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## **Basel Art Trade**

### **Guidelines**

Intermediary report of a  
self-regulation initiative

*GOVERNANCE*

BASEL INSTITUTE ON GOVERNANCE



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### **Governance of Art Trade**

The art trade market is global, highly fragmented and complex, involving a great variety of operators. In light of this complexity, the current level of regulation and existing compliance efforts by individual operators has proven to be insufficient. With some competitors engaged in unethical or illegal behaviour, operating profitably while acting with integrity and ethics is increasingly difficult. As other industry sectors (e.g. the financial sector when faced with the challenge of effectively combating money laundering) have experienced, collective action by key market participants can be a highly effective way to systematically and comprehensively address such business practices and to ensure fair and efficient competition in a global market.

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Januar 2012

Responsibility for the views expressed and for any errors of fact or judgment rests with the author alone.

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## History

The Art Trade Initiative was conceived at a global conference on ‘Governance of Cultural Property: Preservation and Recovery’, which took place in September 2009 in Basel, Switzerland and was organized by the Basel Institute on Governance. Amongst many other topics discussed, one focus of the conference’s initiators, Dr Thomas Christ and Claudia von Selle, was the role of the art market as a ‘*refuge de valeur*’ which may attract dubious players as well as art objects of doubtful origin and value.

As a result of these discussions, the participants expressed a strong interest in pursuing the idea of collective action, by establishing art trade ‘industry standards’, to address fundamental integrity issues in the sector.

Two subsequent meetings of committed key players, representing a major part of the global art market, took place in Basel and New York in 2010. In attendance were high-ranking representatives from several prestigious auction houses and various international art dealers’ associations as well as American and European lawyers. The Basel Institute on Governance organized the meetings and acted as facilitator.

## About the authors

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## 1. Introduction

At first glance the global art trade, with an annual turnover of 30 to 40 billion Euros, seems comparable to other sectors of the global economy. Most of its typical activities, such as buying, selling and placing objects of art, are generally regulated by national commercial, civil and criminal legislation, applied and interpreted by local courts.

On closer inspection, however, certain characteristics emerge that are peculiar to the art trade. They are also crucial for the adequate understanding and appreciation of this sector's increased susceptibility to illegal activity.

- The art trade is an extremely diverse market area bringing together a wide range of highly diverse players. One half of the trade is dominated by a few auction houses, while the other half is an open playing field for a myriad of art-dealers. These in turn are organised in a variety of trade associations and subscribe to a great range of different ethical standards.
- The art trade largely operates independently of the financial markets and the fluctuations of share prices, yet displays comparable characteristics by exposing its trade objects to often dramatic and sometimes inexplicable changes in value.
- Akin to the real estate sector, the art trade has the reputation of a *„refuge de valeur“*, which means that the more tightly the international financial sector is regulated and controlled, the more copiously funds flow into the art world.
- In comparison with other trade sectors, the art market faces a higher risk of exposure to dubious trade practices. This is due to the volume of illegal or legally questionable transactions, which is noticeably higher in this sector than in other globally active markets. Far more serious than shady dealings in a legal grey area, the sector's shadow economy encompasses issues ranging from looted art, professional counterfeiting and fake certificates to the use of art sales for the purpose of money laundering.

However, the main difference between the art trade and neighbouring markets is found in the necessity to subject almost every transaction to two questions. Firstly: 'Is the ownership of an art object up for sale traceable (provenance of the object)?'; secondly: 'Are the buyers and their sources of funds identifiable (provenance of the funds)?' While the latter question has in the last few years increasingly been dealt with by the enactment of anti-money laundering legislation in a growing number of countries, the former still puts professional art dealers in a tight spot due to the conflicting priorities of transparency and discretion. If a dealer cannot prove the authenticity of an object beyond any doubt he should either retire from the transaction or disclose the identity of the vendor. However, the vendor may have very good and legitimate reasons why he/she does not want his/her identity as owner or heir of a given art collection to be known to the general public.

Some auction houses have addressed the looming reputational risks associated with this dilemma by subjecting themselves to a variety of workable in-house rules and guidelines. However, as a result of this unilateral approach, a transaction refused on such grounds by one house may well be picked up later by a competitor who feels committed to

different business standards. In particular, it is the formulation of non-disclosure agreements (and their legal exceptions) between agent and vendor that is a notorious bone of contention for lawyers and art dealers alike.

