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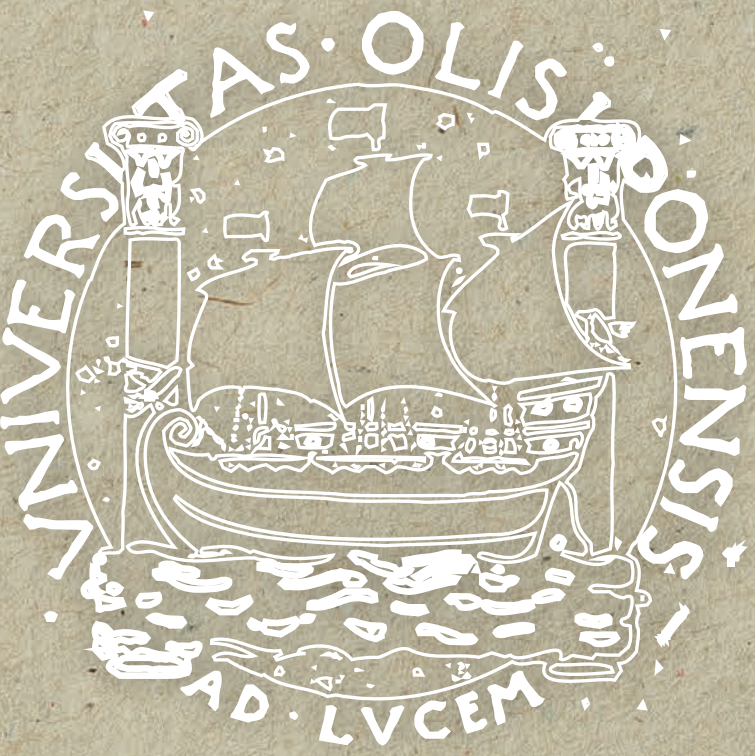
LISBON LAW REVIEW



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Art market(s): from unregulated deals to the pursuit of transparency?

Mercado(s) da arte: de negócios a-jurídicos para a procura da transparência?

Fernando Loureiro Bastos*

Abstract: Businesses carried out within the art market(s) were for a long time perceived as not regulated by law and characterized by an intentional opacity in the behaviour of those involved. In recent decades, as a result of an increase in impositions from other areas, such as the fight against money laundering and the protection of the circulation of endangered species of fauna and flora, is relevant the existence of a growing regulation applicable to this economic sector. On the one hand, the relevant legal regimes may result from the creation and enforcement of rules of International Law, of European Union Law and of the legislation in force in different States (especially the United States of America, the United Kingdom and China). On the other hand, the self-regulation rules of the various participants in the art markets must be taken into account, with emphasis on professional associations of art dealers, international auctioneers, and the organizers of international art fairs and antiques exhibitions.

Resumo: Os negócios efetuados no âmbito dos mercados da arte foram durante muito tempo percecionados como sendo a-jurídicos e caraterizados por uma intencional opacidade no comportamento dos seus intervenientes. Nas últimas décadas, em resultado de um acréscimo de exigências provenientes de outras áreas, como o combate ao branqueamento de capitais e a proteção da circulação de espécies ameaçadas da fauna e da flora, foi-se tomando consciência da existência de uma crescente regulamentação aplicável a este setor económico. Por um lado, os regimes jurídicos relevantes podem resultar da aplicação de normas de Direito Internacional, de Direito da União Europeia e da legislação vigente nos diversos Estados (com destaque para os Estados Unidos da América, o Reino Unido e a China). Por outro lado, devem ser identicamente tidas em consideração as regras de autorregulação dos diversos participantes nos mercados da arte, com destaque para as associações de comerciantes, leiloeiras internacionais e para as feiras de arte internacionais.

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Palavras-chave: Antiguidades; Compra e venda; Convenção CITES; Mercados da arte; Transparência.

1. Introduction

A basic question that can be asked about the art market(s) is whether there is an adequate legal regulation to the specificities of the transactions of works of art, antiques and collectables, since these are movable objects with a cultural meaning and, also, an expression of the creativity of the members of a specific community.

Answering this question begins within the legal order of each State, although the importance of a domestic legal framework may vary according to the type, volume and value of artworks and collectables transacted on a particular jurisdiction. The legal orders of the United States of America, the United Kingdom, China, France and Germany are therefore particularly relevant because of the volume of deals occurring within their jurisdiction or involving persons, whether individual or collective, with their nationality. It should be stressed that the question may be also asked at the level of international law, insofar as international rules are the expression of cooperation between States in a particular area of activity.

According to *The Art Market – 2021: An Art Basel & UBS Report*, prepared by Clare McAndrew, sales in the three largest markets – the US, the UK, and Greater China – accounted for 82% of global market's total value in 2020, with the following distribution: US 42%, UK 20 %, and China 20%[1]. Global online

[1] Clare McANDREW, *The Art Market – 2021: An Art Basel & UBS Report*, Art Basel and UBS, 2021, p. 34.

art and antiques market represented 25% of total sales in 2020 (from 9% in 2019)[2].

The answers to the previously asked question are necessarily conditioned by the number of studies and the academic research that can be found in these domains. In fact, despite that commercial transactions of artworks, antiques and collectables are as old as the main civilizations, the relation between Law and Art is an area of scientific knowledge relatively nascent and still incipiently developed[3]. Notwithstanding the scarce number of studies, remarkable is a glimpse about trading and collecting during the Roman Empire, using the perspective of Cicero reasoning about Verres collections[4].

