

# Art Transaction Due Diligence Toolkit - Explanatory Notes

Due diligence forms an essential part of art transactions. Investigating and obtaining as much information as possible about the parties to the proposed transaction, the artwork and the transaction itself protects art businesses and collectors and helps art businesses manage their reputational and financial risks. Gathering and holding such information may entail additional responsibilities particularly in terms of data protection where personal information relating to individuals is concerned.

## What is the 'toolkit'?

The toolkit is a non-exhaustive compilation of verifications aimed at mitigating risks which can arise in art transactions. It is designed as an “aide-memoire” of the key areas of enquiry when conducting due diligence, identifying various checks which could be considered and/or carried out in particular regarding (1) the parties involved in an art transaction, (2) the artwork and (3) the transaction itself.

The toolkit does not purport to create new standards beyond existing legal obligations or to set a uniform standard to be applied in all transactions. Depending on the circumstances, the suggested checks may not be appropriate, practicable or necessary. Conversely, they may not be sufficient. In all cases, applicable laws should be complied with.

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## How should the 'toolkit' be used?

The toolkit should be used adopting a “risk-based” approach to help determine the level of due diligence required when entering into an art transaction. Enquiries should be tailored to any risk factors (red flags) which are present. In this way, art businesses can target their resources and efforts in the most effective way. It is appreciated that a small dealer, gallery or collector does not have at their disposal the same resources as a large, international auction house with an internal compliance department.

For guidance on adopting a “risk-based” approach to using the toolkit, please see below.

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## What is a 'risk-based' approach and how do I apply it?

A risk-based approach means identifying and understanding the risks to which you are exposed, establishing your appetite for risk and taking commensurate measures to mitigate the risks effectively and efficiently.

To establish the risk profile of a potential transaction, it is helpful to consider the following:

- **the nature of the client:** Are they an existing client who is well known to the art business or a new client?
- **the nature of the artwork:** Is it of high or low value? Does it have characteristics which make it sensitive or which require further investigation? Has it been authenticated in the past?
- **the nature of the transaction:** Is it taking place through intermediaries, face to face or entirely via the Internet or other non-face to face means? It is unusually complex?

Higher risk factors include:

- Clients who are PEPs or associated with PEPs;
- Artworks without an established and verified provenance;
- Transactions which occur entirely via non-face to face means or which are unusually complex.

Lower risk factors include:

- Long-standing clients with a clean transaction record;
- Authenticated artworks with an established and verified provenance;

- Transactions which take place face to face, or which involve low value artworks.
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## What is Due Diligence?

“**Due diligence**” is commonly defined as “*action that is considered reasonable for people to be expected to take to keep themselves or others and their property safe*”.[1] In practice, it is about asking the right questions, obtaining and verifying information and applying common sense.

Where we use the term “due diligence” in the toolkit, we are referring to this common definition and not to any legal definition which may exist in certain legislation.

[1] Cambridge Advanced Learner’s Dictionary & Thesaurus, Cambridge University Press.

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## Why is Due Diligence important?

For anyone involved in art transactions, due diligence is important for managing reputational and financial risks. Situations where due diligence is advised include:

- Acquisitions, sales, donations, loans and exchanges of artworks;
  - Management of art collections by fiduciary service providers and advisors;
  - Financial transactions and investments involving artworks including loans secured against artworks;
  - Curation of exhibitions and art fairs;
  - Arranging insurance, storage and/or transportation of artworks.
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## Who should use the checklists?

Whilst the checklists are specifically aimed at Art Businesses[2] and collectors involved in selling or acquiring art, anyone engaging in the activities described above may find the checklists helpful.

[2] as defined in RAM’s Guidelines on combatting Money Laundering and Terrorist Financing

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## Checklist 1 - CLIENT DUE DILIGENCE

### 1.1 Individual

Identity should be verified based on official identity papers (e.g. passport or national ID card) together with other reliable, independent source documents, data, or information as may be appropriate under the circumstances (e.g. copy of a bank statement or utility bill for proof of address).