In this context, the need for collective action in the art market has repeatedly been emphasized at various art trade conferences. A so-called ‘self-regulation initiative’ has the advantage of pre-empting and potentially influencing formal regulation that is increasingly likely to be introduced in view of the general tightening of regulatory frameworks in related matters.

However, a breakthrough beyond joint statements of intent has not been achieved so far, let alone the formulation of universally agreed upon guidelines such as those proposed in this working paper. Productive initial discussions with some key representatives of the art trade have taken place with the assistance of the Basel Institute on Governance. They have revealed that there is still a gap to bridge between stakeholders’ deeper insights and their actual commitment to addressing the problem. There seems to be a tendency to discredit the pressure towards better regulation of the arts sector as mere media hype. This is, of course, a fallacy. One that the industry itself will hopefully be able to address from within, before national legislators step in; or before the whole sector slides into dubious market behaviour whilst dealing with questionable objects and thus loses its reputation as a respectable business sector.

## 2. Existing Guidelines and Regulations

After the ‘Hague Conventions’ of 1907 und 1954 ousted the looting and destruction of cultural properties in armed conflicts, the UNESCO Convention of 1970 regulated their illicit import, export or transfer of ownership at an inter-governmental level.

- |      |  |
|------|--|
| 1993 | European Commission Directive 93/7 on the return of cultural objects |
| 1995 | UNIDROIT Convention on stolen or illegally exported cultural objects |

Internationally binding agreements have been slow to translate into national law. Consequently, the variety of non-binding guidelines is so great that only a selection can be presented below:

- |      |   |
|------|---|
| 1986 | Code of Ethics for Museums (ICOM), revised in 2004  |
| 1998 | Washington Principles on Nazi-looted Art, followed by the Terezin Declaration in 2009         |
| 1999 | UNESCO International Code of Ethics for Dealers in Cultural Property                          |
| 2007 | Recommendations on the trade of cultural objects on the internet by INTERPOL, UNESCO und ICOM |

There are, furthermore, the ethics rules established by a variety of international trade associations such as:

**Antique Tribal Art Dealers Association (ATADA):** Trade Practices and Guarantee, Article X, Amended Bylaws of the Antique Tribal Art Dealers Association, Inc. (1997, amended 2007)

**Association of Art Museum Directors (AAMD):** New Report on Acquisition of Archaeological Materials and Ancient Art Issued by Association of Art Museum Directors (2008)

**Association of Art Museum Directors (AAMD):** Art Museums and the Identification and Restitution of Works Stolen by the Nazis (2007) - Position Paper (Not Guidelines)

**College Art Association (CAA):** A Code of Ethics for Art Historians and Guidelines for the Professional Practice of Art History (1995)

**College Art Association (CAA):** CAA Statement on the Importance of Documenting the Historical Context of Objects and Sites (2004)

**Confederation internationale des negociants en oeuvres d'art (CINOA):** International Support and Guidelines (1987, amended 1998 and 2005)

**International Association of Dealers in Ancient Art (IADAA):** Code of Ethics and Practice

**Museums Association (MA):** Code of Ethics for Museums: Ethical principles for all who work or govern museums in the UK (2002)

**World Archaeological Congress (WAC):** First Code of Ethics (1990)

Ethical rules have furthermore been established by national arts dealers' and museums' trade associations such as:

**British Art Market Federation (BAMF):** Principles of Conduct of the UK Art Market Adopted by the British Art Market Federation (2000)

**German Museum Association:** Code of Ethics

**J. Paul Getty Museum:** Acquisitions Policy for the J. Paul Getty Museum (2006)

**Metropolitan Museum of Art (MMA):** Collections Management Policy (2008)

**Society for American Archaeology (SAA):** Principles of Archaeological Ethics (1996)

**Swiss Association of Dealers in Arts and Antiques (SADDA):** Code of Ethics

At a national level, most countries nowadays have their own legislation governing the illegal export of cultural goods.