To understand the contemporary trend towards greater transparency in the transactions of works of art and collectables it is important to begin clarifying some basic concepts, such as the object of legal regulation, the diversity of art market(s), and the reasons justifying a tendency towards opacity in the art market(s).

2. Three framework preconditions for a legal regulation of the art market(s)

2.1. First framework precondition: the object of legal regulation

In a practical and fairly prosaic approach, art markets deal with objects' which lawyers call 'movable property'. In Portugal, Article 205 of the Civil Code of 1966 defines movable property in a way that may be considered obscure for non-lawyers: 'movable property means all objects ['coisas'] that cannot be classified as immovable property'.

The concepts of 'objects'[5] and 'movable goods' correspond to what in art markets are 'works of art', 'objects of collection', 'cultural property'[6], and other

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[2] McAndrew, *The Art Market – 2021,* cit., (footnote 1), p. 210.

[3] See Judith B. Prowda, *Visual Arts and the Law. A handbook for professionals*, Lund Humphries in association with Sotheby's Institute of Art, London, 2013, pp. 14-19; and Jason-Louise Graham, 'Art exchange? How the international art market lacks a clear regulatory framework', in Valentina Vadi and Hildegard E. G. S. Schneider (editors), *Art, Cultural Heritage and the Market. Ethical and legal issues*, Springer, Heidelberg, New York, Dordrecht, 2014, pp. 329-336.

[4] See Margaret M. Miles, *Art as plunder. The Ancient Origins of Debate about Cultural Property,* Cambridge University Press, Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo, Delhi, Dubai, Tokyo, 2008, Chapter 3. Cicero's views on the social place of art, pp. 152-217.

[5] About an object as a standard condition for 'what is art', see Tiziana Andina, *What is Art? The question of definition reloaded*, Brill, 2017, pp. 55-59.

[6] For a detailed discussion on the concept of cultural property, see Lucas Lixinski, *International Heritage Law for Communities: Exclusion and Re-Imagination*, Oxford University Press, Oxford, 2019, pp. 27-65.

qualifications, such as 'artefacts' or 'National treasures', whose legal definition is less obvious than it might seem in a first approach[7-8].

In effect, the qualification of an object as a 'work of art' is a cultural creation, meaningful in a concrete space and a historical moment. It follows that each object always has two dimensions or two faces. On the one hand, it is an object with materiality, with certain objective characteristics. On the other hand, whether in wood, iron, glass, the result of the application of pigments on a canvas or, more recently, a digital creation, the attribution of a utility or function to the object is the result of a subjective valuation.

In these terms, the work of art never exists isolated from a subjective interpretation and valuation within a human community, which gives it a certain aesthetic, symbolic and even monetary value[9].

The work of art can be generated as such, as the result of an artistic intention of its creator. But the work of art may also have been initially produced as a manufactured piece with a well-defined practical utility, and then transmuted into something 'culturally more valuable', with a higher cultural status as a result of

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[7] In this sense, Wu HUNG, *Artifacts, Works of Art, and the Historicity of the Encyclopedic Museum*, [2015], affirming that '"Artifact" is a word favored by anthropologists and archeologists; art historians and art museums prefer the more lofty term "works of art". By calling a manmade object a work of art they give it a special status as well as distinct aesthetic and commercial values. How these values have been established is a long and complex story, but one should keep in mind that the concept of "art" or "fine art" is always historically and culturally defined and redefined. To take China as an example, the idea of "fine art" was restricted to portable scroll and calligraphy before the twentieth century. No sculptors, print makers, or architects were ranked 'artists' in the same sense; their works were absent in the art collections of emperors and scholars, and were not subject to historical inquiry. This situation changed fundamentally in the twentieth century when the country embraced the European classification of art forms and systems of collecting. As a result, art historians, not only in London and Paris but also in Beijing and Shanghai, started to reinvent indigenous "art histories" of Chinese objects, sculpture, and architecture, while simultaneously canonizing a small group of examples as representative masterpieces of those elevated visual traditions'.

[8] As an example of that difficulty, see Tom FLYNN, *The A to Z of the International Art Market. The essential guide to customs, conventions and practice*, Bloombery, 2017, p. 47, and the definition proposed to 'Cultural Property (also Cultural Heritage, Cultural Objects)'.

[9] According to Barbara Herrnstein SMITH, 'Contingencies of value: alternative perspectives for critical theory', in 1988, '[a]ll value is radically contingent, being neither a fixed attribute, an inherent quality nor an objective property of things but rather an effect of multiple, continuously changing and continuously interacting variables, or to put this another way, the product of the dynamics of a system, specifically an *economic* system' (in Natacha Degen, *The Market. Documents of Contemporary Art,* Whitechapel Gallery, London – The Mit Press, Cambridge Massachusetts, 2013, (pp. 29-31), p. 29).

the attribution of a distinct meaning[10]. The example of Marcel Duchamp's fountain is particularly significant, as is the importance of this object to the history of Western art. In 2004, in a survey of five hundred of Britain's most influential personalities in the world of the arts, 64% of respondents said that Fountain is the most important and influential modern work of art they can designate[11].

It follows that the object of the legal regulation of the markets of the art in relation to 'movable property', which are both 'valuable objects' in cultural and monetary terms, will require a set of specific legal rules regarding its creation, enjoyment, conservation, circulation and transaction.

2.2. Second framework precondition: the diversity of art markets

The potentiality of works of art and objects of collection[12] as 'movable goods', to be bought and sold and, consequently, to move between jurisdictions subject to the legal regulation of different States, leads us to the second framework precondition: firstly, the necessity of the existence of a market where transactions can occur and, secondly, the diversity of art markets.

