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STANDARDS OF CARE IN THE ART MARKET:
A Comparative Study on What is Expected of Buyers, Sellers and Consignors in the United States, Germany and England*

Birgit Kurtz,* Friederike von Brühl† and Gregor Kleinknecht‡

A. INTRODUCTION

The increasing globalisation and eclecticism of the art market, together with the proliferation of online sales platforms, have attracted buyers all over the world, at all levels of the market. In addition to the traditional professional buyers, consumers are increasingly accessing the art market directly through these new sales channels. This widening reach and ease of access, and the sheer volume of transactions increase the likelihood of unwary buyers making costly mistakes and emphasise the need for careful due diligence and thorough investigations of artworks prior to any acquisition.

On purchasing an artwork, a buyer is generally first concerned with characteristics of the artwork such as its subject matter, artistic quality, size, medium and whether or not it is representative of a particular stage in the artist’s career. These are all factors that may affect the aesthetic and commercial value and the integrity of the piece, and are relatively easy to assess by comparison to other works and research into the artist’s career. These are also aspects of a work that sellers will usually draw to the buyer’s attention and willingly discuss. The next stage will be to examine the surface of the work and what lies beneath. The material composition and condition of an artwork will affect its value and longevity, regardless of whether it is a work on paper, a painting, sculpture, installation, work of mixed media, video or something more out of the ordinary. Auction houses and dealers will generally offer a condition report on request, although it tends not to be comprehensive; otherwise, or in addition to these brief reports, independent investigations should be undertaken. Certainly, if there is any sign of damage or instability to the materials, or signs of an unsatisfactory cleaning process or restoration, a more thorough report should be commissioned by a conservator. A buyer should also consider and plan for the difficulty of conserving and maintaining any works that incorporate unusual or experimental materials or mechanical or electrical components.

Many buyers, even experienced ones, will not take pre-acquisition investigations any further than this. Effective due diligence, however, extends beyond a consideration of

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the inward and outward characteristics of an artwork to a more in-depth exploration of the history behind the work, its ownership, provenance and origin, import or export and tax status. While there is no uniform or binding definition of what constitutes reasonable diligence, a failure to make appropriate enquiries, depending on the context of the acquisition, can nonetheless have unfortunate consequences.

Two of the most important issues to bear in mind when undertaking the necessary investigations involved in conducting due diligence prior to purchasing an artwork, and the ones that often lead to legal disputes or investment loss, are title and authenticity. Obtaining clear legal title is fundamental to acquiring an artwork, or any other type of goods. Without it, a purchaser, however innocent or ignorant of any defect in title, will be subject to the risk of third party claims, at least until such claims are extinguished by the passage of time. The buyer of an artwork without good title is likely to face difficulties in arranging insurance for the artwork, lending it to an exhibition or disposing of it, even as a gift. Invariably, if the marketability of an artwork is adversely affected by such factors, its monetary value will also be diminished.

Whereas defective title can in certain circumstances be cured, as to which see further below, the authenticity of an artwork is a matter substantially beyond the legal sphere. A copy, fake or forgery will never obtain equal value or standing with an authentic work, regardless of the passage of time. The buyer’s diligence is essential in investigating whether an artwork is genuine, is of the correct material, date and positioning within the artist’s oeuvre, and has been accepted by scholars, critics and the market as an authentic work. Furthermore, while, in many jurisdictions, implied contract terms give some protection to the buyer, he should always ensure that a written contract of sale is drawn up, which provides appropriate safeguards in the event that, despite prior indications, the artwork is found not to be genuine or if title defects become apparent.

Different levels of due diligence are required for different methods of collecting contemporary art. A buyer who has a direct relationship with an artist, or who purchases from the artist’s primary dealer, is unlikely to run into difficulties over title or authenticity. A certificate of authenticity should nevertheless always be obtained from the artist at the point of purchase in the primary market. Although reports exist of artists (or their estates/foundations) disclaiming authorship of some of their own artworks (for example in the case of Andy Warhol and Gerhard Richter), in general, an artist is the most reliable source of information relating to an artwork. Many collectors are far removed from the creative origin of the work, however, and artworks, being easily transportable and often of significant value, tend to pass through successive hands quite quickly. A vast number of artworks are bought in the secondary market, either from galleries or auction houses, through private treaty

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1 Revisions to scholarship, which occasionally have major significance for Old Master paintings, are unlikely to feature in the contemporary art market.


sale, or through agents and intermediaries, sometimes acting on their own account and sometimes on behalf of another. Knowing from whom one is buying and that the seller or agent has actual authority to sell the artwork is a first step in assessing the safety of a transaction.

B. CASE STUDIES

The following case studies illustrate the risks art buyers, sellers and consignors face today and what the legal consequences can be when certain basic due diligence requirements are not met. While it cannot be predicted with 100 per cent certainty that the outcome in a given case will be identical to these precedents, the court decisions discussed below do give the reader an idea as to what is expected of art market participants.

1. CASE STUDY - OWNERSHIP: SALANDER-O’REILLY GALLERY

The scandal surrounding the Salander-O’Reilly Gallery and its legal aftermath vividly demonstrate some of the very real legal risks involved in buying and selling art. Following the Gallery’s demise in 2007, several courts were asked to scrutinise complex art transactions and to decide competing ownership claims by customers and consignors of the Gallery. While the courts came to different conclusions in the particular cases, the decisions nonetheless offer some guidance regarding the level of due diligence that is expected of art buyers and consignors.

a. Background

For decades, Lawrence Salander (‘Salander’) was a successful art dealer in New York City. But at some point, Salander and his Salander-O’Reilly Gallery (‘Gallery’) started entering into a series of questionable deals. As a result, consignors complained that the Gallery had failed to pay them for artworks the Gallery had sold, and business partners reported that Salander had defrauded them. In November 2007, the Gallery entered bankruptcy.4

In March 2009, Salander was arrested and indicted on 100 counts of grand larceny, falsifying business records, scheming to defraud investors, forging documents and perjury.5 In March 2010, he pleaded guilty to 29 counts of grand larceny and fraud.6 In August 2010, he was sentenced to a prison term of six to eighteen years and ordered to pay $114.86 million in restitution.7

Salander’s criminal conviction did not, however, resolve the question as to who owned the artworks sold by the Gallery during the years leading up to the 2007 bankruptcy filing. Rather, ownership questions had to be resolved in a number of civil cases in federal and state courts in New York. Three of the cases involved the art dealer Joseph P. Carroll (‘Carroll’), who had bought about 120 artworks from the Gallery between 1998 and 2007. The court decisions in those three cases deal with the due diligence required from art buyers and consignors and will, therefore, be examined below.

b. **Carroll v. Baker**

The first decision was handed down in August 2012 by Judge Stein of the District Court for the Southern District of New York.\(^8\) The plaintiff in that case, Joseph P. Carroll Ltd, was a corporation wholly owned by Carroll.\(^9\) In 2009, Carroll commenced an action for a declaratory judgment, asking the court to declare that his corporation had full title to a particular painting by John Graham.\(^10\) Defendant Craig Baker had owned the painting at issue and, in 2000, orally consigned the painting to the Gallery, with the instruction to sell it for no less than $250,000.\(^11\) In January 2007, Carroll purchased the painting for $105,000.\(^12\)

After a bench trial in April 2012, the court agreed with Carroll and issued a declaratory judgment in his favour. The court found that Carroll did not know that the Gallery held the painting on consignment and that “it is not customary for a purchaser to ask a seller whether a piece of art is held on consignment or whether the seller owns it himself”.\(^13\) The court also found that Carroll’s investigation before purchasing the painting was the “usual and customary” procedure in the art industry, “if not more”.\(^14\)

c. **Davis v. Carroll**

In March 2013, Judge Oetken, also of the Southern District of New York, delivered the next decision.\(^15\) Judge Oetken concluded that Carroll’s due diligence was inadequate when he purchased certain Stuart Davis works from the Gallery and he therefore did not obtain title to those artworks.\(^16\)

The plaintiff in this case, Earl Davis (Stuart Davis’s son), had consigned several works by his father to the Gallery starting in the early 1980s.\(^17\) The consignment

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\(^9\) *Id.* at 594.
\(^10\) *Id.*
\(^11\) *Id.* at 595.
\(^12\) *Id.* at 598.
\(^13\) *Id.* at 602.
\(^14\) *Id.*
\(^16\) *Id.* at 434-36.
\(^17\) *Id.* at 395.
arrangement required that Davis was to give final approval for any sales. In 2006, Carroll acquired a number of Stuart Davis works from the Gallery at what were alleged to be “bargain basement prices”. The Gallery failed to inform Davis of this transaction, did not obtain his approval and never paid him for the works.