### **3. A Proposal for Global Guidelines**

These guidelines, the ‘Basel Art Trade Guidelines’ have been devised by the Basel Institute on Governance on the basis and as a result of what has been discussed among the key market players who participated at the Art Trade meetings held in Basel and New York in 2010. The guidelines are meant to be a first draft and proposal which has to be discussed further and is open to modification which the participants will deem as necessary or more appropriate. The guidelines considered in particular the already existing legal obligations of the art market participants, e.g. with regard to the questions of disclosure regulations and non-disclosure agreements. In art dealing the matter of disclosure and discretion belongs to the most sensitive challenges. The starting point for the creation of guidelines was therefore to be in line with national legal requirements and simultaneously to respect the requirements of a globally functioning art market. Finally the guidelines also offer a proposal on implementation procedures on the basis of experience in other industries. In this sense the guidelines reflect, harmonize and summarize the status quo and hence provide a common platform for self-regulation which the art market participants can develop if necessary.

#### **Basel Art Trade Guidelines**

##### **A. Preamble**

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## A. Preamble

The purpose of the Basel Art Trade Guidelines (BAT Guidelines) is to support the art market in its efficient and fair functioning. Art market participants are required to respect applicable laws and to adopt business practices that are not only ethical but also safeguard and promote the reputation and integrity of the art market as a whole.

The following Guidelines are understood to be applicable to all art market participants and aim to provide practical guidance for the sale of art objects.

Finding a definition of ‘the art market’ is difficult because today’s market is wide ranging in scope and covers not only art and antiquities but also a whole array of collectible objects. As a consequence, the various participants in this market are very diverse.

The art market has various very characteristic attributes that make it attractive but also vulnerable. These include its insider aspects and the hierarchy of knowledge and status, as well as the fact that art market participants can assume the multiple roles of auctioneers, dealers and collectors which, in other markets, would involve conflicts of interest. Furthermore, access to readily available information that directly affects market value and pricing patterns (for example the number of pieces available) is both unstructured and opaque. The art trade market is therefore susceptible to illicit practices and money laundering despite the existence of laws, international frameworks and soft law efforts to combat these crimes.

In this context, many international art market stakeholders have developed internal guidelines and compliance programmes to ensure lawful and ethical business practices, in particular to prevent corruption and minimise risks in their business activities. The adherence to such compliance programmes is difficult if competitors do not conduct their business according to the same high standards and instead engage in illicit behaviour.

Collective self regulatory action by market operators, designed to ensure that best practices are observed throughout the market, is the most efficient way to combat unethical business practices and will result in a level playing field and fair competition for all.

On the one hand the BAT guidelines propose due diligence requirements for contractual partners (namely seller and auction house or art dealer and buyer). On the other hand, they offer a guarantee of equal competitive conditions to participating market operators. Observance of the BAT Guidelines will mean that a competitive advantage can no longer be gained by disregarding due diligence obligations. These Guidelines therefore contribute to the creation of fair trade in what is currently a highly irrational and obscure market.

It is in the interests of all art market participants to adopt and implement these guidelines. Precisely because an art market operator may adopt interchangeable roles, proper due diligence conducted as

a seller will likely benefit that same operator when acting as a buyer.

These Guidelines do not seek to replace existing initiatives but rely on art market operators' full compliance with applicable national legislation, international conventions and relevant Codes of Ethics such as the IADAA, ICOM CINOA, CAA-Codes and others. These various instruments are, however, of limited application and effect as their respective scope will cover only certain countries, specific operators and at the same time often lack mechanism of enforcement and sanctioning. The overarching scope of the BAT Guidelines thus complements the existing range of standards and instruments and provides consistency and a level playing field to all participants.

## **B. Scope of the rules**

### **1. Art market operators**

Art market operators include, for example auction houses, galleries, museums, art fairs, experts, insurers, conservators, curators and restorers. Despite being subject to different regulations, they all face similar risks with regard to the provenance of the art object and the source of funds. As art market operators can assume different roles - for example when an art gallery or museum acts as either seller, buyer or intermediary - it is in their own interest to implement similar practices for all market operators. These Guidelines therefore apply to and address all art market stakeholders who are involved in the sale of art objects as professionals.

### **2. Objects of the market**

For the purposes of these Guidelines the art market is understood to be the trade of art objects. What constitutes an art objects is explained by the following two definitions of 'art objects' and 'collectable objects':

#### **2.1. Art objects**

According to international law art objects are those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science.

