Due Diligence in the Art Market: The Lawyers’ Case

First All and Cultural Heritage Law Conference

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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 number).

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

- **Representation**

Cicero, Offices Gallery, Florence

- **Advisory**

Hi. Where’s the class where I learn to make edits to asset-purchase agreements and don’t need anything learned in any other law class?

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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
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 professionnal guidelines 50%
- International professional guidelines 80%
- 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/duedilgence-artlaw

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

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