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Take the survey: should art lawyers be the vigils of the art market?

The discussion of ethics in the art world and its numerous participants has been ongoing for decades – even more so since the introduction of key legal instruments such as the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property; the 1995 International Institute for the Unification of Private Law (UNIDROIT) Convention on Stolen or Illegally Exported Cultural Objects; and the 1998 Washington Conference Principles on Nazi-Confiscated Art.

Yet cases of illegal and unethical conduct are regularly making the headlines. The increasing commoditisation of art, in the absence of a specific regulatory body, seems to have added another layer of impenetrability to a world already known for its preference for discretion. In this context, the boundaries of the due diligence to be exercised when operating in the art market remain difficult to determine. Due diligence is, however, a focal point of reference for all involved in the art world and particularly for lawyers who are privileged witnesses of its functioning.

In this context, a rather provocative question could be asked of the role art lawyers play in ensuring the respect for ethical and legal rules in the art world within the boundaries of due diligence obligations: should art lawyers be the vigils of the art market? How would this impact the representation of clients' interests? Is there a need for more regulation or guidance on due diligence obligations for lawyers operating in the art market?

Against this background, this article aims to outline the scope of art lawyers' due diligence obligations as well as to reach out to the art lawyers' community to engage in a dialogue by way of a short electronic survey, available at <https://fr.surveymonkey.com/s/duediligence-artlaw>.¹

The data collected from this survey will provide helpful guidance in determining the position of art lawyers in respect of their

due diligence obligations and whether there exists a need, or a wish, for more regulations or guidelines – be it from the international community, states or professional associations.

Ethics and due diligence obligations in the art world

At the heart of the discussion about ethics and due diligence obligations in the art world are recurring issues such as illicit traffic, fakes, forgeries, looted art and money laundering. The restitution of cultural objects to the country of origin also has an important place in this debate. Over the years, these issues have led to the enactment of more stringent regulations and the development of the concept of due diligence applicable to the different actors involved in the art market.

Issues of due diligence typically arise in a civil context in relation to the ascertainment of ownership and authenticity of a work of art or cultural object, and are directly connected to the principle of good faith. Due diligence is also required with respect to possible criminal activities, which can flourish in the art world due to various factors such as: the illicit traffic of cultural objects – mostly coming out of conflict areas; the amounts at stake; the relative ease of transport; the lack of specific training of custom officers; and the lack of, formal or material, powers, if any, of enforcement authorities. Art has also become an increasingly important financial investment, which gives rise to additional due diligence obligations as foreseen in particular by financial and banking compliance regulations and soon, by international or domestic regulations to ensure tax compliance. For instance, the revised Financial Action Task Force (FATF) Recommendations expand the scope of money laundering predicate offences to tax crimes.² All of these elements extend the reach of the due diligence obligations to be observed by the various actors of the art market, including lawyers, as well as the sanctions applicable in case of breach.



TAKE THE SURVEY: SHOULD ART LAWYERS BE THE VIGILS OF THE ART MARKET?

The concept of due diligence in the art market is relative and depends on various factors, such as professional qualifications, specific knowledge of the relevant party, circumstances surrounding the transaction and the object of the transaction. This concept can also be found in various legal instruments, such as international conventions³ or statutory law.⁴ Along the same lines, professional actors in the art market have endeavoured to materialise this concept and have thus drafted codes of conduct with the aim of maintaining public confidence in the art market, such as Article 2.3 of International Council of Museums (ICOM) Code of Ethics for Museums or Council for the Prevention of Art Theft (CoPat)⁵ Code on Due Diligence for Dealers Trading in Fine Art, Antique, Antiquarian Books, Manuscripts and Collectors Items, which set out specific precautions to be taken. Meanwhile, case law continues to shape the concept of due diligence, as per its legal meaning, which may differ from the rules set by professional organisations.⁶

The role of the art lawyer

Alongside collectors, dealers, experts and auctioneers, lawyers play an essential role in the art market: they advise clients on transactions, draft legal documents and, when disputes arise, represent parties before courts or arbitral tribunals. Lawyers are key actors in art transactions, which are often complex and of an international nature, involving numerous issues, such as property, contract, tax, import/export, administrative or conflict of laws issues.

Lack of diligence in these operations can have dire consequences, such as compensation obligations, invalidation of contracts, or even criminal charges if money laundering or concealment are involved. But, while lawyers' practice is extensively regulated by laws as well as professional and ethical rules, there seems to be no specific indications – apart from the general duties owed to their clients – as to their role when faced with art transactions that raise their suspicions; a problematic scholars seldom, if ever, touch upon.

