



# RISK MANAGEMENT IN THE ART AND ANTIQUITIES MARKETS PART II: CRIMINAL AND COMPLIANCE RISK



*#ArtRisk*

*@artmarketminds*

*@klgates*



Art**Market**Minds

In association with

**K&L GATES**



# PROFESSIONAL CODES OF ETHICS, COMBATTING THE ILLICIT TRADE IN ART AND ANTIQUITIES AND NEW REGULATORY CHALLENGES ON THE HORIZON

**Dr Sophie Vigneron**, Kent Law School, University of Kent

**Professor Janet Ulph**, Leicester Law School, University of  
Leicester

**Ivan Macquisten**, art market advisor, campaigner and lobbyist



In association with

**K&L GATES**



#ArtRisk

@artmarketminds

@klgates

Dr Sophie Vigneron  
Senior Lecturer  
Co-director Centre for Heritage

# Soft Law and Ethics: Towards Global Compliance



#ArtRisk

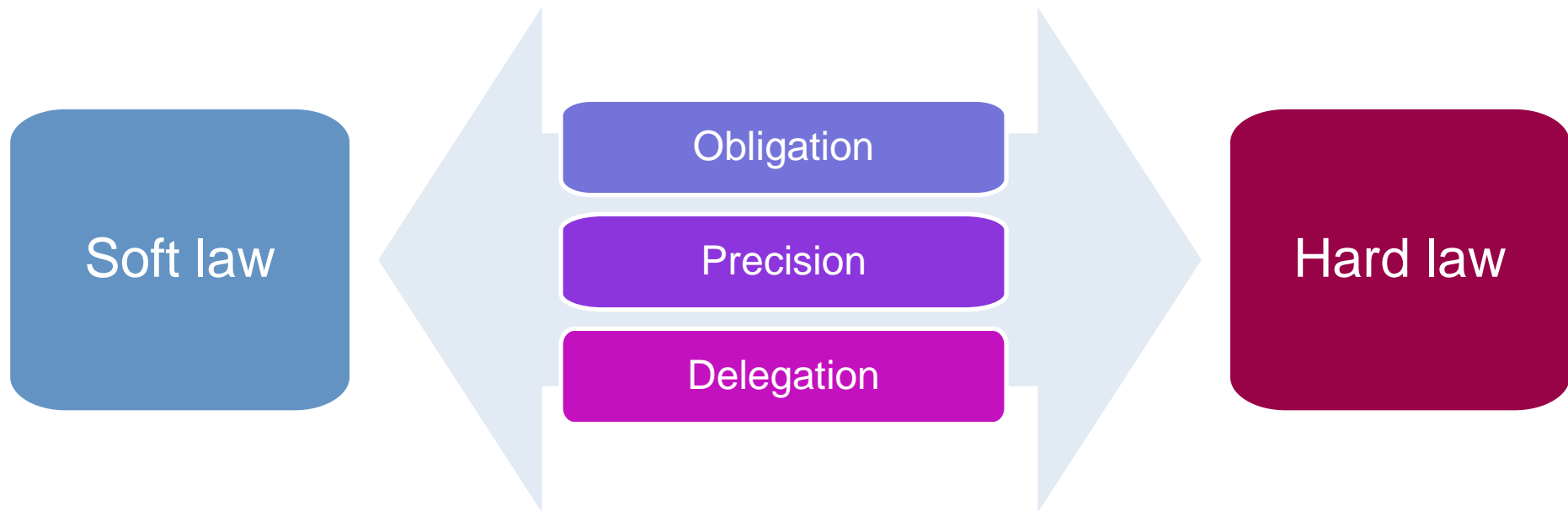
@artmarketminds

@klgates

**Kent**  
Law School

University of Kent

# The Legalization of Soft Law







# Legal framework



- UNESCO Code of Ethics for Dealers
- ICOM Code of Ethics for Museums
- UNESCO Recommendations
  - Protection of Movable Cultural Property 1978
  - International Exchange of Cultural Property 1976
  - Protection at National Level, of the Cultural and Natural Heritage 1972
  - Preservation of Cultural Property Endangered by Public or Private works 1968
  - Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property 1964
  - International Principles Applicable to Archaeological Excavations 1956
- UNESCO Declaration
  - Intentional Destruction of Cultural Heritage, 2003
  - Responsibilities of the Present Generations Towards Future Generations 1997
  - Principles of International Cultural Co-operation, 4 November 1966
- Washington conference principles on Nazi-confiscated art 1998
- EU Parl. resolution on the return of plundered property to Jewish communities 1996
- EU Parl. resolution on the restitution of property belonging to Holocaust victims 1998
- Vermillion Accord on Human Remains 1989
- Tamaki Makaraui Accord on the Display of Human Remains and Sacred Objects 2006