The documents used to verify the client’s identity must be current at the time of undertaking the due diligence and the Art Business should keep copies of the documents in line with any legal time periods or standard practice applying in the jurisdiction where it is carrying out business. Please refer to Guideline 6 “Keep records” of the AML/CFT Guidelines for further guidance.

Internet searches and the use of specialist screening services (screening against up to date PEP and sanction lists) can be useful when checking the client’s identity. If a standalone subscription to a screening service is beyond the art businesses resources, they could consider consulting their bank or other financial institutions, who may be able to offer such screening as part of their banking services.

## 1.2 Company, trust, association, foundation, other legal entity

Identity should be verified based on official documents proving these entities were properly formed and exist (e.g. certificate issued by the relevant company registry including details of directors and, if available shareholders, or partners as the case may be, and for trusts, the trust deed including details of the trustees, settlor(s) and beneficiaries).

The documents used to verify the client's identity must be current at the time of undertaking the due diligence and the Art Business should keep copies of the documents in line with any legal time periods or standard practice applying in the jurisdiction where it is carrying out business. Please refer to Guideline 6 "Keep records" of the AML/CFT Guidelines for further guidance. Holding personal data may also entail obligations in terms of data protection as required by applicable laws.

### **Companies - Controlling owner**

The Art Business should verify who has management control over the company or who is the company's controlling owner, i.e. who is the company's majority shareholder, or who is the single largest or the largest shareholders of the company. Some countries' commercial registers list the shareholders of registered companies. These registry excerpts may be useful in identifying controlling owners.

### **Trusts - Settlor, trustees, beneficiaries, protector**

The settlor is a person or entity that establishes a trust for one or more beneficiaries. Each trust is controlled and managed by trustees. The protector is a person appointed under the trust instrument to direct or restrain the trustees in relation to their administration of the trust. It is important to identify who the trustee is and whether he/she has the power to sell the Artwork.

### **Offshore companies - Beneficial owner**

If the client is a company, trust or other corporate vehicle, in addition to establishing if the corporate vehicle carries out any trading activities or simply exists to hold assets, the Art Business will also want to identify the natural person(s) who control that entity ("**Beneficial Owner(s)**").

The "**Beneficial Owner**" refers to the natural person who enjoys the ultimate benefit of ownership of an artwork, asset, legal entity, bank account or wealth.

If the Art Business knows, or has reason to suspect that the client they are transacting with is acting on behalf of another individual or entity, the Art Business must use best efforts to establish:

- the identity of that other individual or entity, i.e. the Beneficial Owner;
- the capacity in which the contracting client is representing the Beneficial Owner.

If the Beneficial Owner is a company or other form of legal entity, Art Businesses should make further enquiries to establish the individual with ultimate ownership or control of that entity.<sup>[1]</sup>

Best efforts should be made to identify the Beneficial Owner even if the contracting client raises confidentiality concerns because of the reputational and other risks entailed if the Art Business is found to be involved in Money Laundering or Terrorist Financing schemes.

Art Businesses may also choose to include appropriate warranties and representations in their agreements with their clients to emphasise the importance of this point.

The laws in certain countries may require Art Businesses (principally when the Art Business is acting as financial intermediary) to identify the beneficial owners of certain corporate entities.

[1] European Member States are now required to hold beneficial ownership information for certain companies and trusts in central registers. Not all of these registers are accessible to the public so Art Businesses may not be able to use them for verification purposes.

## 1.3 Client's role in the transaction checked

**Intermediaries:** If the transaction involves one or more intermediaries (for example an art advisor or agent), the Art Business should check in what capacity that intermediary is acting and that they have authority to act (see section 1.5 below).

## 1.4 Client's authority to act checked

**Jointly owned artworks:** An Artwork may be owned jointly by two or more individuals (e.g. married couples, siblings following the death of a parent, etc.). In such cases, the sale of the Artwork requires the approval of all joint owners. Art Businesses should obtain confirmation that all joint owners consent to the sale. A signed letter or power of attorney from the other joint owner(s) or their legal representatives can be used to confirm this authority.

**Executor of a deceased person's estate:** If an Artwork is being offered for sale by the Executor of a deceased person's estate, the Art Business should confirm that the executor has authority to sell the Artwork by asking for copies of the relevant documentation confirming their authority to act in this capacity.