#### **2.2. Collectable objects**

In addition to and going beyond this definition the BAT Guidelines also cover collectable objects, which are all objects handled by art market operators, or which, due to their unique selling and pricing pattern/condition, are usually dealt with by the same market participants.

## C. Standards for art market operators

### 3. The identification of seller and buyer

#### 3.1. Principle

Identifying the seller reduces the risks resulting from any ambiguity regarding provenance, illicit trade and forbidden exportation. Identifying the buyer reduces the risks of money laundering and illicit enrichment and serves to preserve the records on provenance of the art object. The art market operator therefore has to ensure full identification and documentation of the seller and the buyer ('know your customers' rule).

#### 3.2. Balancing Interests

Some sellers and buyers may have reasonable grounds to prefer to remain anonymous to third parties (discretion) while the need to ensure clarity on the provenance of art objects and funds has to be adequately addressed (disclosure). In practice, this means that if the art market operator knows, or has reasonable suspicion to believe that the other party to a transaction is, in fact, acting on behalf of someone else (e.g. another buyer or seller), the art market operator must establish the identity of the true beneficial owner and the capacity in which the counterparty is representing this beneficiary. This identification of the beneficial owner should take place even if the identity is to ultimately remain unknown to third parties. It is essential to combine due diligence with a balanced disclosure and discretion approach at different levels as follows:

##### 3.2.1. Disclosure

The identity of the seller and the buyer must be known to each other, and to all intermediaries involved, including to third parties with a legitimate legal interest. Such a legitimate legal interest exists if a third party has a commercially justifiable or reasonable entitlement to the defined value of the object or to the object itself. Where such disclosure is granted, the third party may communicate the identity of the seller only in connection with the said third party's legitimate legal interest, and must confirm this in writing to the market operator before any such disclosure is made.

In general, the rules for the disclosure of the buyer's or seller's identities are in accordance with the applicable anti money laundering laws and regulations.

##### 3.2.2. Non-disclosure to third parties

Non-disclosure agreements should be avoided, but may be admissible when explicitly requested by the seller or the buyer. A request for non-disclosure to third parties can be granted if a market participant presents justifiable or reasonable grounds, such as the necessary and legally defensible protection of his privacy. A justifiable interest will not be recognised if the reason for non-

disclosure serves to circumvent applicable laws. Such non-disclosure requests only lead to enhanced due diligence obligations (see 4.4.1.). The art market operator acting for a seller who requests non-disclosure must provide a purchase back guarantee or equivalent and inform the latter about the possible consequences of non-disclosure.

### 3.2.3. Disclosure procedures towards third parties

These Guidelines propose that even where non-disclosure has been requested the identity of the seller or buyer has to be communicated by the market operator to third parties with a legitimate legal interest using the following procedure: The market operator communicates the request for disclosure to the concerned party (seller/buyer) granting a reasonable time for response. If the latter opposes such a disclosure request explicitly and with a legitimate reason, the final decision will be determined by the Advisory Board (see 9.2.2) which will seek to balance the various interests at stake (*in camera* procedure). If the Advisory Board grants disclosure, the third party may communicate the identity of the seller/owner only in connection with the said third party's legitimate legal interest, and this must be confirmed in writing to the market operator before any such disclosure is made.

## 4. Due Diligence before sale

### 4.1. Due diligence

Due diligence before sale is crucial to establishing transparency on provenance, including rights of disposal, third party rights, authenticity and, finally, the price of the art object. The identification of the art object is verified through due diligence and determines the commitments the seller has to the buyer, and the responsibilities of the art market operator in concluding the operation. In general, an art market operator's best efforts should be at least equal to the due diligence endeavours he would undertake when acting for his own account and responsibility (*diligentia quam in suis*).

### 4.2. Best efforts due diligence

#### 4.2.1. Principle

An undisputed and uninterrupted provenance history and proven authenticity of the art object is the aim in all transactions. In adopting and implementing these standards, art market operators commit to undertaking best efforts in conducting due diligence when preparing for selling, as described in the following:

#### 4.2.2. Research and evidence

The market players will invest sufficient time to research reasonable provenance and authenticity before finalising selling procedures. The art market operator acting on behalf of the seller is obliged to undertake provenance and authenticity research, making such efforts as are commercially reasonable and providing information on the art

object as well as its former owners. He is therefore obliged to use all sources of information which are, or can be, made available using justifiable and reasonable efforts. In particular, this includes:

- obtaining the provenance history of the object;
- requesting identification information from the seller,
- establishing credibility and plausibility references relating to the seller,
- referring to publicly available databases and listings relating to the parties to the transaction and the art object respectively;
- obtaining any relevant and available legal documents, witness declarations, expert opinions as the case may be, and
- checking the restoration history as appropriate and presenting circumstantial evidence when no direct documentation is available.