- Article 36 TFEU
- Article XX(f) GATT
- 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property
- 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954
- First Protocol 1954
- Second Protocol 1999
- 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural objects



- Dealing in Cultural Object (Offences) Act 2003
- Return of Cultural Objects (Amendment) Regulations SI 2015/1926 = Directive 2014/60 on the return of cultural objects unlawfully removed from the territory of a member state
- Cultural Property (Armed Conflict) Bill 2016
- Other statutes

Soft Law

Hard Law

# Soft Law and Museums



#ArtRisk

@artmarketminds

@klgates

# Museum Association

## Code of Ethics for Museums (November 2015)

- 2.4 Conduct due diligence to verify the ownership of any item prior to purchase or loan, and that the current holder is legitimately able to transfer title or to lend. Apply the same strict criteria to gifts and bequests.
- 2.5 Reject any item for purchase, loan or donation if there is any suspicion that it was wrongfully taken during a time of conflict, stolen, illicitly exported or illicitly traded, unless explicitly allowed by treaties or other agreements, or where the museum is co-operating with attempts to establish the identity of the rightful owner(s) of an item.
- 2.6 Discuss expectations and clarify in writing the precise terms on which all parties are accepting transfer of title. Exercise sensitivity towards donors when accepting or declining gifts and bequests.
- 2.7 Deal sensitively and promptly with requests for repatriation both within the UK and from abroad.



#ArtRisk

@artmarketminds

@klgates

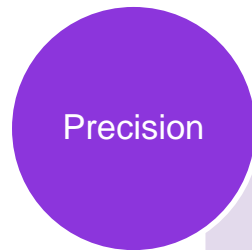


## Obligation

Self regulation

'The Code of Ethics for Museums is consistent with the Code of Ethics for Museums worldwide produced by the International Council of Museums (ICOM)'

DCMS: Combating Illicit Trade: Due diligence guidelines for museums, libraries and archives on collecting and borrowing cultural material October 2005