On the one hand, art markets presuppose the existence of a market economy based on private property, the freedom to buy and sell goods and services, and the circulation of objects between spaces belonging to different States or jurisdictions. In fact, as mentioned earlier, although works of art and objects of collection have a cultural value as such, as an aesthetic and artistic expression of the multiple human communities and of the various historical epochs, they constitute identically a 'commodity' that can be object of economic transactions, that is, an 'object' which may be the subject of a contractual relationship between a buyer and a seller[13].

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[10] In this sense, Sandro Bocola, 'Marcel Duchamp – Bottle Rack, 1914', in Jurgen Tesch and Eckhard Hollmann (editors), *Icons of Art. The 20th Century*, Prestel, Munch – New York, affirms that (p.54) Marcel Duchamp 'accomplishes a radical turn-around of creative principles up to that time; personal choice replaces a binding canon. The choice of an already existing object replaces the creation by the artist. The emphasis of the creative process shifts from the execution of the work to its intellectual conception'.

[11] BBC News, *Duchamp's urinal tops art survey*, 1 December 2004 (available at http://newsvotebbc.co.uk(mpapps/pagetools/print/news.bbc.co.uk/2/hi/entertainment/40559997.stm).

[12] About the rise of the collectables' market as part of the art market, see Judith Benhamou-Huet, *The Worth of Art*, Assouline, New York, 2001, pp. 115-119.

[13] About artwork transactions from the United States legal order perspective, see Ralph E. Lerner and Judith Bresler, *Art Law: The Guide for Collectors, Investors, Dealers, & Artists,* 4th ed., Practising Law Institute, New York City 2012, vol. I, 87-249, and Michael Jones, *Art Law: A concise guide*

Because of the extreme diversity of works of art and collectors' objects, speaking about the 'art market' as an unified market may be limitative to an adequate understanding of the various legal issues involved in its regulation, thereby being preferable the use of 'art market(s)'.

The rules applicable to the transaction of *antiquities* are not similar to the legal regime applicable to the purchase and sale of *contemporary works of art*. In the field of *antiquities*, for example, there is a great difference between the internal and international regulations applicable to archaeological objects in comparation to the legal framework of objects produced in more recent epochs. The market for contemporary art, on its account, is confronted with specific legal problems, such as the questions raised by the possibility of imposing limits to artistic creation (to works of art considered 'sexually offensive' or even 'pornographic'[14]), which requires an appreciation of these activities in the context of freedom of expression and fundamental rights of artists.

The distinction between art market(s) must also be made because the legal problems raised by the purchase and sale in the primary markets, either directly from the artist, or through the intermediation of agents or representatives of the artist, art advisers, or gallery owners[15], are not identical to the ones that must be consider when dealing with a transaction in the secondary market, especially in the context of auctions, face-to-face or through the internet[16] (where questions like authenticity and provenance are crucial)[17]. The progressive evolution of online transactions, where there is no direct and actual contact with works of art and objects of collection to be acquired, nor among the actors involved in the transaction,

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for artists, curators and art educators, Rowman & Littlefield, Lanham – Boulder – New York – London, 2016, pp. 98-117.

[14] See LERNER and BRESLER, *Art Law*, cit., (footnote 13), pp. 863-871 and 1597-1605, and JONES, *Art Law*, cit., (footnote 13), pp. 158-166.

[15] About the artist-dealer relationship, see PROWDA, *Visual Arts and the Law*, cit., (footnote 3), pp. 134-150.

[16] About the specificities of buying art at online auctions, see Alan BAMBERGER, *The art of buying art: how to evaluate and buy art like a professional collector,* Robinson, London, 2018, pp. 350-368.

[17] In general terms, Mary ROZELL, *The Art Collector's Handbook, A guide to collection management and care,* Lund Humphries in association with Sotheby's Institute of Art, London 2014, affirms (p. 37) that '[c]ollectors need to take meaningful measures to ensure that works of art they buy are (1) in good condition, (2) genuine, (3) have clear and unencumbered title, and (4) are appropriately priced. Due diligence can sometimes be done within minutes, but in the case of older, secondary-market works, it can take months or even years'.

has brought a new dimension to classic legal issues such as the production of fakes[18] or the reproduction of works of art.

2.3. Third framework precondition: a tendential opacity of art market(s)

The possibility that transactions of works of art and objects of collection can be completed without a contact between people, in a completely virtual way, leads to the third of the framework preconditions: the tendential opacity of the art market(s)[19].

The legal expression 'movable property' is particularly illustrative of the specific characteristics of works of art and objects of collection: they are 'objects' that can be moved and moved with ease. Except for a few works of contemporary art, created with intentionally larger-than-life dimensions, 'objects' valued as works of art, and 'objects' that can are collectables, in the majority of situations are of small dimension and can be transported without special difficulties by its owner.

The transportability and the possibility that these 'objects' constitute a reserve of value generate the conditions for a tendential opacity in the art markets. An excellent example of this is the anonymity enjoyed by sellers and buyers in the transactions that are made through auction houses[20]. The confidentiality that protects the parties involved in a sale and purchase in an auction house is, moreover, one of the characteristics that most auctioneers advertise, especially when they are announcing the intermediation of private sales. In this sense, it is exemplary that Sotheby's used to announce on its website that, since 2012, two thousand and four hundred buyers from seventy-nine different States have acquired objects (designated as 'works') worth four thousand and million dollars (on the present Sotheby's website, it is only stated that Private Sales 'works discreetly and seamlessly with

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[18] See Gareth FLETCHER, 'Fakes, Forgeries and thefts', in Jos Hackforth-Jones and Ian Robertson (editors), *Art Business Today: 20 Key Topics,* Lund Humphries in association with Sotheby's Institute of Art*,* London, 2016, pp. 106-114.