The market operator's obligations to obtain the evidence described above should be in proportion to the market value or the cultural/historical/religious importance of the object in question.

#### 4.2.3. Conflict of interest

An expert's opinion is invalid if the professional independence of the expert is in doubt. This is the case if the terms dictating his financial remuneration prevent the expert from fully disclosing relevant information (for example because of a success fee). At the request of the art market operator, the art expert will disclose his commercial or financial relationship with the seller, the buyer, the art dealer or the auction house.

#### 4.3. Incomplete Provenance

Being in possession of an art object does not in itself provide sufficient evidence of ownership and the rights of disposal. In the absence of valid objections it is, however, reasonable to suppose that the possessor enjoys full ownership of the art object. In these and other cases where full evidence on the provenance of the art object could not be procured, but sufficient indications of legitimacy are available, the art object can still be sold, but only with full disclosure of the seller's identity and the respective findings.

#### 4.4. Enhanced due diligence

The art market operator must initiate enhanced due diligence if the seller requests non-disclosure of his identity to third parties or if the provenance or the authenticity of the art object itself raises serious doubts. Enhanced due diligence involves, at least, the following efforts: Obtaining additional independent expertise, consulting expert committees and gathering second/further opinions, checking of additional databases, registers and listings, professional background check on the seller, research on previous art trade activities involving the seller (possibly facilitated by the other participants in this initiative), and information requests to relevant law enforcement authorities. The claim that the above procedure would incur

unreasonable expenses has no legal basis under these circumstances.

#### 4.4.1. The cost of enhanced due diligence

Art market operators will inform the seller in advance that enhanced due diligence will take place as a result of the request for information to remain undisclosed, and will inform the seller of the procedure as well as the expenses incurred. The costs of increased due diligence will be borne by the seller.

#### 4.4.2. Residual doubts

##### 4.4.2.1. Unclear provenance

Should the enhanced due diligence procedure yield insufficient or inconsistent information (*non liquet*), the art market operator should propose to the seller full disclosure of these findings to the buyer and to provide a purchase back guarantee or its equivalent, to address the possible consequences of the unclear provenance. Should the seller refuse such disclosure and guarantee, the market operator will abstain from providing his services.

##### 4.4.2.2. Doubtful provenance

Should the enhanced due diligence or similar third party information lead to serious doubts or well founded suspicion that the art object was stolen, illegally imported or otherwise illicitly obtained, the art market operator must inform the appropriate local authorities. In such a case, the object in question has to be held in trust/custody by the art market operator until the respective law enforcement agency gives further instructions. The sellers of such ‘objects of doubtful provenance’ have to be informed by the operator regarding the potential opening of procedures and the operator’s cooperation with the respective authorities.

### 5. Source of funds

#### 5.1. Principle

The art market operator will endeavour to deal only with buyers whose source of funds can be established to be legitimate. To meet this obligation, the art market operator should undertake adequate and reasonable measures to establish the origins of the funds involved in the transaction. Such efforts could include obtaining an appropriate certification from a reputable financial institution regulated for anti-money laundering purposes in the country where the art market operator is located.

#### 5.2. Cash payments

In general, transfers in cash are to be discouraged altogether. Where they take place and if they exceed EUR 15 000 (or the equivalent in any other currency), the art market operator should conduct

enhanced due diligence on the buyer.

### 5.3. Beneficial owner of the Funds

If the buyer is a domiciliary company, or acting as an intermediary or otherwise on behalf of a third party, the art market operator must establish the identification of the ultimate beneficial owner of the funds.

Where the source of funds gives rise to grounded suspicions of money laundering and in the absence of a plausible explanation, the art market operator must report those suspicions to the appropriate authorities. The art object may then be subject to legal orders, as required by local laws and regulations, and the transaction may be blocked.