## Precision

Clear rules and use of imperative

Due diligence defined



## Delegation

Employment contract: disciplinary sanction

Deaccession: Holocaust (Return of CO) Act 2009 and Human Tissue Act 2004

Arts Council England: Loss of accreditation



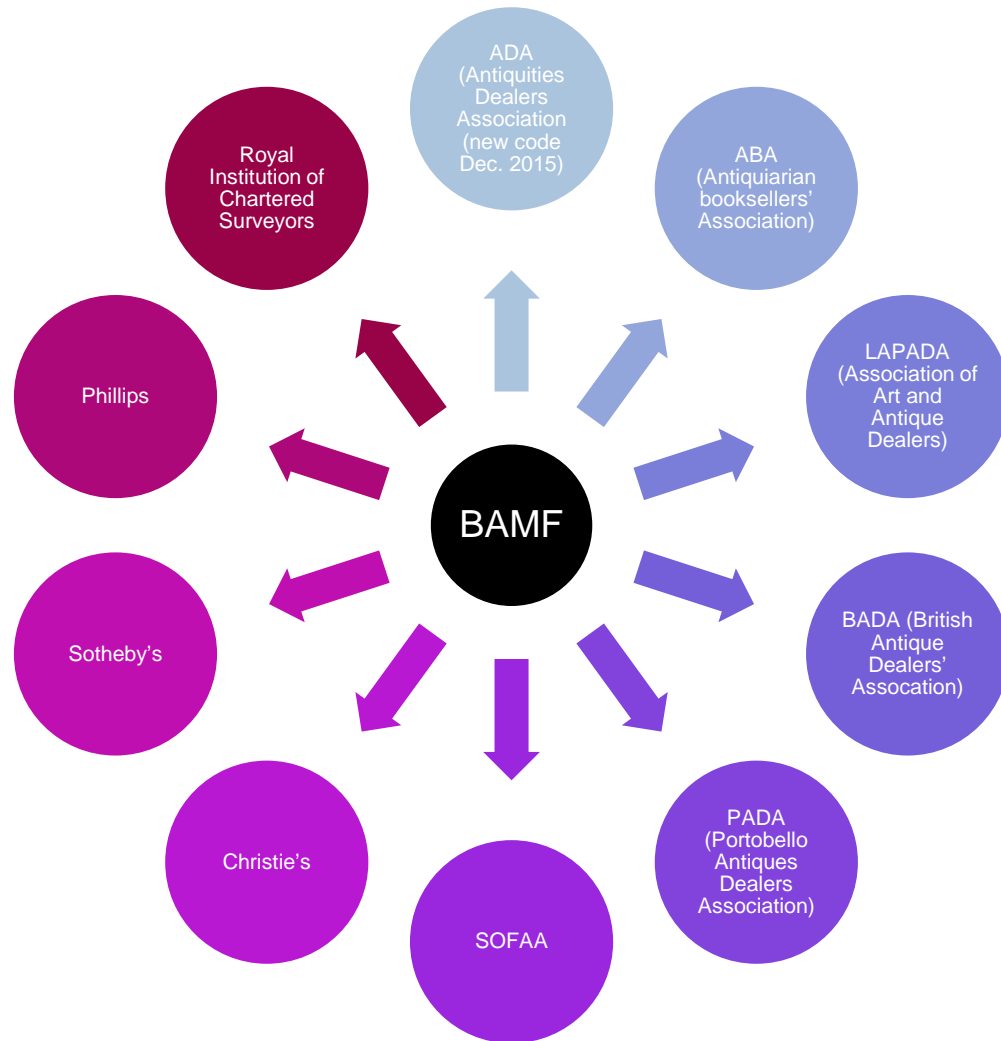


# Soft Law and Dealers



#ArtRisk @artmarketminds @klgates

# A divers landscape



# Principles of conduct of the UK art market adopted by Members of the British Art Market Federation (2000)

- The Members of the British Art Market Federation (“BAMF”) believe it is important to restate the principles that guide their business practices. [...] However, **Members have voluntarily agreed** to abide by certain basic professional standards of operation.
- Below is a distillation of the common principles shared by the various codes, some of which have been in place for over 15 years. [...]
- Good Title, Illegal Export and Illegal Excavation
  - Members undertake not to purchase, sell or offer any item of property that they know has been:
    - stolen
    - illegally exported; or
    - illegally excavated
  - Members will not purchase or sell such property unless the irregularity has been corrected.
- Stolen Property
  - Members have agreed to take appropriate steps if they know, suspect, or have reason to believe that they are in possession of stolen property. Such steps may include conducting further inquiries by checking with a registry of stolen art, or reporting the concern to appropriate legal advisors or law enforcement authorities.
- Anti-money laundering
  - Members have agreed to make themselves aware of relevant anti-money laundering laws and regulations and where applicable to report suspicions of money laundering to appropriate authorities and/or in-house anti-money laundering officers.



# The Antiquities Dealers Association (ADA) December 2015

## Due Diligence

Before offering property for sale, members must be satisfied that they have conducted the level of Due Diligence required to establish that the property they are handling is authentic and that there are no known legal obstacles to selling and passing title.

The ADA requires members to adhere to the relevant domestic and international laws that govern the markets for archaeological and ancient property and, in many respects, ADA standards go beyond the legal requirements.

If members are not certain as to the laws of a particular jurisdiction, or their application to a specific item, please consult the ADA Committee for advice.

Members must act in good faith throughout all transactions.

Members should record each transaction with diligence and keep records for a minimum of 6 years.

Where a member is buying from another dealer or an auction house then the member should record the transaction and note the provenance as provided. Some items will have more detailed provenance than others.

Where a member is buying from a person other than a dealer or an auction house then the member should establish the identity of the vendor. Unless the vendor is well known to the dealer, where an item is worth over £3,000 then member should request photographic identification and if practical take and retain a copy of it. Members should obtain in writing:

- 1.The name and address of the vendor;
- 2.A warranty that the vendor has good title to the objects;
- 3.Confirmation of where, when and how the vendor obtained the objects, as can be provided by the vendor;
- 4.Where the vendor acquired the objects outside the United Kingdom, confirmation that the item has been exported or imported in conformity with local laws and where available evidence or that.