**Agent acting on behalf of a principal owner:** The owner of an artwork (principal) may sometimes appoint a dealer or other individual to act on their behalf (i.e. as their agent) in selling/buying the artwork. If an artwork is sold/bought by an agent on behalf of a principal, the Art Business should verify whether the agent has authority to conduct the transaction. The Art Business can do this by requesting a copy of:

- an authorisation letter signed by the principal owner (or his/her legal representative) confirming the agent's authority to conduct the sale; or
- a signed Power of Attorney confirming the agent's authority to sell.

## 1.5 Client red flags checked

Example red flag situations include:

- Politically Exposed Persons (PEPs) including persons closely associated with PEPs;
- Offshore structures (such as 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;
- Clients who without plausible reason, operate through multiple private investment companies or offshore structures whose ownership, control and/or beneficiary structure is opaque.

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## Checklist 2 - ARTWORK DUE DILIGENCE

### 2.1 Identification

A physical examination of the artwork as well as quality high resolution images (front and back for two dimensional artworks and of multiple facets for three dimensional artworks) is particularly important at the identification stage.

Inscriptions, dates and other distinctive marks can provide important information and clues about the authenticity of the artwork and its ownership history (see 2.2 and 2.5 below).

Information can also be gleaned from exhibition stickers, seals, dealers' and collectors' marks and transport and customs stamps which are often found on the reverse of artworks.

Identifying the country of origin or find spot of an archaeological object can help flag cultural property and/or trade restriction issues.

Comprehensive identification information is needed to undertake the database searches referenced below (see 2.3).

#### **Endangered species material (CITES)[1]**

Does the artwork contain endangered species material? Examples include ivory, tortoiseshell and certain species of crocodile. You can check the lists of endangered species on CITES' website.[2] You may need to ask an expert to help you identify the species. You will need the species information to obtain relevant export and import licences and any sale permits which may be required.

## Cultural Property (including archaeological objects)

Cultural Property<sup>[3]</sup> is “property which is specifically designated by a State as being of importance for archaeology, prehistory, history, literature, art or science and includes:

- archaeological discoveries and excavations;
- elements of artistic or historical monuments or archaeological sites;
- antiquities more than 100 years old;
- property of artistic interest such as pictures, paintings, drawings, statues, sculptures and engravings;
- rare manuscripts, old books, documents and publications of special historic, artistic, scientific or literary interest;
- archives (including photographic, cinematographic and sound archives);
- property of historic interest (including relating to the life of national leaders, thinkers, scientists and artists and events of national importance);
- articles of furniture more than 100 years old.”

Additional obligations often arise when handling items of cultural property so it is important to identify them. Depending on the applicable national cultural property legislation, these measures can include maintaining registers and obtaining export licences to ensure the items are in circulation legally and have not been looted or illegally exported.

ICOM’s “red lists” database<sup>[4]</sup> is a useful resource for determining if the object comes from an area subject to illicit trafficking, and should be checked before handling or acquiring cultural goods.

Other useful sources of information include:

- ICOM’s International Observatory on Illicit Traffic in Cultural Goods website;<sup>[5]</sup>
- Information published by national cultural ministries and departments. For example, the Swiss Federal Office of Culture<sup>[6]</sup> or the Italian Culture Ministry.<sup>[7]</sup>

See also section 2.4 below.

[1] The Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, 993, U.N.T.S. 243.

[2] See here: <https://www.cites.org/>.

[3] As defined in the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970. At the time of writing 134 Member States of UNESCO (The United Nations Educational, Scientific and Cultural Organization) have ratified the convention.

[4] See here: <http://www.icom.museum>.

[5] See here: <http://obs-traffic.museum>.

[6] See here: <https://www.bak.admin.ch>.

[7] See here: <http://www.beniculturali.it>.

## 2.2 Trade restrictions

Possible trade restrictions must be considered. In particular, is the artwork subject to trade sanctions in any of the jurisdictions covered by the transaction? Trade restriction and sanction information is published on official state and government websites.

For example, following a UN Security Council resolution<sup>[1]</sup>, at the time of writing many countries have imposed bans on the handling, importation, exportation, sale, supply and transfer of Syrian and Iraqi cultural property.