[19] For an overview about the opacity of the art market(s), see Georgina ADAM, *Big Buck: The Explosion of the Art Market in the Twenty-First Century.* Lund Humphries, 2014, pp. 159-180 and *Dark Side of the Boom: The Excesses of the Art Market in the Twenty-First Century,* Lund Humphries, 2017, pp. 165-192.

[20] About art auctions in general, see David BELLINGHAM, 'The Auction Process', in Jos Hackforth-Jones and Ian Robertson (editors), *Art Business Today: 20 Key Topics,* Lund Humphries in association with Sotheby's Institute of Art*,* London 2016, pp. 148-156; and, from the United States legal order perspective, LERNER and BRESLER, *Art Law*, cit., (footnote 13), pp. 304-419.

buyers and sellers of world-class works of art throughout the year, independent of the auction calendar'[21]).

It should be noted that works of art and collectables, except in very specific situations, such as those resulting from their inclusion in the cultural heritage of a State, are not subject to a special ownership register, as is the case of other movable property, such as cars, boats or aircrafts, which are also 'objects' or 'commodities' with a high monetary value (and can be also collectables). Private ownership of works of art and collectables is often the result of contractual transactions not documented by written contracts, or by inheritance, without a prior legal inventory to divide an estate, or for the settlement of any sort of tax duties. On these occasions, the fact that someone has an object allows others to assume that he is their legitimate owner and, accordingly, that is authorized to sell them, either directly or through the intermediation of specialized third parties[22].

It is a generalized idea, namely through the mass media (but not necessarily 'fake new'), that deals of works of art and collectables are made in a specific environment characterized by lack of transparency, and even by opacity and secrecy. For that reason, for some, legal regulation of art markets is very scarce and should be substantially strengthened, as has recently been the case for financial markets and financial transactions. For others, in radically opposed terms, usually participants in the art system, the existing regulation is adequate, if not excessive, taking into account the specific qualifications of those involved in the transactions of high value works of art and collectables[23].

While transactions can continue to be made on the basis of a 'handshake', amongst people who have a long history of successfully deals, the ease of current ways of communication, the progressive broadening of the geographical location of potential buyers and sellers, a 'democratization' of the actors involved, and the

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[21] Sotheby's website: Private sales (https://www.sothebys.com/en/buy-sell/private-sales, accessed November 2021).

[22] About specific legal aspects of provenance and the ownership of a work of art, see Judith B. Prowda, 'The perils of buying and selling art at the fair: legal issues of title', in Valentina Vadi and Hildegard E. G. S. Schneider, *Art, Cultural Heritage and the Market,* Springer, Heidelberg, New York, Dordrecht, London, 2014, pp. 141-163.

[23] In this sense, Clinton Howell, president of CINOA, the International Confederation of Art and Antique Dealers, says that '[t]he greatest threat to transparency is top-down government regulation. Without the support of dealer input, governments will make inappropriate decisions about how to "regulate" the art trade – these include things like import and export regulations, making decisions based on popular support (ivory and antiquities are both emotional issues that are severely overblown by government) and, most importantly, cultural nationalism, as for example disputes over national heritages' (quoted by Adam, *Dark Side of the Boom,* cit., (footnote 19), p. 191).

effects of the application of the regulation issued for other areas of economic activities and with other objectives, like consumer protection, have been leading to what seems to be a contemporary trend towards transparency in the art market(s).

3. A contemporary trend towards the affirmation of transparency in the art market(s)?

3.1. Preliminary observations

The creation and enforcement of legal rules and legal principles as standards for the different actors performing in the art market(s) – artists, dealers, auctioneers, collectors, cultural institutions, museums and conservators[24] – can lead to transparency through three different channels.

On the one hand, through the unilateral production of legislation by States or regional integration entities such as the European Union. On the other hand, it may result from agreements reached between States and delivered as documents of international law, in particular through international treaties and agreements, acts of international organizations, such as United Nations Security Council resolutions and, increasingly, international no legal binding acts. And finally, in progressively more important terms, it can be achieved by the self-regulatory efforts of the art market players, such as professional associations of art dealers, international auctioneers, and the organizers of international art fairs and antiques exhibitions.

It is important to point out that in some cases the trend to introduce rules and principles of action leading to transparency in art market(s) is imposed by rules issued for other areas of economic activity and for purposes other than the introduction of rules on the purchase and sale of works of art and collectables, such as the rules for combating money laundering and terrorist financing, as well as the rules on international trade in endangered species of fauna and flora.

The cooperation amongst States to contribute to a greater transparency in the art market(s) has had very important results in the context of the objects qualified as 'cultural property' or 'cultural heritage'. Three international treaties may be mentioned in this area: i) the UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflicts, 14 May 1954, with Protocols

[24] About the legal aspects of the restoration of works of art, see Marc-André Renold and Beatrice Rötheli-Mariotti (editors), *La restauration des objects d'art: aspects juridiques et éthiques / The restoration of works of art: legal and ethical aspects*, La Bibliotèque des Arts, Paris, 1995.

of 1954 and 1999[25]; ii) the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted in Paris 14 November 1970[26]; and iii) the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, signed in Rome, of 24 July 1995[27]-[28].