In addition, wherever possible members should arrange payment by a method that leaves an audit.

## Lawful Trading

Members undertake to carry out Due Diligence, as set out under this Code, to ensure, as far as they are able, that objects in which they trade were not stolen from excavations, architectural monuments, public institutions or private property and are lawfully on the market for sale.

Members will make all reasonable enquiries to ascertain earlier ownership history of any object they are considering purchasing, mindful that the illicit removal of archaeological objects from their original context is damaging to our knowledge and understanding of the past.

Members have a duty to record and preserve relevant prior ownership history of an object along with any evidence supplied.

## Stolen Art Databases

It is a condition of membership that all goods acquired at the purchase price of £3,000 or more be checked with the Art Loss Register, or any other comparable stolen art database, unless they have already been so checked.

# Due diligence

## BAMF

- Knowledge of theft, illegal export or excavation

## ADA

- confirmation by vendor of origin of object
- When possible, evidence of export certificate
- Means of payment (leave audit)
- Make reasonable enquiries
- Art Loss Register Database: sup. £3,000

## SI 2015/1926

- Section 7 Order for compensation
- 2A) all the circumstances of the acquisition,
  - (a) the documentation on the object's provenance;
  - (b) the authorisations for removal required under the law of the requesting member State;
  - (c) the character of the parties;
  - (d) the price paid; and
  - (e) whether the possessor consulted any accessible register of stolen cultural objects and any relevant information which he could reasonably have obtained, or took any other step which a reasonable person would have taken in the circumstances.

## Basel green paper

- Search on Interpol art database and request a Certificate from the Art Loss Register
- Search databases of looted art
- provenance history: request any archives and documentation from the owner (invoice, loan agreement, insurance certificate)
- Obtain any relevant and available legal documents, witness declarations, expert opinions even if the work is reproduced in the catalogue raisonné or any reputable art books. If possible, request a Certificate of Authenticity or a written confirmation from relevant artist committee or expert
- Check all the exhibition catalogues where the art object has been exhibited and
- Check the art object and note any signature, number, frame or labels on the back, and
- Check the restoration history as appropriate and presenting circumstantial evidence when no direct documentation is available.



### Code

#### BAMF

- 7,850 businesses
- 41,420 people
- 'voluntarily agreed'

#### ADA

- 19 members/businesses

#### Statutes

- Dealing in Cultural Objects (Offences ) Act 2003
- Return of CO (Amendment) Regulation SI 2015/1926
- Proceeds of Crime Act 2007
- Cultural Property (Armed Conflicts) Bill [HL] 2016-17



### Due diligence

BAMF: vague

ADA: precise



### Code

Warning, exclusion

#### Courts

- Spain v Christie [1986] 3 All ER 28, at 32.
- Marcq v Christie's [2002] 4 ALL ER 1005
- Kurtha v Marks [2008] EWCH 336



#ArtRisk

@artmarketminds

@klgates



# Conclusion



# **Risk Management in the Art and Antiquities Markets Part II Criminal and Compliance Risk**

**K&L Gates LLP**

7 February 2017

**Professor Janet Ulph  
University of Leicester**

# Codes of conduct

## ADVANTAGES:

- Opportunities for fine tuning (e.g. orphan objects)
- Regular updating
- Protecting members?



#ArtRisk

@artmarketminds

@klgates

# Challenge: making a code readable but compliant with the law

## Museums Association : *Code of Ethics 2015*

- Principle 2.4: Conduct **due diligence** to verify the ownership of any item ... and that the current holder is legitimately able to transfer title or lend. Apply the same strict criteria to gifts and bequests.
- Principle 2.5: reject ... if there is any **suspicion** that it was **wrongfully taken during a time of conflict, stolen, illicitly exported or illicitly traded** ...

Plus **Additional Guidance**

# Civil law



#ArtRisk @artmarketminds @klgates

# Acting in good faith

Good faith purchase under the Limitation Act 1980.