After analysing the transaction and Carroll’s investigation in detail, the court ruled that the transaction raised a number of red flags, which “triggered a duty of heightened inquiry on Carroll’s part”. The court held that Carroll’s investigation did not satisfy that duty, and concluded with a strongly-worded warning: “In the market for art, New York law does not tolerate such persistent indifference to questionable dealings. Intentional or reckless blindness to signs of foul play creates a fertile ground for fraud, facilitates a vast market in stolen works, and runs afoul of both industry norms and legal obligations.”

d. McEnroe v. Carroll

In August of 2013, the third trial court decision was delivered by Justice Kornreich of the New York State Supreme Court, New York County. In that case, the tennis player John McEnroe and the Dorothy G. Bender Foundation (‘Bender’) sued Carroll for the return of a painting by Arshile Gorky. Like Judge Oetken, Judge Kornreich found against Carroll.

McEnroe and Bender had each entered into a separate agreement with Salander to buy two paintings by Arshile Gorky (Pirate I and Pirate II), and neither knew of the other’s interest. McEnroe and Bender each paid half of the total purchase price for the two paintings, believing that Salander had paid the other half. Carroll then acquired Pirate II from Salander in a complex trade, and took possession of that painting. When McEnroe and Bender found out about this transaction, they combined their half interests and sued Carroll.

After a bench trial, the court concluded that Carroll had not performed a reasonable investigation and that, therefore, McEnroe and Bender together held title to Pirate II. The court explained:

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18 Id. at 398.
19 Id. at 396-411.
20 Id. at 410.
21 Id. at 434.
22 Id. at 435-36.
23 Id. at 437.
26 Id.
27 Id. at *7-11.
28 Id. at *12.
Carroll acquired *Pirate II* in a grossly undervalued transaction in which he chose to make no inquiry as to Salander’s authority to sell the work, despite behavior on Salander’s part which marked a departure of their normal course of dealings. By going forward with the transaction despite these red flags, Carroll did not observe the reasonable commercial standards of the art trade, and therefore, as an art dealer himself, failed to qualify as a buyer in the ordinary course of business...29

Carroll appealed this decision but in March 2015, the appeals court affirmed the decision of the lower court.30

2. **Case Study - Authenticity: Trasteco Ltd / Kunsthaus Lempertz KG**

Similar uproar in the art market and its media has been caused by recent forgery scandals, in particular the Knoedler scandal in the United States and the Beltracchi scandal in Europe. Trasteco Ltd / Kunsthaus Lempertz KG, the 2012 decision of a court in Cologne, Germany, relates to the latter scandal. It is particularly illustrative of the problems concerning forged art and the due diligence requirements with respect to the authenticity of works of art.31

a. **Background**

In 2006, a Malta-based investment company bought at auction for a price of €2.88 million a painting entitled *Red Painting with Horses*, allegedly a work by German expressionist Heinrich Campendonk dating from 1914. The historic existence of a *Red Painting with Horses* had been documented in the *catalogue raisonné* of the artist Heinrich Campendonk, though there was no information in the literature about the image and appearance, measures, material and whereabouts of the work. Following the auction, the painting was revealed to contain pigments that could not date from earlier than the 1940s.

b. **Outcome**

In its decision delivered in 2012, the Regional Court of Cologne held that the auction house had breached its duties of diligence towards the buyer when selling the *Red Painting with Horses* and was therefore required to reimburse the purchase price to the buyer. Given the scenario of a prestigious auction house selling a work with high price potential and an uncertain provenance and attribution, the court held that it would have been part of the auction house’s duty of care to exclude forgery risks by having a pigment analysis executed to ensure that the pigments were consistent with the alleged date of origin. Without such analysis, the court held that the auction house could not attribute the work to Heinrich Campendonk without any reservation.

29 Id. at *27-28.
30 Dorothy G. Bender Foundation, Inc. v. Carroll, 7 N.Y.S.3d 33 (1st Dep’t 2015).
The decision stresses the link between the value of the work and the degree of care required from the auction house: The higher the price potential of a work of art, the higher the standard of care to be expected from the auction house. Further, the decision highlights that the applicable standard of care depends on the diligence required in the ordinary course of business. The actual market standards are irrelevant, as they may be significantly lower than the level of care objectively required to protect the legitimate interests of the auction house’s customers. Hence, general market laxities in handling authenticity issues may not be used as an excuse for auction houses to fall short of objectively required standards of care to ensure proper attributions.

3. **Case Study - Illegal Excavation and Export of Antiquities: Iran v. Barakat**

   a. **Introduction**

   The international art market serves a plethora of collectors’ interests, ranging from ancient art and antiquities to cutting-edge contemporary art. Many of these fields of collecting give rise to their own particular legal issues and challenges. Collecting antiquities is an example in point: problems arise when antiquities which find their way into the art trade were illegally excavated and/or exported from their country of origin, thereby not only destroying their historical, geographical and archaeological context but also depriving source nations of their cultural heritage and national treasures. Often such illegal excavation and looting activity coincides with war or civil unrest in those source nations as we are currently witnessing so tragically in Syria, and saw previously in the looting of Iraqi museums in the aftermath of the second Iraq war, as well as the looting of museums and historical sites in Egypt during what has become known as the Arab Spring.

   Many source nations, including European countries such as Italy, have enshrined in their national laws explicit export bans in relation to artefacts over a certain age, and much has also been achieved at the international level through the creation of a network of international treaties and conventions, such as the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, aimed at curbing the trafficking in illegally excavated antiquities. Within the European Union, Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State pursues similar aims.

   *Iran v. Barakat* is the leading English example of a successful attempt by a source nation to use the civil courts to recover such an artefact from the international art trade. However, the claim could just as well have been brought against a private individual in whose possession the item was found.

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32 A similar conclusion was drawn by the Higher Regional Court of Hamm, see OLG Hamm, 28 Sept. 1993, 29 U 18/92, NJW 1994, 1967, *Carl Schuch*.

b. Background

Barakat Gallery, an international dealer in ancient art and antiquities with a prominent gallery in London, had in its possession some eighteen carved vessels made from chlorite and said to date from the period 3000 B.C. to 2000 B.C. Iran sued the Barakat Gallery in England, claiming ownership of the antiquities on the grounds that they formed part of its national heritage and originated from recent unlicensed and unlawful excavations in the Jiroft region in the Kerman province of southern Iran. Barakat denied the origin of the antiquities and claimed to have purchased them legally on the open market in several European countries.

The English Court of Appeal was concerned with two preliminary questions: firstly, whether Iran could show that it had obtained title to the objects as a matter of Iranian law and, if so, secondly, whether the court should recognise and/or enforce that title.

c. The Position under Iranian Law

The question of title to the antiquities had to be determined according to Iranian law as the law of the place from where the antiquities originated. Iran relied extensively on its internal laws and regulations in relation to antiquities, in particular, on legislation regarding the prevention of unauthorised excavations, and argued that Iranian law vested in it a proprietary title to the antiquities that enabled it to recover them in proceedings in England. As mentioned above, Iran’s legislation is by no means unusual in this regard since many source nations have enacted legislation intended to protect their cultural heritage against looting, illegal excavation and trafficking of antiquities and items of cultural heritage, often by vesting title in the State.

d. The Decision of the English Court of Appeal

The unanimous judgment of the Court of Appeal allowed Iran’s appeal from the adverse decision at first instance and found that Iran’s title to the antiquities was sufficient for it to succeed with a claim in conversion and to obtain their return.

In analysing the Iranian legislation, the Court of Appeal concluded in relation to the first issue, (whether Iran had title to the objects as a matter of Iranian law), that a finder could not acquire title to newly discovered antiquities found accidentally or as a result of illegal excavation, and, further, that Iran’s ownership rights in relation to such antiquities were so extensive and exclusive that Iran was properly to be considered the owner, enjoying both a proprietary title and an immediate right to possession of the antiquities.