A particularly important example of the measures that have been taken prevent the illegal sale of cultural property or cultural heritage is UN Security Council Resolution 2347, unanimously adopted on 24 March 2017, relating to objects of cultural nature which have been illegally removed from Iraq since 6 August 1990 and Syria since 15 March 2011. To that end, Security Council Resolution 2347 calls on the Member States of the United Nations to consider the adoption of a set of measures that may control the circulation and sale of cultural objects originating from armed conflicts in Iraq and Syria, including:

> – '[e]stablishing, where appropriate, in accordance with national legislation and procedures, specialized units in central and local administrations as well appointing customs and law enforcement dedicated personnel, and providing them, as well as public prosecutors, with effective tools and adequate training' (paragraph 17 (b));
>
> – '[e]ngaging museums, relevant business associations and antiquities market participants on standards of provenance documentation, differentiated due diligence and all measures to prevent the trade of stolen or illegally traded cultural property' (paragraph 17 (g));

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[25] UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflicts, 14 May 1954, entered into force on 7 August 1956, with Protocol of 14 May 1954, entered into force on 7 August 1956, and Protocol of 26 March 1999, entered into force on 9 March 2004. Texts available at https://en.unesco.org/sites/default/files/1954_Convention_EN_2020.pdf, and https://en.unesco.org/protecting-heritage/convention-and-protocols/o.org/sites/default/files/1999_Protocol_Text_EN_2020.pdf (accessed November 2021).

[26] UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Paris, 14 November 1970, entered into force on 24 April 1972. Text available at https://unesdoc.unesco.org/ark:/48223/pf0000133378 (accessed November 2021).

[27] UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Rome, 24 July 1995, entered into force on 1 July 1998. Text available at https://www.unidroit.org/instruments/cultural-property/1995-convention/ (accessed November 2021).

[28] For a summary about the international conventions concerning the protection of cultural property, see Sophie Vigneron, 'Protecting Cultural Objects: Enforcing the Illicit Export of Foreign Cultural Objects', in Valentina Vadi and Hildegard E. G. S. Schneider (editors), *Art, Cultural Heritage and the Market. Ethical and legal issues*, Springer, Heidelberg, New York, Dordrecht, London, 2014, pp. 126-129.

– '[p]roviding, where available, to relevant industry stakeholders and associations operating within their jurisdiction lists of archaeological sites, museums and excavation storage houses that are located in territory under the control of ISIL or any other group listed by the 1267/1989/2253 ISIL (Da'esh) and Al-Qaida Sanctions Committee' (paragraph 17 (h)).

3.2. Self-regulatory efforts of the art market players

The importance that has been given to issues of transparency in the commercial transactions that take place in the art market(s) can be seen in three recent self-regulation acts produced by art market participants: i) the *Basel Art Trade Guidelines*, published by Thomas Christ and Claudia von Selle, in 2012, under the Basel Institute on Governance; ii) the *Art Market Principles and Best Practices*, approved by the Show Management of Art Basel, in September 2017; iii) and the *Art Diligence Toolkit of the RAM – Responsible Art Market*, presented in early February 2018.

The *Basel Art Trade Guidelines* are based on a conference organized in 2009 in Basel, Switzerland, by the Basel Institute on Governance and subsequent meetings held in 2010 in Basel and New York, with 'committed key players, representing a major part of the global art market'. The *Basel Art Trade Guidelines* are divided in five parts: A. Preamble; B. Scope of the rules; C. Standards for art market operators; D. Implementation; e E. Recommendation.

According to the *Basel Art Trade Guidelines*:

i) 3.2.1. Disclosure, '[t]he identity of the seller and the buyer must be known to each other, and to all intermediaries involved, including to third parties with a legitimate legal interest';
ii) 4.2.1. Principle [related with 'due diligence before sale'], '[a]n undisputed and uninterrupted provenance history and proven authenticity of an art object is the aim in all transactions';
iii) 5.1. Principle [related with the 'source of funds'], '[t]he art market operator will endeavour to deal only with buyers whose source of funds can be established to be legitimate'.

The *Art Market Principles and Best Practices*, approved by the Show Management of Art Basel in September 2017, were to be applied from the beginning of 2018 as 'part of the exhibitor regulations included in the applications for all three Art Basel shows'. Accepting and acting in accordance with those rules will be a 'factor

taken into consideration by the Art Basel's Selection Committees in selecting exhibitors for participation in Art Basel shows in Basel, Miami Beach and Hong Kong'. The *Art Market Principles and Best Practices* are divided in four parts: Introduction; Overview; Section 1: Best Practice Guidelines; and Section 2: Legal Compliance Process.

According to the Art Basel *Art Market Principles and Best Practices*:

i) 1.3. '[e]xhibitors shall only sell works when, to their best knowledge, the artist and consignor have clear title to the works, free of all encumbrances and possible ownership claims';
ii) 2.1. '[u]pon selling work, Exhibitors shall provide the buyer with a written invoice containing the description and image of the work, the identity of the artist, the dimensions and medium of the work, the sale price, the identity of the buyer and any other customary information related to the transaction';
iii) *Overview* da *Section 2: Legal Compliance Process*, '[e]xhibitors must comply with all applicable laws in the country or countries where they do business, including statutes governing forgery of artworks and provenance; dealing with stolen, looted, embezzled and forged artworks; money laundering; forgery of documents; fraud; misappropriation; and illegal import and export of cultural property'.