[1] UN Security Council resolution 2199 (2015).

## 2.3 Ownership

The person who presents the artwork for sale may not be the legal owner or the sole legal owner. In these situations:

- obtain details of the legal owner and all other persons who have a legal interest in the artwork; and
- confirm that the people you are dealing with have authority to act on behalf of the legal owner of the artwork.

Situations where heightened due diligence over ownership may be required include:

- divorcing couples;
- family disputes and sales following inheritance;
- artworks subject to charges, liens and other security interests;
- legal proceedings involving the seller of the artwork;
- insurer interests in the artwork following a loss or theft.

### Security interests

A security interest is a legal right granted by a debtor to a creditor over the debtor's property (usually referred to as collateral) which enables the creditor to have recourse to the property if the debtor defaults in making payment or otherwise performing the secured obligations. Artworks can and are frequently used as collateral in financing arrangements. In certain jurisdictions, such as the USA, creditors can have security interests in artworks without having physical possession of them. In these jurisdictions, it is therefore important to check if any security interests have been registered against the artwork. In the USA this is done by searching the state based UCC<sup>[1]</sup> lien databases for financing statements mentioning the artworks as collateral.

<sup>[1]</sup> Uniform Commercial Code.

## 2.4 Provenance & exhibition history

Establishing the provenance (historical record of ownership) and if applicable, exhibition history of an artwork can:

- help establish the artwork's authenticity;
- add to the artwork's value if it has a complete or distinguished ownership and exhibition history; and
- help prove ownership if legal title to the artwork is later contested.

Conversely, the absence or lack of a credible provenance can raise "red flags" regarding the artwork's attribution or authenticity. In the case of archaeological objects and cultural goods, the absence of a verifiable recent provenance could indicate that the item has been illegally removed from its source country.

### Lost and stolen items

If there are provenance doubts or gaps, it is advisable to check the artwork against databases of lost and stolen art. Examples include:

- Interpol's "Works of Art" database;<sup>[1]</sup>
- the Art Loss Register.<sup>[2]</sup>

Enhanced due diligence is advised for the following categories of artworks, which present additional risks:

### Cultural Property (including archaeological objects)

The looting and illicit trafficking of cultural property, including from conflict zones such as Iraq and Syria, is of increasing concern.

Before handling or acquiring cultural property, you should aim to establish:

- the country of origin of the object;
- when and how it left its country of origin and any intermediate country.

Provenance information should be supported by documentary evidence, as far as possible. It can be helpful to request copies of the following:

- export documents (including the export licence from the country of origin, if available);
- wills and dated inventories;
- publications in reputable sources (e.g. exhibition and auction catalogues);
- photos and family correspondence;
- excavation field notes.

Beware of fake documents and if necessary consult the authorities in the country of origin, any intermediate country and the country of the transaction. Examining the item first hand is also recommended as marks and other features can indicate if the item has been illegally excavated, restored, or taken from a larger item or collection. Consulting independent specialists (experts, museums, universities) about the object and its origin, can also be helpful.

Useful guidance on due diligence for cultural objects can be found at ICOM's International Observatory on Illicit Traffic in Cultural Goods website.[3]

### **Looted or spoliated items**

Art professionals and collectors should be alert to the looting and spoliation of artworks that occurred in particular:

- at the hands of the Nazis in Europe between 1933 and 1948;
- in Eastern Europe and in the Soviet Union during the Communist era between 1949 and 1990; and
- in Cuba during the revolution between 1953 and 1959.

If an artwork was located in these areas during the sensitive periods, enhanced due diligence should be carried out to ensure the artwork is not looted or stolen. Specialist databases which can be searched include:

- Lost Art;[4]
- Central Registry of Information on Looted Cultural Property 1933-1945;[5]
- Catalogue of the MNR (Musées Nationaux Récupération) (France) ;[6]
- The Getty Research Institute.[7]

Some countries have published guidance on conducting due diligence for artworks suspected as having been spoliated or looted. For example, the Swiss Federal Office of Culture.[8]

[1] See here: <https://www.interpol.int>.

[2] See here: <http://www.artloss.com/en>.