In relation to the second issue, (whether the court should recognise and/or enforce Iran’s title) which it also answered in the affirmative, the Court of Appeal took the view that Iran was asserting a proprietary claim to antiquities which formed part of its national heritage, and qualified this as a ‘patrimonial’ claim rather than a claim to

34 See generally Gerstenblith, above, note 33.
enforce a public or penal law, or to assert rights of a sovereign nature, which would have been unenforceable in England.\textsuperscript{35}

The Court of Appeal distinguished this case from earlier decisions \textit{inter alia} on the grounds that a refusal to recognise the title of a foreign State (derived from its national law) to antiquities would in most cases render it impossible for the United Kingdom to recognise any claim for the recovery of antiquities illegally exported to the country. In distinguishing this claim, the Court of Appeal also referred to the US case of \textit{United States v. Schultz},\textsuperscript{36} in which the Second Circuit Court of Appeals had recognised a claim under Egyptian patrimony law.

The Court of Appeal further found that there were positive reasons of public policy why a claim by a State for recovery of antiquities which formed part of its national heritage, and which otherwise complied with the principles of private international law, should not be precluded by English law. There was international recognition that States should assist one another to prevent the wrongful removal of cultural property. The United Kingdom was a party to international instruments which had as their aim to prevent the unlawful dealing in property which formed part of the cultural heritage of States. The Court of Appeal specifically referred to the 1970 UNESCO Convention, EU Council Directives, and other international instruments as evidencing those policy considerations (even though they were not otherwise of direct relevance in this case).\textsuperscript{37}

\textbf{e. Conclusion}

The Court of Appeal judgment was a landmark decision when it was handed down in 2007. The Judge at first instance had expressed regret at the conclusions he had reached and the Court of Appeal’s reversal of his decision has been widely welcomed as a success for source nations in their quest for effective worldwide protection of cultural heritage objects.

From the perspective of the collector and the art market, it reinforces the need for proper due diligence enquiries to be made into the provenance and ownership history of artefacts, supported by appropriate documentation.

\textbf{C. Legal Framework in the United States, Germany and England}

In each jurisdiction discussed in this article, centuries of legislation and court decisions provide distinct bases for the legal frameworks in force today relating to due diligence in the art market. While the historical and jurisprudential bases of the legal requirements may be very different in each jurisdiction, some of the specific due diligence obligations currently required of buyers, sellers and consignors are based

\textsuperscript{35} See the discussion of the House of Lords in \textit{Attorney-General of New Zealand v. Ortiz} [1984] A.C. 1.

\textsuperscript{36} 333 F.3d 393 (2d Cir. 2003), discussed by Gerstenblith, above, note 33 at pp. 27-32.

\textsuperscript{37} \textit{Id.} at paras 156-163.
on common practices in the international art market, recent technical developments and, not least, basic common sense. Thus, while the analysis of a given fact pattern might appear very different under the three legal regimes, the outcome may often be the same.

1. Legal Framework: United States / New York State

The law regarding the transfer of title in art in the United States in general, and in New York State specifically, distinguishes between art that was stolen and art that was entrusted to a gallery. The sale of forged art is governed by a third set of rules.

a. Art Entrusted to a Gallery

The transfer of title in goods, including tangible works of art, is governed by the Uniform Commercial Code (‘UCC’), which provides:

§ 2-403 Power to Transfer; Good Faith Purchase of Goods; “Entrusting”

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer . . .

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

(3) “Entrusting” includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor’s disposition of the goods has been such as to be larcenous under the criminal law. . . .

Thus, when the owner of a work of art ‘entrusts’ it to an art gallery, that gallery has the “power to transfer all rights of the [owner] to a buyer in ordinary course of business,” and “a buyer in ordinary course of business” can obtain title in the artwork. The UCC defines “buyer in ordinary course of business” as follows:

38 See e.g. Davis, 937 F. Supp. 2d at 421.
39 See also NY UCC § 2-312 ‘Warranty of Title . . .’ (2016).
40 NY UCC § 2-403 (2016).
41 See NY UCC § 2-403(2) (2016).
42 New York’s highest court, the New York Court of Appeals explained the underlying policy: “The “entruster provision” of the Uniform Commercial Code is designed to enhance the reliability of commercial sales by merchants (who deal with the kind of goods sold on a regular basis) while shifting the risk of loss through fraudulent transfer to the owner of the goods, who can select the merchant to whom he entrusts his property. It protects only those who purchase from the merchant to whom the property was entrusted in the ordinary course of the merchant’s business.” Porter v. Wertz, 439 N.Y.S.2d 105, 105-06 (1981). “Thus, a person who knowingly delivers his property to a merchant dealing in goods of that kind ‘assumes the risk of the merchant’s
“Buyer in ordinary course of business” means a person that buys goods *in good faith, without knowledge that the sale violates the rights of another person* in the goods, and in the ordinary course from a person . . . in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person *comports with the usual or customary practices* in the kind of business in which the seller is engaged or with the seller’s own usual or customary practices. . . .

If the buyer is a merchant, the term ‘good faith’ means “honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.” Courts have held that:

in New York, a merchant might be required under the UCC to take additional steps to verify the true owner of a piece of artwork. This heightened duty of due diligence is triggered where there are warning signs about problems in a sale.

What circumstances qualify as ‘warning signs’ (or ‘red flags’) and what tasks are required by the ‘heightened duty to inquire’ in a particular case, depends on the facts of that case. Some examples from actual cases will be discussed in more detail below.

### b. Stolen Art

If the artwork at issue was stolen (as opposed to entrusted) and never returned to its rightful owner (or his successors), even a good faith purchaser for value cannot acquire good title in that artwork: It is the law in all the states of the United States that a thief cannot pass good title. If the theft happened a long time ago, however, the question arises whether any claim by the aggrieved original owner (or his heirs or successors) has expired. To answer this question, courts have applied different tests: Under the ‘discovery rule’ (applicable, for example, in New Jersey, Ohio, Indiana and Pennsylvania), the statute of limitations begins to run when the original owner (or his successor) “discovers, or by the exercise of reasonable diligence and intelligence should have discovered, facts which form the basis of a cause of action”, such facts

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43 NY UCC § 1-201(b)(9) (2016) (emphasis added).
44 NY UCC § 2-103(1)(b) (2016).
46 *Id.* (internal citations and quotation marks omitted).
including “the identity of the possessor” of the artwork.\textsuperscript{48} Under the ‘demand and refusal rule’ (which applies in New York), the limitation period begins to run when the original owner (or his successor) has demanded the return of the artwork from the current possessor, and that demand has been refused.\textsuperscript{49} In such a case, however, the current possessor may be able to raise the defence of ‘laches’, which bars a claim to the artwork if: (1) the original owner (or his successors) was aware of his claim to the artwork; (2) he inexcusably delayed making the demand; and (3) the current possessor was prejudiced as a result of the delay.\textsuperscript{50}

\textbf{c. Forged Art}

The UCC warranty provisions generally govern the sale of forged (tangible) artworks, unless they are supplanted by a more specific statute, like the New York Arts and Cultural Affairs Law (‘NYACAL’).\textsuperscript{51} Under the UCC, an express warranty by the seller is created by, \textit{inter alia}, an affirmation of fact, a promise or a description of the merchandise.\textsuperscript{52} Formal words such as ‘warrant’ or ‘guarantee’ are not required.\textsuperscript{53} The UCC also provides for implied warranties of merchantability if the seller is a merchant with respect to goods of that kind\textsuperscript{54} (an art dealer who sells a work of art, for example, as opposed to a car dealer who sells a work of art), and implied warranties as to the fitness for a particular purpose.\textsuperscript{55} Warranties can be excluded or modified,\textsuperscript{56} as, to a certain extent, can the remedies for their breach.\textsuperscript{57} Certificates of authenticity for artworks are specifically covered by NYACAL, which provides that, when an art merchant sells or exchanges a work of fine art and, as part of that transaction, gives the buyer who is not an art merchant a certificate of authenticity or a similar writing, that certificate or other writing shall:

\begin{quote}
be presumed to be part of the basis of the bargain ... [and] create an express warranty for the material facts stated as of the date of such sale or exchange.
\end{quote}