The following gives an overview of Art Basel's procedure in case of perceived potential criminal conduct by exhibitors:

1. When Show Management becomes aware of potential criminal conduct by an Exhibitor, Show Management will submit reports of such potential criminal conduct ('Reports') to a Legal Compliance Board for assessment.
2. If upon analysis of the case the Legal Compliance Board finds that a Legal Compliance Panel ('Panel') is warranted, such a Panel shall be established by Show Management.
3. The Legal Compliance Panel will analyse the case and issue a recommendation to Show Management.
4. Based upon the recommendation of the Legal Compliance Panel, Show Management will decide on whether to take action concerning the Exhibitor and, if so, which measures to take.

The decision by Show Management according to paragraph 8 can be as follows:

8.2. Recommended measures and sanctions may include, but are not limited to: a) Deciding the matter does not warrant any measures, given the current state

> and nature of the case; b) Waiting for a court ruling before recommending specific measures; c) Putting an Exhibitor on notice that they must henceforth systematically comply with the relevant regulatory and statutory obligations; d) Refusal of admission to Art Basel for a particular show; e) Refusal of admission to Art Basel for an extended period of time; g) Revocation of admission already granted for a particular Art Basel show; and g) In extremis, expulsion from a running Art Basel show, in which case Show Management will grant a short period to the Exhibitor to clear its booth and remove artwork from the premises of Art Basel.'

The *Art Transaction Due Diligence Toolkit* of the RAM – Responsible Art Market, presented in early February 2018, is composed of checklists that must be taken into account in the transaction of an artwork or a collectable. The *Art Transaction Due Diligence Toolkit* is divided in three parts: 1. Client due diligence checklist; 2. Artwork due diligence checklist; and 3. Transaction due diligence checklist[29].

The 'Client due diligence checklist' are divided in five items: 1.1. Individual; 1.2. Company/Trust/Association/Foundation/other legal entity; 1.3. Client's role in the transaction checked; 1.4. Client's authority to act checked; and 1.5. Client red flags checked. The following examples of red flags are given:

> Politically Exposed Persons (PEP's) including persons closely associated with PEPs; Offshore structures (such companies or trusts) which exist to hold assets only; Clients known to be (or associated with persons) subject to criminal or regulatory investigation, prosecution or conviction: Agents for undisclosed buyers or sellers; and Clients who without plausible reason, operate through multiple private investment companies or offshore structures whose ownership, control and/or beneficiary structure is opaque.

The 'Artwork due diligence checklist' are divided in eight items: 2.1. Identification; 2.2. Trade restrictions; 2.3. Ownership; 2.4. Provenance & exhibition history; 2.5. Artwork location & recent movement; 2.6. Authenticity; 2.7. Condition; and 2.8. Artwork red flags checked. The following examples of red flags are given:

> An artwork is presented with very limited or no documentation or provenance; The seller is reluctant to provide written evidence of the artwork's provenance; The

[29] On due diligence, see Tom Christophersen, 'Due diligence', in Jos Hackforth-Jones and Ian Robertson (editors), *Art Business Today:20 Key Topics,* Lund Humphries in association with Sotheby's Institute of Art, London, 2016, pp. 136-145.

artwork is an archaeological object or part of a monument and its source country (i.e. the country where it originated) is or has been in recent conflict; The artist or the object is known to be forged; Adverse market comment regarding the artwork exists; Documentation for the artwork (e.g. authorisations, export licences, provenance documents) appear to be false. See for example the fraud regarding fake ICOM / UNRSC certificates; The artwork has no recent provenance or has unexplained gaps in its provenance. This can indicate an item that has been stolen, illicitly excavated or which is a fake or a forgery; Unexplained or inconsistent changes in ownership; The seller changes their story as to how they acquired the artwork; The artwork is subject to trade restrictions (e.g. sanctions prohibiting the trade in items originating from Syria and Iraq); Artworks presenting unusual fluorescence under UV light (e.g. as a result of special varnishes used to hide details of restoration); Artworks where the original canvas and tacking edges cannot be accessed; Artworks with unexplained or extensive restorations; and For high value artworks, no insurance and/or storage records exists.

The 'Transaction due diligence checklist' are divided in five items: 3.1 Purpose of the transaction; 3.2. Form of the transaction; 3.3. Source of the funds; 3.4. Documentation; and 3.5. Transaction red flags checked. The following examples of red flags are given:

Buyers wishing to pay from bank accounts located in jurisdictions having weak anti-money laundering measures (see lists established by FATF at http://fatf-gafi.org); Client provides information which appears to be false or documentation which appears to be fake; Buyers who insist on paying large amounts in cash; Buyers who insist on making multiple low value cash payments for a single or connected transactions; Buyers who insist on paying with an anonymous credit card (e.g. China Union Pay Card which does not include the holder's name) or cash cards; Clients who ask detailed questions about the Art Business' procedures for reporting suspicious activity and/or financial matters to tax authorities; Clients who knowingly wish to sell at an artificially low or inflated price; Clients who suggest unusually complicated structures for achieving a purchase or sale; Sellers / Consignors are unwilling to provide adequate proof of ownership for items they wish to consign (note: the situation of an "unwilling client" should be distinguished from situations where clients have legitimate reasons for being unable to provide documentation proving their ownership. For example, it is not necessarily realistic to expect an original purchase invoice for an item which has been inherited. Common sense should prevail in these situations and other inquiries undertaken to verify ownership (e.g. obtain copies of insurance documentation, exhibition or catalogues references to the artwork, dated photographs of the artwork in situ, etc); Client is evasive or reluctant to provide adequate information relating to their identity or the artwork; Seller requests the sale proceeds to be paid to a third

party; The documentation provided is inaccurate or incomplete; The seller and buyer (or their intermediaries) are connected; The client's profile or business structure is inconsistent with the proposed transaction; Parties to the transaction have conflicts of interest.