*Nicole de Préval v Adrian Alan Ltd* (1997) 24 January.

Recovery of two nineteenth Century Barye candelabra (stolen from the claimant's home in France in 1986)



#ArtRisk

@artmarketminds

@klgates



# Antiquities Dealers Association's *Code of Conduct*

- Before offering property for sale, members must be satisfied that they have conducted the level of **Due Diligence** required to establish that the property they are handling is authentic and that there are no known legal obstacles to selling and passing title.
- Members must act **in good faith** throughout all transactions



#ArtRisk

@artmarketminds

@klgates

# Antiquities Dealers Association's *Code of Conduct*

## Databases

It is a condition of membership that all goods acquired at the purchase price of £3,000 or more be checked with the **Art Loss Register**, or any other comparable stolen art database, unless they have already been so checked.



#ArtRisk

@artmarketminds

@klgates

# Association of International Antiquities Dealers' *Code of Conduct*

## Databases

7. The Member agrees to check with the **Art Loss Register** or similar database concerning items with a value of £2,000 or more.



#ArtRisk

@artmarketminds

@klgates

# Criminal law



#ArtRisk

@artmarketminds

@klgates

# Provenance, due diligence and the criminal law

Theft Act 1968 – dishonesty

Fraud Act 2006 – dishonesty

Dealing in Cultural Objects (Offences) Act 2003 – dishonesty

Proceeds of Crime Act 2002: knows or suspects

Export Control (Syria Sanctions) Order 2014: reasonable grounds to suspect

Cultural Property (Armed Conflict) Bill: knowing or having reason to suspect

Iraq (United Nations) Sanctions Order 2003? A prosecution will fail if the defendant can prove that, “he did not know and had no reason to suppose that the item in question was illegally removed Iraqi cultural property”

# Dealing in Cultural Objects (Offences) Act 2003

- Dealing with a cultural object which is “**tainted**” (illegally removed from a monument, site or wreck)
- **Knowing or believing** that it is “tainted”
- Acting ***dishonestly***

Written question - HL2223 September 2015: no prosecutions up till that date

Conviction in May 2016: Hereford Crown Court. Christopher Cooper: sentenced to three years in prison on seven charges of theft; three years for dealing in tainted cultural objects. Also sentenced to eight months on two counts of fraud (Institute of Art and Law blog)



# “Suspect” and the criminal law

Proceeds of Crime Act 2002: **knows or suspects**

Export Control (Syria Sanctions) Order 2014: **reasonable grounds to suspect**

Cultural Property (Armed Conflict) Bill: **knowing or having reason to suspect**

*R v Da Silva* [2007] 1 WLR 303, Court of Appeal:

“the defendant must think that there is a possibility, which is more than fanciful that the relevant facts exist.”

i.e. must be conscious that there is a possibility that the cultural object is the product of crime

# Antiquities Dealers Association's *Code of Conduct*. Due diligence.

Members must act **in good faith** throughout all transactions.

Members undertake to carry out Due Diligence, as set out under this Code, **to ensure, as far as they are able**, that objects in which they trade were **not stolen** from excavations, architectural monuments, public institutions or private property and are lawfully on the market for sale.

Members will make **all reasonable enquiries** to ascertain earlier ownership history of any object they are considering purchasing ...



#ArtRisk

@artmarketminds

@klgates

# High value dealers in cash: Money Laundering Regulations 2007

Money Laundering Regulations 2007, Reg. 3 (12)

*“High value dealer”* means a firm or sole trader who by way of business trades in goods (including an auctioneer dealing in goods), when he receives, in respect of any transaction, a payment or payments **in cash of at least 15,000 euros** in total ...

See also Proceeds of Crime Act 2002, Sch.9 (1) (q).

Lower threshold by June 2017 due to the 4<sup>th</sup> Money Laundering Directive: **10,000 euro**



#ArtRisk

@artmarketminds

@klgates

# High value dealers in cash: Money Laundering Regulations 2007

- Register with HMRC and pay fees ;
- Have procedures in place that prevent the business being used for money laundering or terrorist financing;
- Apply a risk based approach to customers, goods and services, delivery channels (e.g. cash).



# Transparency International UK: “Don’t Look, Won’t Find” November 2015

Page 12 : low level of reporting by high value dealers.