Whether a seller’s statements as to the value of an artwork to be sold create a warranty

\begin{footnotes}
\item[50] \textit{Bakalar v. Vavra}, 500 Fed. App’x 6, 8 (2d Cir. 2012). Such prejudice can be based on, for example, the death of a witness or the loss of documentary evidence, or it can be due to a material change in the possessor’s position that would not have occurred but for the delay.
\item[52] NY UCC § 2-313(1) (2016).
\item[53] NY UCC § 2-313(2) (2016).
\item[54] NY UCC § 2-314 (2016).
\item[55] NY UCC § 2-315 (2016).
\item[56] NY UCC § 2-316 (2016).
\item[57] NY UCC §§ 2-316(4), 2-718, 2-719 (2016).
\item[58] NY Arts & Cultural Affairs Law § 13.01 (2016). See also NY Arts & Cultural Affairs Law § 15.03 (2016) regarding ‘multiples’ produced on or after 1 Jan. 1982.
\end{footnotes}
depends on the specific facts of the transaction at issue.\footnote{Levin, 2006 US Dist. LEXIS 70184, at *54.} The UCC provides that:

an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.\footnote{NY UCC § 2-313(2) (2016).}

Nevertheless, at least one court has held that an art merchant’s representations to a lay buyer regarding the value of an artwork can create a warranty under NYACAL or under the UCC if they have become part of the bargain.\footnote{Levin, 2006 U.S. Dist. LEXIS 70184, at *53-56 (relying on NY Arts & Cultural Affairs Law § 13.01(1)(b) and NY UCC § 2-313 cmt.8).}

In the absence of suspicious facts, a buyer is generally not required to examine the artwork to confirm the accuracy of the seller’s representations; it suffices if the buyer believes in and relies on those representations.\footnote{Ralph E. Lerner and Judith Bresler, Art Law 96 (4th edn., 2012). See also De Sole v. Knoedler Gallery, LLC, Nos. 12 Civ. 2313 (PGG), 12 Civ. 5263 (PGG), 2015 U.S. Dist. LEXIS 138729, at *103-107 (S.D.N.Y. 9 Oct. 2015) (“In order to demonstrate that an express warranty was created under New York law, a plaintiff must prove that the statement falls within the definition of a warranty, that she relied on it, and that it became part of the basis for the bargain. . . . In any event, the reliance element in a breach of warranty claim is not onerous: the only reliance that is necessary is the buyer’s belief that it was purchasing the seller’s promise as to the truth of the matters stated in the warranty . . . [i.e..] reliance is established if the express warranties are bargained-for terms of the seller.” (internal quotation marks omitted)).}

If, however, the buyer examines the artwork or declines the seller’s demand that he do so, “there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him”.\footnote{NY UCC § 2-316(3)(b) (2016).} The circumstances of the examination and the buyer’s skill and experience will determine which defects will be excluded from a warranty:

- The failure to notice an obvious defect cannot excuse the buyer.
- An examination under circumstances that do not permit chemical or other testing of the artwork does not exclude defects that could be ascertained only by such testing.
- Latent defects cannot be excluded by a simple examination.
- An art merchant examining an artwork will be held to have assumed the risk as to all defects that an art merchant should observe.
- A lay buyer will be held to have assumed the risk only for such defects as a layman might be expected to observe.\footnote{NY UCC § 2-316 cmt.8 (2016).}

A claim for breach of warranty under the NY UCC generally expires four years after the object is tendered, regardless of the buyer’s lack of knowledge of the
breach. Thus, if possible, an art buyer should obtain independent confirmation of the authenticity of his new artwork before the purchase; but in any event, he is well-advised to do so no later than four years after delivery in order to ensure that any warranty claim can still be brought against the seller.

In addition to (or instead of) a warranty claim for a forged artwork, a buyer can, under appropriate circumstances, also claim damages for fraud / misrepresentation and possibly other causes of action, implicating different requirements and limitations rules. Thus, if a warranty claim has expired, a different cause of action may still be timely. Also, while a warranty expires regardless of the buyer’s knowledge, for a fraud claim, the buyer’s actual or imputed knowledge and his reliance on the seller’s representations are centrally relevant.

In New York, a fraud claim expires, inter alia, “two years from the time the plaintiff . . . discovered the fraud, or could with reasonable diligence have discovered it”. “Inquiry notice imposes an obligation of reasonable diligence”. “Where the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him”. Conversely, a buyer who has no reason to suspect a fraud does not have to arrange for forensic testing of the artwork, even if such testing would reveal a forgery.

2. LEGAL FRAMEWORK: GERMANY

Under German law, the legal framework for art transactions distinguishes between the due diligence of the seller and the due diligence of the buyer.

a. Due Diligence of the Seller

In respect of the seller’s liability, fakes, forgeries or counterfeit works of art are considered to have a ‘defect in material’ under section 434 (1) of the German Civil Code (‘BGB’):

67 Id.
68 See e.g. Knoedler, 974 F. Supp. 2d at 295-99.
69 NY CPLR § 213(8) (2016).
70 Knoedler, above, note 66 at 296.
71 Id. at 298.
72 Rosen, 894 F.2d at 36 n.2 (“New York courts have exhibited a reluctance to impute discovery to a plaintiff maintaining a claim of fraud who has no reason to suspect that he has been defrauded”); Knoedler, above, note 66 at 297-98 (“the fact that forensic testing was available to the [buyers] at the time of purchase does not trigger the running of the two-year discovery period, because the [buyers] ‘had no reason to suspect the authenticity of their painting’”).
The object is free from material defects if, upon the passing of the risk, the object has the agreed quality. To the extent that the quality has not been agreed, the object is free of material defects

1. if it is suitable for the use intended under the contract,

2. if it is suitable for the customary use and its quality is usual in objects of the same kind and the buyer may expect this quality in view of the type of the object. …

In contrast to this, works with title issues or third party ownership rights are considered to have a ‘defect in title’ under section 435 BGB:

The object is free of legal defects if third parties, in relation to the thing, can assert either no rights, or only the rights taken over in the purchase agreement, against the buyer. It is equivalent to a legal defect if a right that does not exist is registered in the Land Register.

The legal regime in respect of liability for defects grants three options to the buyer: withdrawal from the purchase (Rücktritt), price reduction (Minderung), or damages (Schadensersatz). While the first two of these three remedies do not require any specific misconduct by the seller, damages may be claimed only where the seller acted wilfully or negligently. Whether negligence or wilful misconduct may be assumed depends on the applicable due diligence standards.

Limitations of liability in the seller’s terms and conditions, for example, a reduction of the length of the limitation period or the exclusion of specific damages, are not valid if the seller acted wilfully or negligently.73

In the case of a seller’s or consignor’s bad faith or wilful misconduct, the buyer may also set aside the purchase agreement (Anfechtung) thus rendering it null and void (sections 123, 142 BGB). Depending on the specific circumstances, this may be more attractive than claims based on liability for defects. Claims for damages based on breaches of due diligence requirements during the initiation of the agreement (culpa in contrahendo claims) remain unaffected by cancellations based on the seller’s or consignor’s bad faith or wilful misconduct.74

b. Due Diligence of the Buyer

aa) Stolen Art

German law strongly protects the owner of goods that have been lost or stolen. In particular, German law excludes any good faith acquisition of an object that has


74 Such claims may be filed on the basis of ‘culpa in contrahendo’ under §§ 280(1), 311(2) No. 1 BGB, see for example LG Köln, 28 Sept. 2012, 19 U 160/12, GRUR-RR 2012, 444, Campendonk.
been stolen or lost or that otherwise went missing (section 935 BGB). Hence, even the good faith purchaser of a stolen object must return the object to the owner and is not allowed to deduct his own purchase price. Good faith acquisition of stolen property is possible only in the case of a sale at an auction publicly performed by a bailiff or other publicly employed auctioneer. ‘Good faith’ is excluded where the buyer positively knew that the seller was not the rightful owner, or where ignoring this fact was grossly negligent. Furthermore, a possessor of stolen goods may acquire ownership through acquisitive prescription (Ersitzung), which requires ten years of peaceful possession with the good faith belief of being the rightful owner (section 937 BGB). As a peculiarity of German law, property and possession may be permanently separated where rightful title claims are time-barred under the statute of limitations. Under German law, the statute of limitations for title claims is 30 years. As a result, even a bad faith purchaser can refuse to return the object after expiry of the 30-year period, although he may never acquire good title.