Lawyers' due diligence obligations

Lawyers' due diligence obligations are primarily set out in their contractual relationships with clients. They also derive

from statutory law or professional rules, the aim of which is to protect the legal profession and the public confidence placed in it. While the relationship between lawyers and clients differs from one jurisdiction to another – and, more importantly, from one legal system (civil law, common law or religious) to another – lawyers have generally a duty to protect their clients' interest and a duty to act with diligence, which materialises, inter alia, in a duty of loyalty and a duty to keep confidential what is considered privileged information. At the same time, lawyers also have a duty to act diligently in respect of the regulations enacted in their jurisdiction to combat illegal activities, which, in some cases, means a duty to report, notably in the context of money laundering and financing of terrorism.⁷

Due diligence obligations towards clients, including the duty of confidentiality, are central to the relationship of trust that exists between lawyers and their clients. At the same time, it is important for the good administration of justice that the trust placed in the legal professional is not abused and that lawyers also respect the due diligence obligations imposed upon them when faced with illegal activities. As a result, lawyers can find themselves in a delicate situation, torn between their due diligence obligations towards their clients and their due diligence obligations towards the legal system.

This tension may be especially felt by art lawyers, given the particularities of the art market as described above. The relative impenetrability of the art world and the fact that it is often the scene of illegal activities raise the question of the role of art lawyers as 'vigils' of the art market.

Survey

Because no single and straightforward answer can be given to the question of the art lawyers' role as vigils of the art market, there is an opportunity for the art law community to reflect on the answer best suited for its needs.

A first attempt to address this question was made at a recent conference held by the Art-Law Centre of the University of Geneva on All Art and Cultural Heritage Law, which touched in particular upon the issue of *developing due diligence, expert interaction and quality impulse in the art market*.⁸ To support the discussion, an electronic survey was launched prior to the conference and sent to a selection of art law specialists.

Interestingly, to the question of whether

regulations or professional/ethical guidelines on due diligence obligations were needed for lawyers operating in the art market, about 53 per cent strongly agreed or agreed and 37 per cent strongly disagreed or disagreed. Of the former group, 80 per cent considered that the appropriate form for such rules should be international professional guidelines, 50 per cent national professional guidelines and only 20 per cent considered regulations to be the appropriate form.

This data, while rich in lessons, should only be considered an indication of a trend, given the limited number of persons questioned. Still, the data seems to show a wish for more regulation.

This article aims to expand the discussion to all members of the IBA Art, Cultural Institutions and Heritage Law Committee and beyond, to the art law community. Those interested in taking part in this discussion may access the survey at: <https://fr.surveymonkey.com/s/duediligence-artlaw>.

Active participation will be helpful in the initiation of a useful and preventive debate on the due diligence obligations of art lawyers.

Conclusion

Outlining the scope of lawyers' due diligence obligations in the art market is a complex task. The general concept of due diligence depends on many factors, including the professional qualification and the specific knowledge of the person whose lack of diligence is at stake. Guidelines or best practices for art lawyers could be a tool to assist them to better deal with unusual transactions.

In this period of increasing regulatory initiatives at the international level in all fields where financial interests are high, it seems

important for the legal profession active in the art world to consider carefully the scope of its due diligence obligations in order to ensure sustainable activity devoid of any of the unfortunate consequences and sanctions that have fallen on other sectors, such as the financial and banking sectors, due to the abuses they have witnessed. One can, however, remain hopeful given the ever creative art world and the interests of all actors involved in a stable and a thriving art market.

Notes

- 1 The survey will be open until the beginning of September 2014 and the data collected will be used in support of a contribution on the topic of due diligence obligations applicable to art lawyers.
- 2 International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, Financial Action Task Force (FATF) Recommendations 2012, available at www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf. This and all other URLs throughout last accessed 16 August 2014 unless otherwise specified.
- 3 See eg, Art 4(4) of the 1995 Unidroit Convention.
- 4 See eg, Art 87a of the Dutch Implementation Act of the 1970 UNESCO Convention.
- 5 Council for Prevention of Art Theft.
- 6 See eg, *Autocephalous Greek-Orthodox Church of Cyprus and Cyprus v Goldberg & Feldman Fine Arts and Goldberg*, United States Court of Appeal, Seventh Circuit, No 89-2809, 24 October 1990. See also Decision of the Swiss Federal Tribunal ATF 139 III 305.
- 7 See eg, FATF Report on Money Laundering and Terrorist Financing, Vulnerabilities of Legal Professions, available at www.fatf-gafi.org/documents/documents/mltf-vulnerabilities-legal-professionals.html. See also, as an example of legislation, Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.
- 8 First All Art and Cultural Heritage Law Conference, Art-Law Centre, University of Geneva, programme available at www.art-law.org/events/papers.html.



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This newsletter is intended to provide general information regarding recent developments in art, cultural institutions and heritage law. The views expressed are not necessarily those of the International Bar Association.

Contributions sent to this newsletter are always welcome and should be sent to Sarah Theurich at the following address:

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