[3] See here: <http://obs-traffic.museum>.

[4] See here: <http://www.lostart.de>.

[5] See here: <http://www.lootedart.com>

[6] See here: <http://www.culture.gouv.fr/documentation/mnr/pres.htm>.

[7] See here: <http://www.getty.edu>.

[8] See here: <http://www.bak.admin.ch>.

## **2.5 Artwork location & recent movement**

The location and tax status of the artwork and if applicable its last country of export should be identified and verified. This ensures relevant tax requirements can be complied with and any necessary import and export licences and permits can be obtained[1].

Copies of export and import paperwork should be obtained ideally before taking possession of the artwork to ensure the artwork has entered the country legally.

If the artwork is an archaeological object, a fragment of an ancient building or a statue or other cultural good, written evidence confirming the artwork left its source country legally, should be obtained. Extra vigilance is required if the cultural goods have transited through countries neighbouring a conflict zone or which have been identified as being used in illicit trafficking routes[2].

[1] If the proposed European regulation on the import of cultural goods is adopted, art businesses and collectors will need to provide this information to import cultural goods into the EU, whether bringing them into free circulation or storing them in a bonded warehouse or Freeport.

[2] At the time of writing, examples of transit countries for Syrian objects include Turkey, Lebanon and Jordan.

## 2.6 Authenticity

Fakes, forgeries and misattributions are perceived as a major risk for buyers in art transactions. A fake artwork or one whose authenticity is difficult or impossible to establish with a high degree of certainty, will lose its commercial value and could represent a total loss for its buyer.

With the professionalization of the art market higher standards of due diligence are expected of art market actors. The reputational and financial consequences for art businesses are also extremely high.

Determining authenticity is a complex task and the checks undertaken will depend on the artwork. Where there is doubt, typically the following three areas will be explored in conjunction to give an overall picture on authenticity:

- expert opinion (including artist foundations, authentication boards and committees where they exist) and catalogues raisonné;
- provenance and art historical research; and
- scientific testing.

It is best practice to gather information from all three areas of enquiry and not to rely on one source alone.

### **Expert opinions and scholarship**

There can be differences of opinion between experts, authors of catalogue raisonné and authentication boards and committees. Also, for some artists, the body of scholarship is constantly evolving. It is essential to record all expert opinions provided, even if those opinions differ. To avoid conflicts of interests, experts should not have a financial interest in the transaction for which their opinion is sought. Where several reliable catalogues raisonné exist on an artist, they should all be checked.

### **Provenance and art historical research**

The provenance of an artwork should be supported and verified wherever possible with factual, written or photographic evidence. If any part of the provenance is hypothetical or cannot be verified, this should be indicated clearly. Caution is required when verifying provenance information as forgers or traffickers often falsify provenance information. For this reason, it is not advisable to rely on it as the only proof of authenticity.

### **Scientific testing**

Scientific testing is increasingly used in art due diligence as it can provide independent and reliable information on materials and techniques used and the dating of materials and pigments. Scientific analyses can be helpful in detecting fakes and forgeries by revealing inconsistencies and anachronisms. These tests cannot however positively prove the authenticity of an artwork or its attribution to a particular artist. Any scientific report which makes such claims should be considered biased and unreliable. Scientific testing provides a complementary source of information to be used in conjunction with the other sources (i.e. expert opinion and art historical research) to provide an overall conclusion on authenticity.

In keeping with best practices, scientific testing should be performed by laboratories and conservation scientists with the relevant qualifications. Scientific reports should clearly describe the analytical process followed (including the type and calibration of the equipment) such that other professional



laboratories could repeat the tests and verify the results. The reports should clearly indicate which part of the results is factual and which part represents the author's interpretation of the results. As with any academic publication, scientific reports should reference their sources.

## 2.7 Condition

It is advisable to gather and share as much information as possible on the artwork's composition, condition and recommended conservation.

The materials used in an artwork as well as the artwork's condition and the presence of any restoration can impact the artwork's present and future value. An original artwork which has been highly or improperly restored can lose an important part of its value.