**bb) Forged Art**

Under German law, a buyer’s claims based on a defect of a work of art are restricted if he was aware of that defect when purchasing the work. For example, if the artwork is a forgery, claims are excluded if the buyer positively knew about the lack of authenticity at the time of buying. If, as a result of gross negligence on his own part, the buyer did not know about the lack of authenticity, he may assert his rights only if the seller either granted a quality guarantee or fraudulently concealed the lack of authenticity within the meaning of section 442 BGB.

3. **LEGAL FRAMEWORK: ENGLAND AND WALES**

**a. Chain of Title**

Under English law, the onus lies with the buyer to investigate the goods being purchased and the principle of *caveat emptor* or ‘buyer beware’ applies to art sales as it does to other sales. The buyer is responsible for asking the right questions of the seller and conducting independent due diligence. A seller has no duty to volunteer information but must not make any misrepresentations, whether innocent, negligent or fraudulent. This is important in relation to all aspects of an artwork, and includes eliciting information about its provenance and chain of title.

The ‘*nemo dat*’ rule (*nemo dat quod non habet*) is the basic principle in relation to the transfer of title on the sale of goods, including artworks, and means that no one can transfer a better title to goods than the one which he possesses.\(^{75}\) It follows that one cannot gain good title from a thief.

\(^{75}\) This is reflected in s. 21(1) of the SGA 1979 in the following terms: “Where goods are sold by a person who is not their owner, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller has unless the owner of the goods is by his conduct precluded from denying the seller’s authority to sell.”
The sale and purchase of artworks is governed, in principle, by the Sale of Goods Act 1979 (‘SGA 1979’), as well as by a series of other overlapping statutory instruments and regulations, some domestic and others imposed by European law. Much new primary and secondary legislation has been introduced in recent years with the objective of furthering consumer protection and this legislation likewise applies to the acquisition of artworks. In England, this culminated in the coming into force of the Consumer Rights Act in October 2015.

A contract of sale can exclude or vary the implied terms of the SGA 1979 to an extent, although some provisions are mandatory and cannot be varied or excluded by contract. The term set out in section 12(1) of the SGA 1979 in relation to title cannot be excluded. Section 12(1) reads:

In a contract of sale … there is an implied term on the part of the seller that in the case of a sale he has a right to sell the goods, and in the case of an agreement to sell he will have such a right at the time when the property is to pass.

A seller’s breach of this implied term will mean that the contract can be brought to an end or the buyer can seek payment of damages instead.76 Liability for a defect in title can remain with the initial seller regardless of whether there are successive transactions. Subject to limitation periods, each person in the chain of title can sue their predecessor in title for return of the purchase price.

A further and separate warranty in relation to title is implied by section 12(2) of the SGA 1979, which provides that a term is implied that:

(a) the goods are free, and will remain free, until the time when the property is to pass, from any charge or encumbrance not disclosed or known to the buyer before the contract is made, and

(b) the buyer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known.

The seller’s breach of this term will allow the buyer to claim damages.77 The remedies in section 12 are available to the buyer for a period of six years following the sale, except in certain circumstances described below, in which the start of that limitation period can be delayed, after which time the expiry of the limitation period will bar the buyer from pursuing the seller.78 Naturally, any remedy is of use to the buyer only if the seller can be located in the intervening period and remains solvent. A buyer should not only investigate title and thoroughly check the provenance of an object prior to acquisition but should remain vigilant following the purchase, in case

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76 Section 12(5A) SGA 1979 gives the buyer the right to treat the contract as repudiated and claim damages or, alternatively, affirm the contract and claim damages.

77 Id.

78 Section 5, Limitation Act 1980.
adverse information comes to light later, and should act promptly if any suspicions are raised. In reality, it is often the case that defects in title may come to light only years down the line, at which point the buyer may no longer have any legal recourse and will have to rely on the seller’s goodwill to obtain a refund of the purchase price or other compensation. This emphasises further the need to carry out appropriate pre-acquisition due diligence, in particular, verifications as to title and authenticity, before entering into a transaction in relation to any artwork.

b. Circumstances Affecting Transactional Security

While the limitation period may exclude a buyer’s recourse against a seller for breach of contract, it also offers transactional security, which can benefit both parties. Under the Limitation Act 1980, there are exceptions to the six-year limitation period, however, which can extend it sometimes indefinitely, and mean that a transaction retains the potential to be undone. The primary exception relates to the case of goods that have been stolen at some point in their history. The true owner of an artwork which has been stolen, in principle, never loses the right to pursue the thief to recover the artwork.79 If the thief has made a gift of the stolen item to someone else, the owner can pursue the recipient, 80 or if the stolen item has been purchased in bad faith, he can sue the purchaser. Likewise, if the purchase was made in good faith but proceedings are brought before the limitation period expires, 81 However, if the item has been purchased in good faith, for value, and without notice of the true owner’s rights, that purchaser can acquire good legal title if a claim is not made until after six years have passed from the date of the first good faith purchase. The combination of a good faith purchase and the passage of time can therefore cure a defect in title arising from theft.

The burden of proving that the purchase was made in good faith lies with the defendant (being the immediate or subsequent purchaser or possessor) and is not an easy task. The statutory interpretation of good faith in the SGA 1979 is that: “a thing is deemed to be done in good faith within the meaning of this Act when it is done honestly, whether it is done negligently or not”. 82 The common law meaning of the term has evolved, however, and it could be argued that honesty is no longer a

79 Section 4(1), Limitation Act 1980. This was not the case under the Limitation Act 1939: the limitation period is therefore likely to apply to artworks stolen prior to 1939, even in the case of a thief or someone who derives title from a thief.

80 For a recent example of this principle in relation to a gifted artwork under the law of Victoria, Australia, see Levy v. Watt [2014] VSCA 60, noted by Alexander Herman in (2014) XIX Art Antiquity and Law 267.

81 This is because, pursuant to s. 4(2) of the Limitation Act 1980, the rule in s. 4(1) applies to “any conversion related to the theft of a chattel as it applies to the theft of a chattel”. See Bumper Development Corporation Ltd v. Metropolitan Commissioner for Police [1991] 4 All E.R. 638, which concerned the good faith purchase by Bumper of a religious idol unlawfully excavated in India and for which the selling dealer had produced a false provenance for the purpose of making the sale; and De Préval v. Adrian Alan Ltd (1997) unrep., 24 Jan, per Arden J., noted by Ruth Redmond-Cooper in (1997) II Art Antiquity and Law 55.

82 Section 61(3), SGA 1979.
complete defence. Due diligence is key. Case law has established that, certainly in circumstances involving dealers experienced in the art market, failure to perform a search against a public register of stolen art (such as the Art Loss Register or Interpol database) may prevent a trade buyer from claiming that an item was purchased in good faith. Unsurprisingly, disreputable dealers who regularly transact in cash, store paintings under their beds, and keep no records of where or when paintings were acquired, are likely to have imputed to them the knowledge or at least suspicion that they are dealing in stolen paintings. Particularly in cases where a valuable, unusual or significant object has been purchased and is later discovered to be stolen, the purchaser must also be able to show that he made appropriate enquiries before acquiring the object. Although not tested, this requirement should not be assumed to be limited to members of the art market, and, in practice, all buyers should make further investigations and reasonable enquiries and consult professional advisers if the item is valuable or encountered in unusual or suspicious circumstances.

Other potential extensions to the six-year limitation period apply in the case of fraud on the part of the seller, or where the seller deliberately conceals the buyer’s right of action, or by virtue of a mutual mistake, in which case the limitation period does not start to run until the buyer discovers, or could with reasonable diligence have discovered the fraud, concealment or mistake. Whether the buyer has been ‘reasonably diligent’ will depend on the context of the purchase and the facts of each individual case, including the relative expertise of the parties and the degree of reliance placed by the buyer on the seller’s reputation and advice. The judicial interpretation of the term given by Webster J. in Peco Arts Inc v. Hazlitt Gallery Ltd is that:

reasonable diligence means not the doing of everything possible, not necessarily the using of any means at the plaintiff’s disposal, not even necessarily the doing of anything at all; but [that] it means the doing of that which an ordinarily prudent buyer and possessor of a valuable work of art would do having regard to all the circumstances, including the circumstances of the purchase.