Page 13: Art and auction houses?

2013-2014: **15** suspicious activity reports from 1500 firms.

Page 60-61: The core of any successful money-laundering enterprise is **secrecy** ...

In art sales it is not unusual for the identities of both seller and buyer to be kept secret and cash is a commonly accepted form of payment, making it difficult to track transactions.

# Antiquities Dealers Association's *Code of Conduct*

Where a member is buying from another dealer or an auction house then the member should record the transaction and note the provenance as provided. **Some items will have more detailed provenance than others.**

Unless the vendor is well known to the dealer, **where an item is worth over £3,000** the member should request photographic identification ... Members should obtain in writing:

1. The name and address of the vendor;
2. A warranty that the vendor has good title to the objects;
3. Confirmation of where, when and how the vendor obtained the objects, as can be provided by the vendor;
4. Where the vendor acquired the objects outside the United Kingdom, confirmation that the item has been exported or imported in conformity with local laws and where available evidence of that.

In addition, wherever possible members should arrange payment by a method that leaves an audit [trail].



# Ethics? Antiquities Dealers Association's *Code of Conduct*

“ADA members shall promote the lawful trade in antiquities and oppose any illegal and **unethical** trading and the illegal removal of antiquities from their countries of origin. ”

Members will not dismantle or sell separately parts of one complete object.

Members will make **all reasonable enquiries** to ascertain earlier ownership history of any object they are considering purchasing, **mindful that the illicit removal of archaeological objects from their original context is damaging to our knowledge and understanding of the past.**



# The Art Market in Crisis?



Ethics, transparency, the law and  
facing up to reality.

The challenge for art market  
professionals in 2017



# + So what's the problem?



- The growing importance of art and collectables as an alternative asset class
- The perceived lack of direct regulation of the art market
- A background of developing social and political instability, especially in the Near and Middle East



#ArtRisk

@artmarketminds

@klgates



# Some of things this has led to



The perception of the art market as:

- being awash with huge amounts of unaccounted for cash
- an unregulated Wild West of hucksters and shady dealings
- a cloak for international criminal activity, including money laundering and the financing of terrorism



#ArtRisk

@artmarketminds

@klgates



# And some other things it has led to



- Outrage and resentment from other regulated industries
- Public suspicion
- Media suspicion
- Antipathy among politicians and specialist interest groups
- Opportunism among those who have long wanted to see trade in specific areas heavily regulated or stopped entirely
- Rhino horn, ivory, antiquities



#ArtRisk

@artmarketminds

@klgates



# New laws and proposals since early 2016



- New German law
- New US law
- New UK law
- EU survey
- US/Egypt Memorandum of Understanding
- Abu Dhabi accord
- Prospect of another US law (TAAR: Terrorism Art and Antiquity Revenue Protection Act)
- Council of Europe Convention on Offences relating to Cultural Property
- Ivory law change



#ArtRisk

@artmarketminds

@klgates

# + Do they have a point?

- There is undoubtedly crime linked to the art market: theft, money laundering, fakes and forgeries etc
- There are also a number of transparency issues: commissions, guarantees, private deals, anonymity of buyers and sellers, orphan works, forged documentation
- And there have been high-profile criminal cases involving looting, the sale of stolen or illegally exported goods (Nancy Wiener and others)



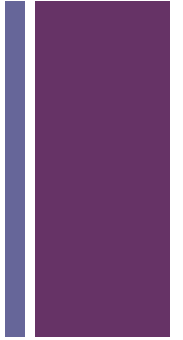
#ArtRisk

@artmarketminds

@klgates



# However...



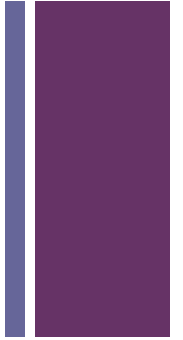
There is also a deep misunderstanding about the art market and the way in which it operates:

- Client confidentiality and the right to privacy
- Changing standards within the market and the problem of retroactivity
- Bogus claims and hidden agendas
- Complex issues that defy easy explanations to satisfy public antipathy
- Money





# + And another thing...



The art market has been ill-equipped to deal with a lot of its problems because of the:

- lack of money
- dominance of SMEs in the market
- antipathy between dealers and auctioneers
- failure to overcome historical differences and present a united front
- complacency and lack of awareness



#ArtRisk

@artmarketminds

@klgates



# So where does this leave us?



- Powerful and well-funded anti-trade lobbies, often with public, legal and political sympathies on their side
- Often they are wrong in their perceptions, but the complex detail of the issues at hand make changing opinions and perceptions difficult
- Who does the UK art market have lobbying at a national and international level?



