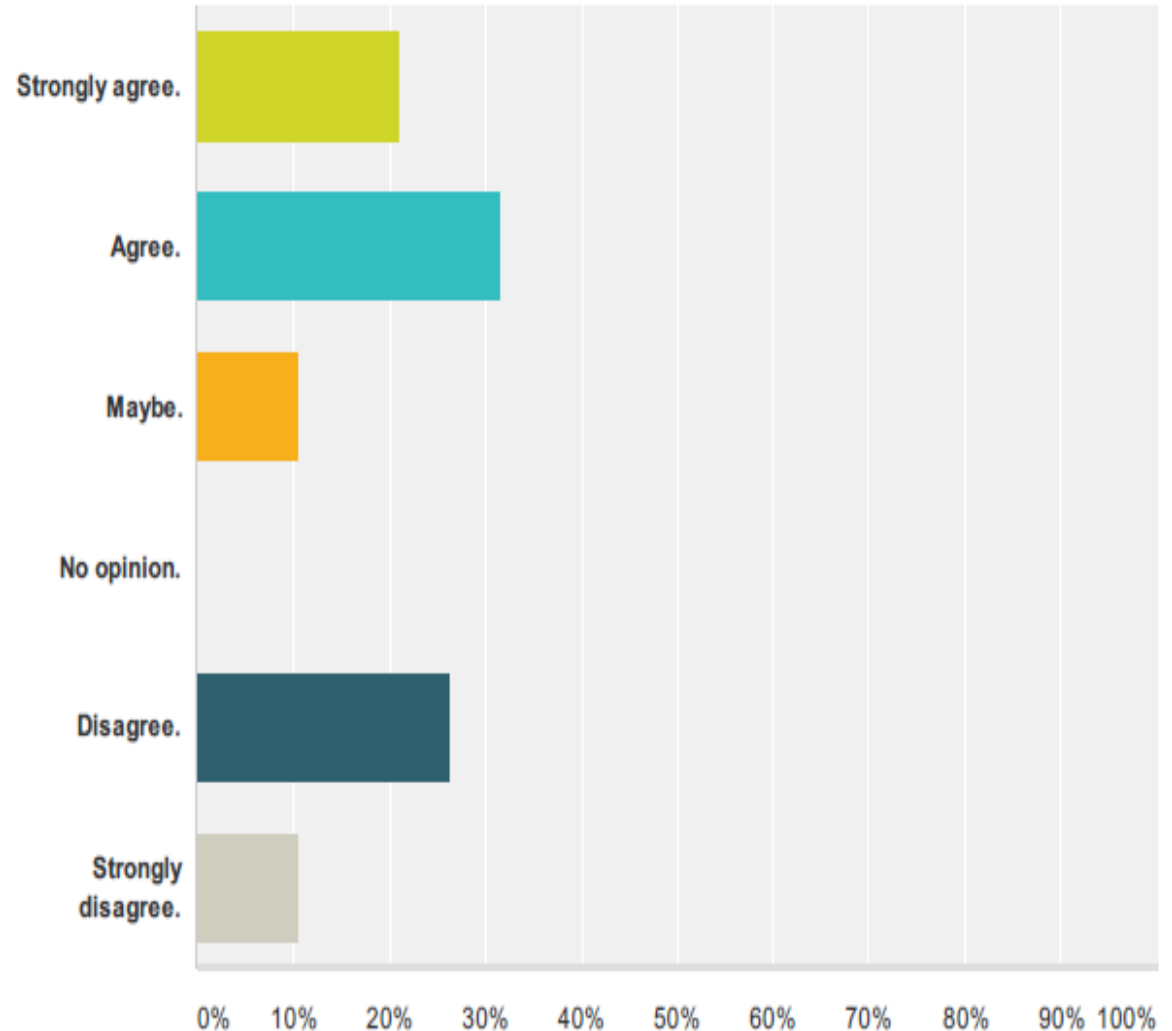
- Survey on lawyers' due diligence obligations in relation to art law related matters in their own jurisdiction
 - Over 450 addressee → Over 20 responses
 - Covering China, France, Germany, Greece, Spain, Switzerland, UK, USA
- Distinctions
 - Due diligence obligations general / specific to the art market
 - Duty to report / no duty to report
 - Statute / soft law

Survey (2/4)