In that case, an individual acting on behalf of the claimant bought a drawing, purportedly by Ingres, from a reputable dealer, on the recommendation of a nineteenth-century-drawings expert. The drawing turned out some years later to be a worthless reproduction and the buyer sued the seller for return of the purchase price on the

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86 Section 32, Limitation Act 1980.
87 See Peco Arts Inc v. Hazlitt Gallery Ltd [1983] 1 W.L.R. 1315. Note also that in this case the Judge found that any negligence on the part of the buyer’s agent was not, under s. 32, to be attributed to the buyer (although negligence on the part of the seller’s agent may be so attributable).
88 Id. at 1323.
basis of a mutual mistake of fact. The question was whether the buyer had used reasonable diligence to discover the mistake so that the action would not be time-barred, despite more than six years having passed from the date on which the cause of action arose. In the particular circumstances, Webster J. found, on the evidence presented by the claimant-buyer, and on the particular point in relation to whether his action should be time-barred, that he was entitled to rely on the recommendation of the expert and to assume that the expert and the seller were satisfied that the drawing was authentic. The Judge concluded that a prudent purchaser would have done nothing further in obtaining independent verification of the authenticity of the drawing and the claimant had therefore exercised the reasonable diligence necessary to suspend the limitation period.

c. The Need for a Written Contract

Despite the protection afforded by statutory implied terms, a buyer should negotiate bespoke terms wherever possible and conduct appropriate searches in relation to the seller, and any agents, as well as the artwork. At the most basic level, a bankruptcy or insolvency search should be made against the seller, and a company search, if the seller trades through a company. If the artwork is bought in the secondary market, it should be checked against a public register of lost and stolen art. Such checks are made routinely by the major auction houses in preparation for sales but will otherwise be the responsibility of the buyer. As there is no central repository of information relating to liens against goods in the United Kingdom, the buyer will be unable to confirm whether the artwork is subject to a charge. While the implied terms of the SGA 1979 offer some protection in such a situation, a prudent buyer will insist on express contractual warranties as to the seller’s legal title and right to sell and that title being free from encumbrances, backed up by an indemnity from the seller. If the value of the artwork so merits, the buyer may also consider obtaining title insurance to protect against provenance and chain of title risks and, if necessary, cover legal defence costs in the event that a third party challenges the buyer’s title.

d. Establishing Authenticity

A growing trend in the contemporary art market is for works to be sold with a certificate of authenticity, which is a unique document supplied by the artist or seller that verifies that the artwork is authentic. To be effective, a certificate of authenticity should be signed and dated by the artist and should include details of the title of the artwork, materials used, the name of the artist, the year of creation of the work, its exact dimensions, the country in which it was created, whether it is an original or reproduction (and, if a reproduction, the details of the number of the impression and edition size) and a certificate number. There is no requirement for such certificates to be issued, and they are sometimes viewed with scepticism as they can quite easily be forged and have no value if they do not sufficiently and clearly identify the work.

89 Id. at 1325.
90 Other common law jurisdictions do have such registers: see the Personal Property Securities Act 2009 (Australia) and the Personal Property Securities Act 1999 (New Zealand).
to which they relate. Unfortunately, it is a truism to say that forged artworks will normally be accompanied by forged documentation in an attempt to give them the appearance of legitimacy. While a certificate of authenticity is an added reassurance if produced correctly, it is not a substitute for independently verifying the authenticity of an artwork.

There is no general duty under English law for a seller to disclose information about an artwork to a buyer. Even where a seller or an agent of the seller, whether or not a professional, has assumed a responsibility giving rise to a duty of care towards a buyer, he is not normally obliged to draw attention to ‘obvious’ features of an item for sale. The definition of what is obvious will depend on the characteristics and experience of the buyer.91 A buyer may have an action against a seller in particular circumstances, such as where an artwork was bought in reliance on an unambiguous and material representation made by the seller, or a knowingly false statement that the work is by a particular artist. The overriding principle of caveat emptor dictates, however, that a buyer, no matter how inexperienced, is responsible for ensuring that he has received sound advice and, as far as possible, ascertained the authenticity of an artwork before purchase.

e. Sale by Description

The Sale of Goods Act 1979 gives the buyer some protection in the form of implied terms relating to the conformity of an artwork with the description given to it by the seller. However, this protection is less effective in practice than that afforded by the implied terms in relation to title.92 The implied term in section 13(1) SGA 1979 provides that goods sold by description must correspond with their description. A sale by description occurs when the sale is of specific goods, which are:

bought by the buyer in reliance, at least in part, upon the description given, or to be tacitly inferred from the circumstances, and which identifies the goods.93

The section 13(1) implied term is a condition, a term whose breach, in theory at least, entitles the purchaser to repudiate the contract and/or claim damages if the work is found to be a fake or forgery or otherwise not as described. However, this does not accord with the traditional approach of the courts. The judicial response to claims made on the basis of a sale by inaccurate description has been dismissive, showing a marked reluctance to attach legal consequences to a seller’s statements concerning the authenticity of an artwork.94 The leading cases to date have involved dealers

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92 This is due in part to the courts’ reluctance to attach legal consequences to sellers’ statements about authenticity and the pre-eminence of the principle of caveat emptor, and in part due to the fact that s. 13 can be restricted contractually except in relation to consumers, subject to a reasonableness test.
93 Joseph Travers & Son Ltd v. Longel Ltd (1948) 64 T.L.T. 150.
and other members of the trade or corporate buyers, rather than individuals who have greater protection afforded to them as consumers, so it is arguable that future decisions involving sales to private individuals may be decided differently.\textsuperscript{95} As the law stands, however, statements of opinion about the authenticity or other aspects of an artwork made by a seller are not generally actionable.

In \textit{Harlingdon and Leinster Enterprises Ltd v. Christopher Hull Fine Art Ltd},\textsuperscript{96} emphasis was placed on the fact that the case was one between two art dealers and that the principle of \textit{caveat emptor} prevailed. The claimants, who had bought a forged Gabriele Münter painting from the defendants, sued the defendants \textit{inter alia} for breach of the condition implied by section 13(1), on the basis that the painting did not correspond with its description as a genuine work of the artist. Nourse L.J. stated in his judgment that:

\begin{quote}
Frequently the seller makes an attribution to an artist, although the degree of confidence with which he does so may vary considerably. In some cases the attribution may be of sufficient gravity to become a condition of the contract. In others it may be no more than a warranty, either collateral or as a term of the contract. Or it may have no contractual effect at all. Which of these is in point may depend on the circumstances of the sale; there being, for example, a difference between a sale by one dealer to another and by a dealer to a private buyer.\textsuperscript{97}
\end{quote}

The Court ultimately found that the claimants had relied on their own assessment of the painting, and not on the defendants’ description. In addition to considering the expertise of the parties and their common intention, the Court also explored customary practice in the art market and concluded that an attribution by the seller is not generally considered a matter of importance in dealings between two professionals.

In \textit{Drake v. Thos Agnew & Sons},\textsuperscript{98} the issue between the parties was the authenticity of a painting that was attributed to Sir Anthony van Dyck. The buyer, a private individual who had purchased the work through an agent, alleged that the sale was one by description and that the implied condition that the painting was by van Dyck had been breached. The defendant, a gallery, argued that its statements about attribution made leading up to the sale, and also printed in its brochure and on its sale invoice, were statements of opinion only and had not become terms of the contract. Furthermore, the defendant had drawn to the attention of the buyer’s agent certain doubts held by other experts in the field about the attribution of the painting. The

\begin{footnotes}
\item[96] Above, note 94.
\item[97] \textit{Id.} at 568.
\item[98] [2002] EWHC 294 (Q.B.); [2002] All E.R. (D.) 107 (Mar.).
\end{footnotes}
agent did not disclose this information to the buyer. The judge found in favour of the defendant, holding that the attribution was indeed an opinion, rather than a term of the contract, and that no sale by description had taken place. The Judge found that the buyer’s agent had not placed any reliance on the seller’s statements and, in particular, had not been concerned about whether the authorship of the painting was genuine. The agent’s principal concern had been to secure his commission. While unfortunate and costly for the buyer, he was bound by the actions of his unscrupulous agent and had no remedy against the seller. *Drake v. Agnew* highlights the importance of due diligence, not only in respect of authenticity, but also in relation to exercising care in choosing and relying on agents and intermediaries when buying art.