Sales are regularly contested based on what the buyer perceives as a lack of information (or incorrect information) regarding the state of conservation of the artwork. These factors will also dictate how the artwork should be transported and conserved and the associated costs. If incomplete information about the condition or fragility of an artwork is communicated to people taking custody of the artwork for shipping or exhibition purposes for example, damage can occur.

An artwork composed of materials which are bound to react chemically or which are organic and could decompose in the short term, should be considered a risky investment and a buyer should be informed of the risks related to the artwork's conservation. Seeking the advice of a professional and independent art conservator, specialising in the type of artwork in question (work on paper, oil paintings, ceramic, bronze sculpture, contemporary installation, etc.) is recommended.

Restoration is sometimes used to forge an artwork and/or modify its attribution (for example making it look older, adding a signature or an inscription, adding details typical of a particular artist or period, etc.)

A condition report prepared by an independent art conservator, with the proper level of expertise and specialisation can be an essential document in an art transaction or during a key stage of a logistical operation.

## 2.8 Artwork red flags checked

Example red flag situations include:

- an artwork is presented with very limited or no documentation or provenance;
- the 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) appears to be false. See for example the fraud regarding fake ICOM / UNESCO certificates<sup>[1]</sup>;
- 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 forgery
- 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 or restoration);
- artworks where the original canvas and tacking edges cannot be accessed;
- artworks with unexplained or extensive restorations;
- for high value artworks, no insurance and/or storage records exist.

[1] <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/scam-alert/>

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## Checklist 3 - TRANSACTION DUE DILIGENCE

Understanding the background and purpose of the transaction is helpful to establish the risk profile of the transaction and to inform on the level of diligence the Art Business should carry out.

Art Businesses should examine in particular:

- the purpose of the transaction;
- the form and structure of the transaction (fair price, structure of the payment, involvement of intermediaries, conflicts of interests);
- the source of funds; and
- the documentation supporting the transaction.

Any activity relating to a proposed transaction that is not consistent with what is known about the client and the client's risk profile or which otherwise raises "red flags" should be the subject of enhanced due diligence by the Art Business. Such enhanced due diligence could include asking for additional information or documentation on the key elements of the transaction such as the context of the transaction, the source of funds or the structure of the transaction.

### 3.1 Purpose of the transaction

The Art Business should examine the client's background and purpose behind the contemplated transaction to identify if there is anything which raises suspicions as to the legitimate purpose of the transaction. For example:

- are the artworks being sold by the client consistent with what is known about the client's collection?
- is the level at which the client is selling or buying consistent with their past transactions and what is known about their professional activities and personal wealth?

if not, the Art Business may want to ask the client for further information.

### 3.2 Form of the transaction

Art Businesses should also consider the form and structure of the transaction, such as:

#### **The use of intermediaries and other non-face to face methods**

If the transaction is taking place through intermediaries, face to face, entirely via the Internet, over the phone, or by any other similar non-face to face means, there is a risk that the information provided cannot be properly verified and that the transaction is used in the context of an illegal scheme;

#### **The use of unusually complex structures**

If the client operates through multiple private investment companies or offshore structures whose ownership, control and/or beneficiary structure is opaque, legal rights arising from the transaction may be difficult to ascertain Art Businesses should exercise caution to ensure the transaction is not part of an illegal scheme.

#### **Artificially low or inflated prices**

If the client is willing to sell or buy at an artificially low or inflated price, and there are no logical business reasons justifying the price difference, there is a risk that the transaction may be part of a money laundering scheme and art businesses should exercise caution.

#### **Unusual payment structures**

If the client proposes making multiple low value cash payments for a single or series of connected transactions or proposes using a loan from a lender whose background cannot be verified or who is otherwise unreliable and the terms of the loan are unusual (non-existent interest rates, lack of collateral, excessive loan maturity dates), Art Businesses should exercise caution and obtain additional comfort that the transaction is not part of an illegal scheme before proceeding.

#### **Conflicts of interests**

Art Businesses should be alert to actual or potential conflicts of interest arising and take steps to avoid them and any situations of potential bribery. Examples of situations requiring scrutiny include where the seller and buyer (or their intermediaries) are connected. For those involved in the transaction, conflicts of interests create a potential exposure to liability for breach of contract or breach of other duties and the transaction could be rendered void.