#ArtRisk

@artmarketminds

@klgates



# We can make a difference, but...



- Such an ad hoc approach is not a sustainable model
- Laws will change, rules will tighten, so...

## ETHICS, TRANSPARENCY & SELF REGULATION

are already becoming increasingly important, rather than simply being abstract concepts for inward-looking debates.

In fact, they are all great for brand building and business



#ArtRisk

@artmarketminds

@klgates



# So what now?



- The ADA's new Code of Conduct and website FAQ section in 2016 is now held up as the industry standard by politicians and legal academics.
- We have become much more engaged in the debate at national and international level, where once we were utterly ignored.
- We have urged and are now helping with the formation of a new US campaign group to make sure trade voices are heard at the highest levels.
- Trade associations and leading art market companies are waking up to the issues at hand.



#ArtRisk

@artmarketminds

@klgates



imacQ.com



Lyle's Golden Syrup



#ArtRisk @artmarketminds @klgates



# KEEPING TRACK OF LOST AND STOLEN ARTWORKS AND ANTIQUITIES: SOME CHALLENGES AND OPPORTUNITIES

**Ariane Moser**, COO, Artive Inc.

**James Ratcliffe**, Director of Recoveries & General Counsel, Art  
Loss Register

**Dr Sean Kelsey**, Senior Associate, K&L Gates



In association with

**K&L GATES**



#ArtRisk

@artmarketminds

@klgates





# Money Laundering in the Fine Art Market

Dylan Moses, Senior Associate, K&L Gates

Daniel Dehner, Director, EY

James Dodsworth, Senior Manager and Sanctions SME, EY



In association with

**K&L GATES**



#ArtRisk

@artmarketminds

@klgates



# WHAT IS MONEY LAUNDERING?

- Making criminal property seem legitimate through placement, layering and integration.



Placement

Layering

Integration







## WHAT IS MONEY LAUNDERING CONT.

- Criminal property - **benefit** gained from any **criminal conduct** which the offender knows or suspects represents such a benefit.
- Benefit – anything... money to real estate to fine art.
- Criminal conduct - any act that constitutes an offence in the UK.





## MONEY LAUNDERING OFFENCES

- Conceal, transfer, disguise, convert, acquire, use or possess criminal property
- Make arrangements that you know or suspect facilitates the above.
- Potential defence – Submit a SAR.





# TERRORIST FINANCING

- It is an offence to:
  - finance terrorism; or
  - launder terrorist property.
- Penalty - up to 14 years in prison and/or a fine.
- Positive duty to report a belief/suspicion that an offence has been committed.
- Penalty for failing to report - up to 5 years in prison and/or a fine.