**f. Limited Contractual Authenticity Warranties**

Sales at auction, unlike sales between art dealers and agents, are traditionally held to be sales where the descriptions used in relation to goods are of critical importance. As a result, most auction houses rely on carefully worded terms and conditions to seek to exclude liability for statements of opinion. Christie’s current Conditions of Sale, for example, state that:

> Our description of any lot in the catalogue, any condition report and any other statement made by us (whether orally or in writing) about any lot, including about its nature or condition, artist, period, materials, approximate dimensions or provenance are our opinion and not to be relied upon as a statement of fact. . . .

Christie’s and other auction houses seek to exclude liability for cataloguing errors

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100 See De Balkany v. Christie, Manson & Woods Ltd (1995) Independent, noted by N.E. Palmer in (1996) I *Art Antiquity and Law* 49, where the auction house was held liable to the buyer of a painting for a false attribution. The case turned on the wording of Christie’s then standard terms which Morison J. held were sufficient to protect the auction house in case of negligent misattribution, but did not extend to protect them in respect of a forgery (which this case, involving the overpainting of a work by Schiele, was deemed to be). This should be compared with the earlier decision in *Hoos v. Weber* (1974) 232 *Estates Gazette* 1379 where it was held that Sotheby’s owed buyers a duty of reasonable care in making an attribution, notwithstanding a term in the then terms of business that “statements [as to authorship, attribution, origin, date, age, provenance and condition] are statements of opinion and are not to be taken as statements or representations of fact”; however, on the facts of that case, Sotheby’s had exercised proper skill and care in making the attribution at issue and were therefore not liable to the buyer. See also Morin v. Bonham & Brooks Ltd [2003] EWCA Civ 1802, noted by M. Bristow in (2008) XIII *Art Antiquity and Law* 105, where Mance L.J. in the Court of Appeal stated *obiter*, (at para. 24), that while the auction house’s conditions of sale purported to exclude any liability for the description of the item sold (a classic car), and referred to statements in the sale catalogue as statements of ‘opinion’ only, “It is a usual implication in relation to any expression of opinion by a professional person that due diligence has been exercised in preparing and expressing the opinion”.

and incorrect attributions to the greatest extent possible;\textsuperscript{102} if, however, an artist’s name is printed in upper case type in the catalogue, Christie’s warrants that the lot is the authentic work of the artist in question. If the work turns out to be a forgery,\textsuperscript{103} a purchaser has a period of five years from the date of purchase to return the work and claim a refund from Christie’s under the terms of its limited authenticity warranty, subject to a prescribed procedure being followed. The contract terms of many other auction houses contain similar limited authenticity warranties. In order to avail himself of the benefit of these limited warranties, the buyer must comply strictly with their requirements, in particular, as to notice.

Limited contractual warranties are often subject to a number of exceptions, which mean that they preclude the return of most artworks that are short of being outright forgeries. Christie’s will decline to take back artworks in cases where:

- the catalogue description or saleroom notice correspond to the generally accepted opinion of scholars or experts at the date of the sale or fairly indicated that there was a conflict of opinions

or cases where:

- correct identification of a lot can be demonstrated only by means of either a scientific process not generally accepted for use until after the publication of the catalogue or a process which at the date of publication of the catalogue was unreasonably expensive or impractical or likely to have caused damage to the property

(the so-called ‘state of the art’ exception).\textsuperscript{104}

Dealers and private sellers may also offer such limited contractual warranties in order to give their buyers peace of mind; they assume, however, that the seller will be in a position to repay the purchase price at a future date. Naturally, sellers will seek some transactional security, and impose a time limit within which claims under a contractual warranty can be brought, which again means that buyers should maintain their vigilance following the purchase. In the absence of a standard contract term to this effect, a buyer should seek to negotiate the addition of an express term clarifying that the buyer is relying on the seller’s description of the artwork, and that the seller warrants the accuracy of the description and indemnifies the buyer for any loss of value if the artwork is not genuine. These provisions will assist the buyer if, on further examination or additional information coming to light after the purchase, the artwork turns out not to be an autograph work. In the present contemporary

\textsuperscript{102} Purchasers buying at auction can lose their rights under the SGA 1979 if the goods are second hand (which will be the case with all secondary art market sales), the purchaser had the opportunity to attend the sale in person, he was told that the SGA 1979 did not apply, or that the goods were sold as seen (which could be by way of a notice or exclusion clause in the catalogue), and the auctioneer can show that this was reasonable.

\textsuperscript{103} The definition of a ‘forgery’ was considered in \textit{De Balkany v. Christie’s}, above, note 102.

\textsuperscript{104} \textit{Id.}, p. 231.
market, where artworks are often bought online or at temporary exhibitions and fairs, it is conceivable that there may not be time to make careful investigations before purchasing a work. Continuing diligence immediately after the sale, including careful collection management, regular insurance valuations and condition reports, can help to alert a new owner to problems, which if caught in time may still be remedied.

While such practical measures should always be undertaken, the Consumer Rights Act 2015 has consolidated and in some respects strengthened legislative provisions relating to consumer protection which may serve to provide additional safeguards to a buyer who qualifies as a ‘consumer’\textsuperscript{105} in certain circumstances.\textsuperscript{106} Further protection for consumers is provided by the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 which apply to distance, off-premises and on-premises contracts made on or after 13\textsuperscript{th} June 2014. The significance for the art market of these provisions has increased markedly in recent years with the rapid increase in online transactions.

**D. PRACTICAL ADVICE FOR DUE DILIGENCE IN THE ART MARKET**

Based on the case studies discussed above, and in light of the legal frameworks in the three jurisdictions we have explored, buyers, sellers and consignors in those countries are well advised to consider certain precautionary measures before entering into an art transaction. While these precautions cannot completely exclude legal or other problems, they will certainly reduce the risk of adverse legal consequences. The art market participant is urged to consider taking the steps suggested below, as well as such further precautions as may be appropriate for the particular transaction contemplated. While New York law requires some ‘measure of due diligence’,\textsuperscript{107} it is not at all clear precisely what is required.\textsuperscript{108} Similarly, German law does not provide any specific measures of care to be applied in the art market. Under UK law, the premise of \textit{caveat emptor} still prevails.

Despite this absence of detailed guidelines by the legislators and courts of all three jurisdictions, one may highlight the following good practice measures to be taken into account by buyers and consignors as well as dealers buying or selling works of art in all three countries.

As discussed above, the presence of ‘red flags’ regarding the question of ownership

\textsuperscript{105} Section 2(1) of the Consumer Rights Act 2015 defines the term ‘Consumer’ as meaning an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession.

\textsuperscript{106} For a wider discussion of consumer protection in art transactions, see Gregor Kleinknecht and Petra Williams-Lescht, ‘Consumer Protection in Art Transactions’ (2014) XIX \textit{Art Antiquity and Law} 145.

\textsuperscript{107} \textit{Davis v. Carroll}, above, note 15 at 424.

\textsuperscript{108} \textit{Id.} at 425-26 (“New York law does not expressly identify the triggers of a duty of heightened inquiry in the art industry. Precedent inclines more toward the enumeration of possible red flags than a detailed description of their commercial norms or legal duties.”).
in an art acquisition triggers a ‘heightened duty to inquire’ on the part of the buyer. US and German courts have pointed to the following facts as constituting examples of red flags:

- The sale price is obviously below market value;\(^\text{109}\)
- The negotiations or procedure of the sale differ from previous transactions between the buyer and the seller;\(^\text{110}\)
- The buyer is aware of the seller’s financial difficulties;\(^\text{111}\)
- The buyer has reason to doubt the seller’s ownership of the artwork;\(^\text{112}\)
- Payment for the artwork is made in cash;\(^\text{113}\)
- The buyer and the seller meet in a hotel room or in other dubious circumstances to close the deal;\(^\text{114}\)
- The buyer does not receive any documentation regarding the provenance or there are significant gaps in the provenance information provided.\(^\text{115}\)

Of course, this list is not exhaustive and will vary depending on the particular facts and circumstances.

When those types of warning signs were present, ‘some combination of’ the following tasks has been required of art buyers to satisfy their ‘heightened duty of inquiry’:

- Inquire directly of the seller and insist upon a clear answer or documentation regarding the provenance\(^\text{116}\) or otherwise regarding his or her ownership or rights of sale;\(^\text{117}\)
- Consult with the authors and preparers of any forthcoming, definitive *catalogue raisonné*;\(^\text{118}\)

\(^{109}\) *Joseph P. Carroll Ltd v. Baker*, above, note 8 at 604.