The difficulties of acting in accordance with the applicable legal framework in this area can be seen with the example of the ICOM (International Council of Museums) Red Lists Database[30]. There are 18 red lists, covering: Afghanistan; Africa (including 8 States); Cambodia; Central America and Mexico (including 7 States); China; Colombia; Dominican Republic; Egypt; Haiti; Iraq; Iraq 2015; Latin America (including 12 States); Libya; Peru; Syria; Southeast Europe (including 10 States); West Africa (including 8 States); and Yemen.

In relation to China[31], those red lists includes: Architectural elements; Books and documents; Ceramics; Folk objects; Inscriptions; Jade and semi-precious stones; Lacquer; Metals – Bronze; Metals – Gold and Silver; Numismatics; Painting and calligraphy; Rubbings; Sculpture; and Textile and accessories. Considering that all categories cover all objects until 1949, it is said that '[b]ecause of the great diversity of Chinese objects, styles and periods, the *Red List of Chinese Objects at Risk* is not exhaustive, and any antiquity originating from China should be subjected to detailed scrutiny and precautionary measures'. ICOM website warns that '[t]here are fraudulent websites which imitate ICOM institutional website. These websites are not operated by or authorised by ICOM', and also informs that 'ICOM does not provide certificates of expertise, origin or authenticity. These certificates must be obtained from the relevant national Government authorities'.

3.3. Going in the wrong direction on the pursuit of transparency? The application of the international legal regime provided for in the CITES Convention on the circulation and trading of art objects in ivory

One potentially (over)regulated area in the predominantly unregulated art market(s) is the existence of rules of international law applicable to the circulation

[30] See https://icom.museum/en/our-actions/heritage-protection/red-lists/ (accessed November 2021).

[31] About Chinese cultural heritage see Shuzhong HE, 'Illicit Excavation in Contemporary China', in Neil Brodie, Jennifer Dole and Colin Renfrew (editors), *Trade in illicit antiquities: the destruction of the world's archaeological heritage.* McDonald Institute for Archaeological Research, Cambridge, 2001, pp. 19-24; and James Cuno, *Who Owns Antiquity?,Museums Battle over our Ancient Heritage,* Princeton University Press, Princeton – Oxford. 2008, pp. 88-120.

and trade of ivory art objects. The International Convention on the Endangered Species of Wild Fauna and Flora (CITES Convention or Washington Convention), signed on March 3, 1973, as amended on June 22, 1979, in Bonn, and on April 30, 1983, in Gaborone, is the international legal framework governing the market for art objects in ivory[32]. In November 2021, the CITES Convention had been agreed to by 183 parties (182 States and the European Union[33], since 2015)[34]-[35].

The CITES Convention applies to the circulation ('trade') among States of specimens of species of fauna or flora listed in its Appendices (Article I). The legal regime provided for in the CITES Convention covers 'any animal or plant, live or dead', insofar as the species to which they belong are listed in Appendices I, II or III. Species are integrated into Appendices I, II and III in accordance with the threat of extinction to which they are or may be subject. The list of species of fauna and flora covered by the legal regime of the CITES Convention, in order to be fully effective, shall be modified by the Contracting Parties as the evolving threat of extinction of the species occurs. The list of species currently included in Appendices I, II and III published on the CITES website, with effect from 4 October 2017, is particularly detailed and is sixty-nine pages long (covering about five thousand and eight hundred species of fauna and thirty thousand species of flora).

Article XIV authorizes the Parties to adopt domestic measures more stringent than those in force for all States as a result of the CITES Convention's international legal regime. The most stringent domestic measures may include the 'total ban'

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[32] Convention on International Trade in Endangered Species of Wild Fauna and Flora signed on March 3, 1973, as amended on June 22, 1979, in Bonn, and on April 30, 1983, in Gaborone, entered into force on 1 July 1975. Text available at https://cites.org/eng/disc/text.php (accessed November 2021).

[33] For the legal regime applicable at the European Union, see Council Regulation (EC) nº 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein (consolidated text with 24 amendments available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A01997R0338-20200101, accessed November 2021).

[34] See https://cites.org/eng/disc/parties/chronolo.php (accessed November 2021).

[35] About the international legal regime applicable to ivory art objects, see Andrew M. Lemieux and Ronald V. Clark, *The international ban on ivory sales and its effects on elephant poaching in Africa*, 'British Journal of Criminology', vol. 49, 2009, pp. 451-471; Vitoria Mundy, *The re-export of pre-convention/antique ivory from the European Union., Report prepared for the European Union,* Traffic, 2014; Morgan V. Manley, *The (Inter)national Strategy: An Ivory Trade Ban in the United States and China,* 'Fordham International Law Journal', vol. 38, 2015, pp. 1511-1585; Mike Graves, *Customary Ivory Law: Inefficient problem solving with customary international law*, 'Washington International Law Journal', vol. 26, 2017, pp. 325-347; and Willem Wijnstekers, *The evolution of CITES,* 11th ed., International Council for Game and Wildlife Conservation, 2018.

on 'trade in, capture or collection, possession or transport of specimens listed in Appendices I, II or III'. Amendments to the species listed in Appendices I and II shall be effective with respect to all Parties to the CITES Convention, unless a reservation is made by a Party within a period of ninety days.