### 3.3 Source of funds

Art Businesses should pay particular attention to the source of funds used in a transaction and be particularly alert to risks of money laundering or terrorist financing.

#### **Cash payments**

Art Businesses should generally discourage cash payments wherever possible. The source of cash cannot be traced in the way that payments made through established banking systems can. Accordingly, there can be no guarantee that the cash source is legitimate and clean.

Where Art Businesses accept cash they should keep the amounts small. Some countries have imposed limits on cash transactions per transaction or series of related transactions. Art Businesses should check the limits (if any) applying in the jurisdictions where they operate. See the Country Guides for further details.

Art Businesses should not accept single or multiple cash payments for an artwork in excess of the legally imposed threshold. If there is no legal threshold, Art Businesses are advised to conduct enhanced due diligence on the buyer and the source of funds so that they are satisfied that no money laundering risk exists.

#### **Third party payments**

Art Businesses are discouraged from accepting payments from a third party who is not their client and buyer of record. If there are legitimate reasons why it is justified for the Art Business to accept payment from a third party, before doing so the Art Business should conduct enhanced due diligence on both their buyer of record and the third-party payer and only proceed with accepting the payment if satisfied that no money laundering or terrorist financing risk exists.

#### **Payments from bank accounts located in non-AML regulated jurisdictions**

The preference for all transactions should be for the Art Business only to accept payments from reputable banks in jurisdictions subject to AML regulation and supervision. Such reputable banks and financial institutions are generally subject to a high degree of AML regulation. That said Art Businesses should remain vigilant and not rely entirely on the fact that banks and financial institutions will have carried out the necessary checks and verification to be satisfied that the source of funds is clean.

Art Businesses should be wary about accepting payments from bank accounts located in high risk or non-cooperative AML jurisdictions. To identify such jurisdictions Art Businesses are encouraged to consult the list of “High Risk and Non-Cooperative Jurisdictions” published by the Financial Action Task Force (FATF).[1]

#### **Digital currencies**

Digital currencies are currencies with no physical form that are not controlled by a central bank. Examples of digital currencies include Bitcoins, Litecoins and Namecoins.

At the time of writing the use of digital currencies in art transactions is not common. Art Businesses are advised to act cautiously before accepting payments in digital currencies which are not controlled or regulated. It is an area which regulators continue to monitor.

[1] See here: <http://www.fatf-gafi.org>.

### 3.4 Documentation

It is important to document transactions and movements in artworks fully and correctly. This puts Art Businesses in a better position if they are later required to provide information in the context of an investigation or if a dispute subsequently arises. Art Businesses minimise their legal, reputational and financial risks by being able to demonstrate and prove the circumstances of the transaction and the due

diligence measures they carried out at the time. Holding personal data on individuals may also entail data protection obligations which should be considered and complied with as prescribed by applicable laws.

### **Transactions**

It is advisable to record transactions (such as for the consignment, sale and purchase, loan or exchange of artworks) in written agreements and to gather and retain proof of the due diligence measures carried out, particularly for transactions presenting increased risks or involving artworks of significant value. For identification purposes, it is advisable to include a good quality image of the artwork in any agreements.

### **Movement of artworks**

Having correct and complete transport documents (including export and import permits, bills of lading and delivery notes) is important to prove the legal import and export of an artwork. Relevant aspects to record and check include:

- statements of origin and destination;
- details of the consignor, consignee and transporter;
- correctly entered dates;
- vehicle and flight details;
- the description of the artwork;
- condition reports for the artwork.

## **3.5 Transaction Red Flags checked**

Example red flag situations include:

- client is evasive or reluctant to provide adequate information relating to their identity or the artwork;
- 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;
- buyers wishing to pay by a cheque drawn on a bank located outside the FATF jurisdictions <http://www.fatf-gafi.org/>;
- 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 enquiries undertaken to verify ownership (e.g. obtain copies of insurance documentation, exhibition or catalogue references to the artwork, dated photographs of the artwork in situ. etc).*

- buyer arranges payment for the artwork by a third party;
  - 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.
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## Downloads

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- Checklists
- Explanatory Note

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