\(^{110}\) *Id.*

\(^{111}\) *Id.*

\(^{112}\) *Id.* Such reasons to doubt the seller’s ownership could, for example, consist of evasive behavior or contradictory statements by the seller regarding the ownership.


\(^{114}\) *Id.*; OLG Hamm, NJW 1994, 1967, *Carl Schuch*.


\(^{117}\) *Davis*, 937 F. Supp. 2d at 436.

\(^{118}\) *Davis*, 937 F. Supp. 2d at 436; OLG Hamm, NJW 1994, 1967, *Carl Schuch*. 
• Consult with the artist’s estate, his heirs, scholars of his work and/or publicly known owners of his works;\textsuperscript{119}

• Review the publications cited in the cataloguing materials before entering into the deal;\textsuperscript{120}

• Examine the seller’s list of retail prices of other works on sale “to more accurately ascertain whether the prices were so low as to provide cause for concern.”\textsuperscript{121}

Again, these steps are neither exhaustive nor applicable or mandatory in each and every case.

Even if there is no specific basis for suspicion, it is good practice for any art buyer, and certainly for professional art market participants, to make adequate enquiries before proceeding with a purchase, such as:

• Close examination of the work, especially with regards to its condition and authenticity;

• To the extent possible, perform research on the solvency of the seller;\textsuperscript{122}

• Insist on a written purchase contract, purchase order and/or invoice;

• Request written provenance information;

• Research in the relevant literature, in particular, in the catalogue raisonné, which may provide essential information as to the provenance, authenticity and ownership of the work;

• Consult online databases and registers such as the Art Loss Register (<www.artloss.com>), the Lost Art Database (<www.lostart.de>) or Art Recovery International (<www.artrecovery.com>) to determine whether the work may have been registered as stolen;

• In high-value transactions, consider obtaining art title insurance;

\textsuperscript{119} Davis, 937 F. Supp. 2d at 436; OLG Hamm, NJW 1994, 1967, Carl Schuch.

\textsuperscript{120} Davis, 937 F. Supp. 2d at 436.

\textsuperscript{121} Id.

\textsuperscript{122} In Germany, it is possible to obtain credit information from SCHUFA (<https://www.meineschufa.de/index.php>) or in the latest insolvency publications (<https://www.insolvenzbekanntmachungen.de>). In the United Kingdom, commercial credit reference agencies, such as Equifax or Experian provide information; Companies House now offers a free search facility in relation to companies, which includes statutory accounts, mortgage charge and insolvency data (<https://beta.companieshouse.gov.uk/help/welcome>). In the United States, on the other hand, solvency information is generally not publicly available. Rather, buyers are urged to protect their interests by researching whether the artwork at issue is being used as security for a loan, etc. This is done by performing a so-called UCC Search’, which is a search in public databases for liens filed against a debtor’s assets. For example, the New York State database can be found at <http://appext20.dos.ny.gov/pls/ucc_public/web_search.main_frame>.
• Where the artwork in question has previously crossed international borders, whether it is accompanied by all relevant export/import licences and permissions and whether all applicable taxes and duties have been paid;
• Obtain independent confirmation of the authenticity of the artwork before or soon after the purchase; and
• Where relevant, commission external expert reports, in particular, in relation to condition and attribution, based on stylistic, art historical or scientific analysis (for example, infrared and x-ray analysis, pigment analysis) as well as provenance research.

Conversely, it is good practice for consignors to take some basic steps before entrusting their artworks to a gallery, including:

• Obtaining financial information about the gallery’s liquidity;
• Insisting on a written consignment agreement, setting forth all rights and obligations of the parties, including provisions for the consignor to retain ownership in the event that the gallery becomes insolvent;
• Requesting periodic reports on the status of consigned artworks (accounting);
• Regularly visiting the gallery space in person and confirming the physical presence of the consigned artworks;
• Requiring the gallery to post signs informing potential buyers that the works are held on consignment.

For sellers, the standard of care required may be particularly high if the seller is a professional dealer or auction house. German law requires art market professionals to apply the ‘due diligence of a prudent merchant’ as laid down in sections 347(1) and 384(1) German Commercial Code (‘HGB’), namely a “level of care that a prudent and considerate member of the relevant business circles would apply”.

123 If a renowned expert has approved the work before it is sold, this may serve as an argument for having complied with applicable due diligence standards, BGH, 15 Jan. 1975, VIII ZR 80/73, GRUR 1975, 612, 614, Jawlensky.
124 Where a prestigious auction house sells a work with high price potential and an uncertain provenance and attribution, the auction house’s duties of care may include an obligation to have a scientific analysis of the painting executed before the sale to ensure that the work is not a forgery, in particular, by way of a pigment analysis (LG Köln, 28.9.2012, 19 U 160/12, GRUR-RR 2012, 444, Campendonk); see also the case study in Section B.2 above for further details.
125 In Germany, the relevant financial statement could be based on a SCHUFA certificate. In the United Kingdom, a company’s financial status is a matter of public record. See above, note 122. In the United States, consignors are urged to establish a lien over the artwork by filing a UCC-1 Financing Statement and requiring the gallery to co-operate in the process.
126 It is also a good idea to become familiar with any relevant state art consignment laws. See, e.g., NY Arts & Cultural Affairs Law § 12.01 (2016).
Standards of Care in the Art Market

In the United States, any seller of a work of art can create a warranty concerning a particular characteristic by merely describing the work. If such a description is incorrect, the seller can be liable to the buyer. In addition, if the seller of the artwork is an art dealer, a warranty of merchantability is implied in any sales contract, unless it is validly excluded or modified. In order to succeed in a claim against the seller for breach of warranty, it is irrelevant whether the seller was negligent in his duties or not: the level of the seller’s diligence is immaterial. The seller should, therefore, carefully phrase any statements of fact regarding the work of art at issue and, in addition, consider contractually excluding or modifying warranties where possible.

In England and Wales, a seller has no duty to volunteer information but must not make any misrepresentations about an artwork. Higher professional standards are, however, required by the codes of practice of trade associations such as the Association of Art & Antiques Dealers (LAPADA), which requires that:

- The Member shall give to the Customer as much clear and accurate information as is reasonably practicable about the article in question, and this shall normally include: The approximate date or period (e.g. Regency, Art Deco) of manufacture or, if hallmarked/date-marked, the actual year; The material in which the article is predominantly made (e.g. walnut, bronze, oil on canvas); The maker or artist’s name, if known, together with any provenance if known; Any major restoration or later additions.

The British Antique Dealers’ Association (BADA) similarly requires that:

- Any article offered for sale by a Member shall have a label either affixed to or placed immediately alongside it containing:
  - (a) a clear and accurate description of the article; and
  - (b) if applicable, a proper attribution of the article; and
  - (c) the approximate date of manufacture of the article.

As the cases sparked by the Salander-O’Reilly Gallery fiasco or the Beltracchi scandal demonstrate, however, it cannot be predicted with absolute certainty whether a court in a particular case will, in hindsight, view these or similar steps as adequate. Nonetheless, art buyers, consignors and sellers alike should be mindful of the risks.

128 See section C.1.c., above.
129 In this respect, the ‘conditions of sale’ of the various auction houses are instructive, as they often contain lengthy terms and conditions, detailed terms of guarantee and a comprehensive glossary of terms, as well as a ‘symbol key’, which explains the meaning of the different symbols that are part of the description of each lot.
130 Conversely, a buyer should thoroughly review the terms and conditions of the art dealer or auction house in order to determine exactly what is warranted and what is not.
they face and consider taking steps to mitigate the risk of litigation or, worse, of losing a valuable work of art.

E. CONCLUSION

In light of the risks and requirements discussed above, one may be tempted to think of today’s art market as a minefield, full of pitfalls and impediments in a hazardous investment environment. It is certainly true that exposure to risk in the art market is a serious issue, even for those who have many years of experience as art dealers. Careful attention to the ‘red flags’, legal frameworks and practical steps discussed above will help to reduce the likelihood of unwelcome surprises, both in the art market itself as well as potentially later in court. The risk of legal disputes concerning authenticity or title arising following the acquisition or divestiture of artworks depends largely on whether or not one has acted with the degree of care required by local laws. Appropriate due diligence is thus the key to reducing investment risks in the art market. Despite some differences of position and focal points between the United States, Germany and England, the basic measures required from buyers, consignors and sellers to avoid liability risks are similar in all three jurisdictions.