The perception of ivory as being a material used to produce objects of the most varied nature and of elephants as being a natural resource capable of human exploitation has been changing radically in the decades since the end of World War II. Environmental concerns about elephants have been strengthened recently as a result of a steady and consistent reduction of African elephant populations in recent years. In order to combat the illegal slaughter of elephants there is a growing movement advocating that all circulation of ivory should be qualified as being illegal. In its most radical expression, it even sanctions the destruction of any object or artefact in ivory or containing ivory in its decoration.

The legitimacy of the environmentalist perspective in support of measures to prevent the horrendous decrease in the number of living African elephants should not allow it to overflow into other areas such as the ivory art objects market which deals with movables that were created in substantially different historical times. There is no similarity in the situations regarding the use of ivory resulting from a contemporary slaughter of elephants, particularly where it is illegal, and the circulation of objects of art which were produced at times when animal welfare was a non-existent concern.

There is an arguable justification for the complete separation of the legal regimes relating to the trade of ivory art objects as rules relating to cultural heritage, and the rules governing the conservation of elephants as wild animals. The international legal regime applicable to ivory art objects is, however, exactly the same as the one which aims to regulate the preservation of endangered animal species, and this results in a significant number of areas of uncertainty, confusion or even potential conflict.

Because the international legal regime applicable both to the preservation of wild animal species and to the circulation of ivory objects of art is one and the same, at least three unjust and confusing results can appear. Firstly, there is the possibility that objects of art and cultural artefacts are prevented from circulating between States and, even, in extreme situations destroyed. Secondly, there is the potential for substantial losses for owners of ivory works of art, regardless of their historical and cultural relevance. And, thirdly, there is the possibility of the progressive annihilation of an area of the art market. There is a complete mismatch of the application of the international legal regime of the CITES Convention to art objects in ivory, bearing in mind that the objectives underlying its structure

and dynamics, such as the creation of adequate mechanisms for preservation of endangered species and the combating of their illegal killing, do not have any effect whatsoever on elephants killed in previous historical times[36].

4. Conclusions

Considering the extreme diversity of works of art and collectors' objects, speaking about the 'art market' as an unified market may be limitative to an adequate understanding of the various legal issues involved in its regulation, thereby being preferable the use of 'art market(s)'. Art market(s) presuppose the existence of a market economy based on private property, the freedom to buy and sell goods and services, and the circulation of objects between spaces belonging to different States or jurisdictions. In a practical approach, art market(s) deal with objects' which lawyers call 'movable property'. The object of the legal regulation of the art market(s) in relation to 'movable property', which are both 'valuable objects' in cultural and monetary terms, requires a set of specific legal rules regarding its creation, enjoyment, conservation, circulation and transaction.

The transportability and the possibility that works of art and collectables constitute a reserve of value generate the conditions for a tendential opacity in the art market(s), considering that those objects are not subject to a special ownership register, except in very specific situations, such as those resulting from their inclusion in the cultural heritage of a State. Private ownership of works of art and collectables is often the result of contractual transactions not documented by written contracts, or by inheritance, without a prior legal inventory to divide an estate, or for the settlement of any sort of tax duties. On these occasions, the fact that someone has an object allows others to assume that he is their legitimate owner and, accordingly, that is authorized to sell them, either directly or through the intermediation of specialized third parties.

The creation and enforcement of legal rules and legal principles as standards for the different actors performing in the art market(s) – artists, dealers, auctioneers,

[36] Accordingly, article 2 (w), definitions for the purpose of the Regulation, of Council Regulation (EC) nº 338/97 of 9 December 1996, states that "'worked specimens that were acquired more than 50 years previously' shall mean specimens that were significantly altered from their natural raw state for jewellery, adornment, art, utility, or musical instruments, more than 50 years before the entry into force of this Regulation and that have been, to the satisfaction of the management authority of the Member State concerned, acquired in such conditions, Such specimens shall be considered as worked only if they are clearly in one of the aforementioned categories and require no further carving, crafting or manufacture to effect their purpose".

collectors, cultural institutions, museums and conservators – can lead to transparency through three different channels. On the one hand, through the unilateral production of legislation by States or regional integration entities such as the European Union. On the other hand, it may result from agreements reached between States and delivered as documents of international law, in particular through international treaties and agreements, acts of international organizations, such as United Nations Security Council resolutions and, increasingly, international no legal binding acts. And finally, in progressively more important terms, it can be achieved by the self-regulatory efforts of the art market players, such as professional associations of art dealers, international auctioneers, and the organizers of international art fairs and antiques exhibitions.

It is important to point out that in some cases the trend to introduce rules and principles of action leading to transparency in art market(s) is imposed by rules issued for other areas of economic activity and for purposes other than the introduction of rules on the purchase and sale of works of art and collectables, such as the rules for combating money laundering and terrorist financing, as well as the rules on international trade in endangered species of fauna and flora.

One potentially (over)regulated area in the art market(s) is the existence of rules of international law applicable to the circulation and trade of ivory art objects (regulated by the International Convention on the Endangered Species of Wild Fauna and Flora – CITES Convention or Washington Convention –, signed on March 3, 1973). Because the international legal regime applicable both to the preservation of wild animal species and to the circulation of ivory objects of art is one and the same, unjust and confusing results can appear. In fact, there can be a complete mismatch of the application of the international legal regime of the CITES Convention to art objects in ivory, bearing in mind that the objectives underlying its structure and dynamics, such as the creation of adequate mechanisms for preservation of endangered species and the combating of their illegal killing, do not have any effect whatsoever on elephants killed in previous historical times.