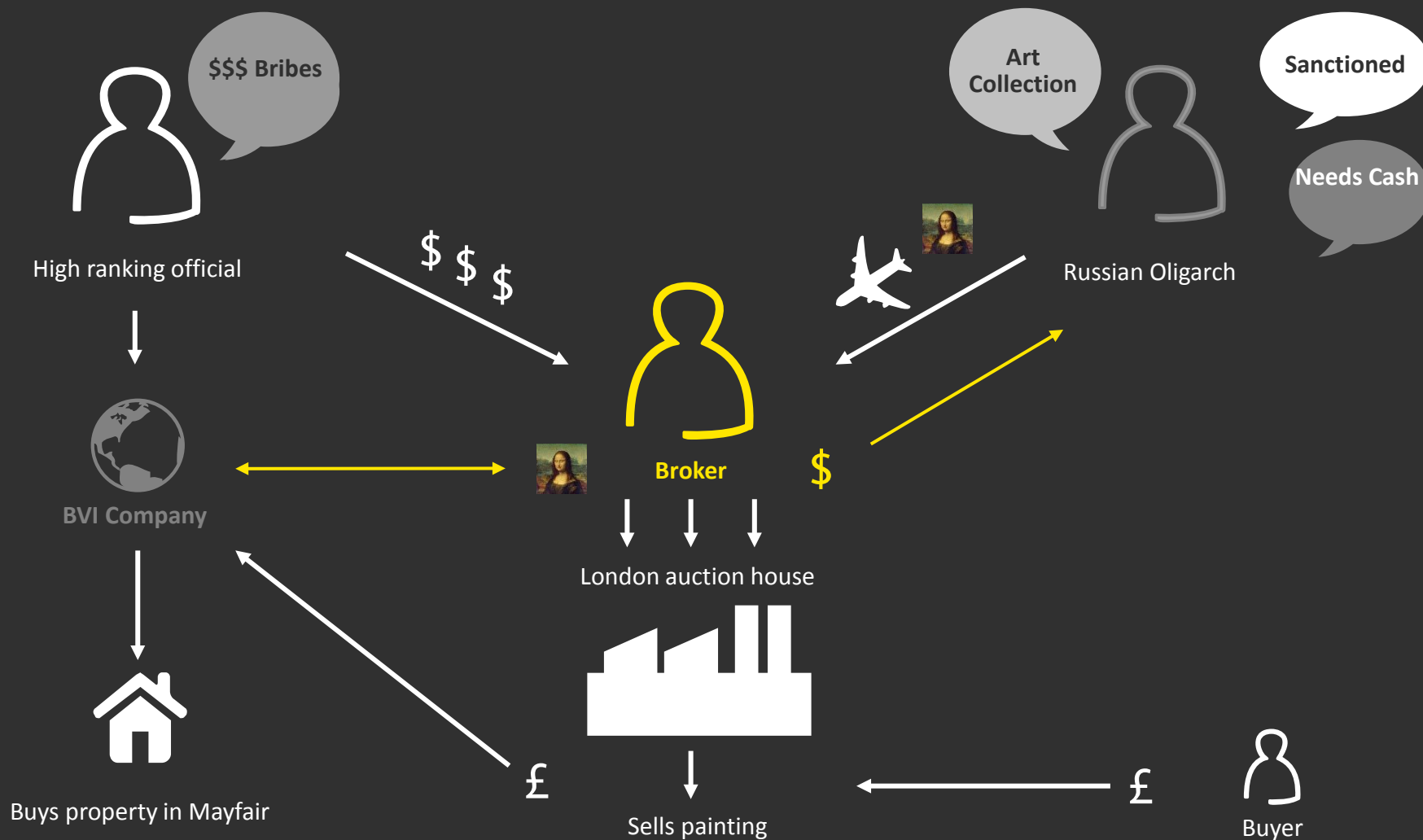


## SANCTIONS

- BNP Paribas - fined \$9 billion for breaching US sanctions.
- Mabey & Johnson - fined £3.7m for breaching UN sanctions.
- Mabey & Johnson MD - imprisoned for 5 years.
- Weir Group - fined £3 million for a similar offence.



# Red Flag Scenario



# Factors making the art world more attractive for money laundering:

---

- ▶ **The anonymous nature of the business**
- ▶ **The typically high value of goods**
- ▶ **Difficult to trace**
- ▶ **Physical movement of goods**
- ▶ **“off book” transaction**



## EXAMPLES

- Shirley Sack and Arnold Katzen's fine art money laundering programme for drug dealers.
- Ferreira's embezzled funds hidden in US artist Jean-Michel Basquiat's piece "Hannibal".
- Royal Bank of Canada hiding fine art for clients to help them evade tax.





## THE SUSPICIOUS ACTIVITY REPORT (SAR)

- SAR - report of suspicious activity sent to the NCA.
- Suspicion - a possibility, which is more than fanciful...
- Effect of submitting a SAR:
  - Cannot proceed until the NCA give permission.
  - Permission received = defence.







## REFORMS OF THE SAR REGIME

- Changes due in 2017:
  - Increased moratorium period.
  - Sharing suspicions.
  - Unexplained Wealth Orders.
  
- Think more carefully about SARs:
  - Could delay a deal with a client significantly.
  - Could cause a sale to fall through.



# K&L GATES

*This presentation is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the presenter(s) and not necessarily those of the law firm's clients.*