- Specific legal issues relevant in relation to art law matter
 - Ownership rights → 94%
 - Anti-money laundering → 90%
 - Export regulations → 83%
 - Authenticity → 78%
 - Tax → 78%
 - IP rights → 72%

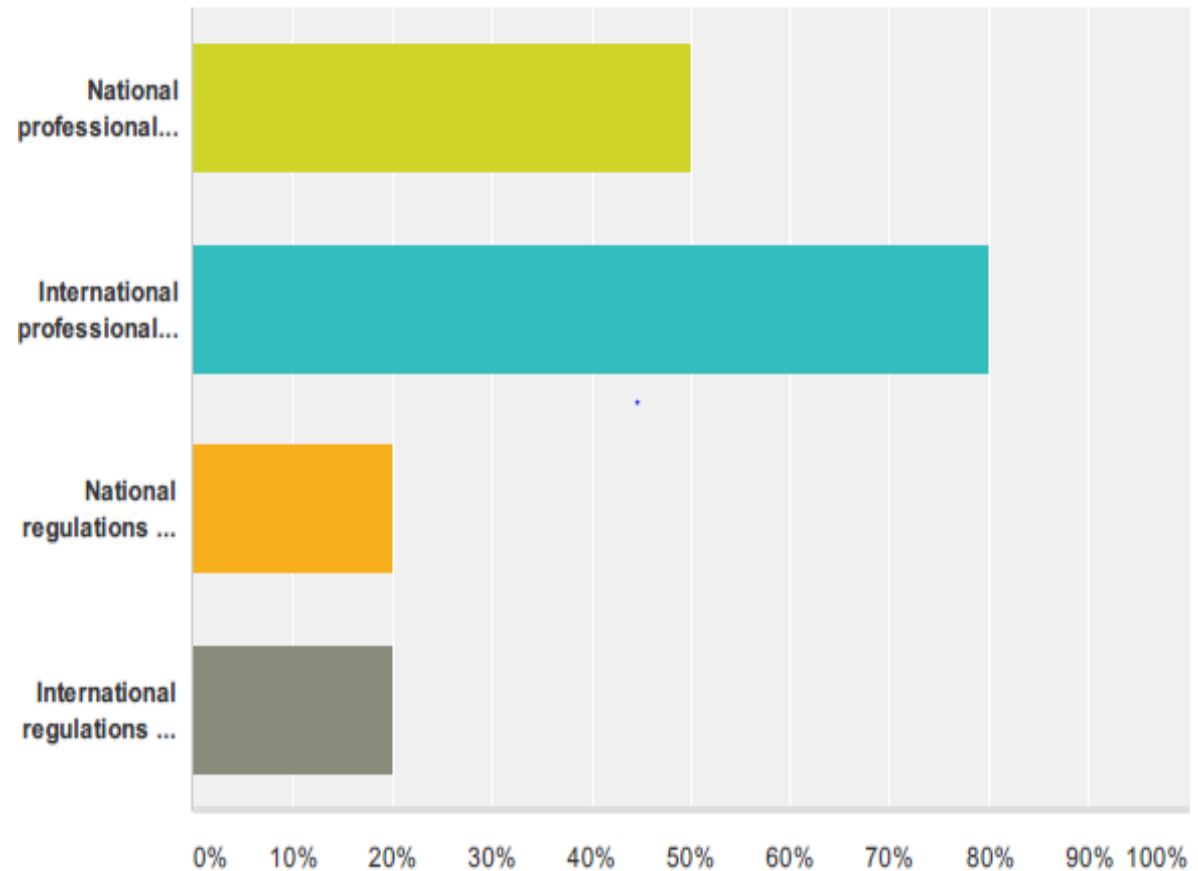
In your opinion, would regulations or professional/ethical guidelines on due diligence obligations be needed for LAWYERS operating in the art market?

- Strongly agree/agree
53%
- Strongly disagree/disagree
37%



What would be the appropriate form of such regulations/professional guidelines?

- National professional guidelines
50%
- International professional guidelines
80%
- National regulations
80%
- International regulations
20%



Conclusion

- Variety of legal systems and approaches
- Lawyer's duty of loyalty and professional privilege generally prevailing
- Is there a real need to regulate?
- Form of such regulation?
- Survey still available at:

<https://fr.surveymonkey.com/s/duediligence-artlaw>



Honoré Daumier, A meeting of lawyers (c. 1861)

Thank you

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