The art market operator must establish record retention requirements for all documents relating to transactions involving art objects. The documents must be retained for a minimum of five years.

## 6. After-sale responsibility

### 6.1. Principle

The after-sale responsibility of the art market operator is directly proportional to the level of disclosure and due diligence exercised in the operation. The greater the level of disclosure and due diligence by the art market operator the lesser the responsibility after sale.

#### 6.2.1. Limited responsibility

If the identity of the seller and the buyer is disclosed (see 3 above), and due diligence duties have been properly observed (see 4 above), the art market operator will only be liable for those deeds that he is usually responsible for in the conduct of his own dealings (*diligentia quam in suis*; see 4.1.).

#### 6.2.2. Strict responsibility

If the seller's identity is not disclosed, or the market operator otherwise breaches his due diligence obligations, he will be liable to the buyer also in cases of unclear provenance or unresolved questions regarding the genuineness of the art object, provided the buyer acquired the object of art according to applicable laws and free of any legal impediments.

## 7. Conflict management

As disputes about art objects typically involve weighty economic interests, or arise through political, historical or cultural conflict, a non-judicial settlement of such cases is usually more appropriate and successful.

Besides seeking remedies from conventional courts, the BAT

Guidelines recommend taking recourse to out-of-court settlements, which include various Alternative Dispute Resolution (ADR) proceedings, such as:

- Arbitration
- Mediation
- Recourse to a Dispute Board (within ADR Proceedings)
- Adjudication

All signatory art market operators will receive a list of available ADR proceedings in conflict resolution. Umbrella cooperation agreements will be signed between the competent international and national institutions and the Advisory Board or the respective art dealers association, thus allowing the signatory art market operators to rely on and refer to a pool of experts when considering ADR proceedings.

The signatory art dealers' associations in cooperation with the Advisory Board will provide *ad hoc* guidance for the selection and application of appropriate ADR proceedings and will give general advice on conflict management.

#### **D. Implementation**

The proposed measures try to convert these Guidelines into a living document. The foreseen steps therefore have to be discussed, if necessary amended and agreed upon by the signatory parties.

#### 8. Information and documentation

##### 8.1. Information

In order to facilitate the implementation of the standards set out in these Guidelines, art market operators make a commitment that they will:

Publicly subscribe to the BAT Guidelines, either directly or through their respective art dealers association, and will report back on the measures undertaken to implement them.

All signatory parties will:

Publicly acknowledge their compliance with the BAT Guidelines, define internal measures to implement them or amend existing policies and procedures as may be necessary; retain all documentation that may be relevant to establishing the provenance of art objects in the future or to funds involved in transactions that have been either conducted or refused, for a minimum of five years starting from the date of receipt of such documentation.

##### 8.2. Databases

The art market operators will establish two databases, namely: A database of art objects whose provenance could not be fully

established; and a database of art objects whose provenance has been subject to a claim. These databases will be accessible to signatory parties, law enforcement officials and other authorities entitled to request such information.

## 9. Implementation action

Implementation of the BAT Guidelines involves:

### 9.1. Training programmes

The art market operators will engage in training and awareness raising programmes to support the implementation and dissemination of these Guidelines throughout the art market. Training activities may involve peer-to-peer exchanges of information as well as specific training programmes organised for example, by art trade associations and their members/signatories. Awareness raising programmes should include all relevant media, public and private sector firms and take place worldwide.

### 9.2. Monitoring

#### 9.2.1. Monitoring mechanism

The art market operators of this initiative will establish an independent monitoring mechanism to ensure compliance with the BAT Guidelines. Its main functions will be:

- to take the necessary steps towards the development of an auditing mechanism for art market operators committed to implementing the BAT Guidelines (i.e. through jury activities at international fairs);
- to create certification procedures through international art dealers associations;
- to control the effective use of the BAT Guidelines;
- to receive and address complaints of violations or non-compliance with the BAT Guidelines and impose sanctions for breaches of these Guidelines.

#### 9.2.2. Advisory board

Elections for the eight members of the Advisory Board will be held every five years. The composition of the Advisory Board will be in proportion to the art market operators' professions and the details to be defined in rules governing these elections. The Advisory Board will be responsible for monitoring compliance with the BAT Guidelines. In carrying out its duties, the Advisory Board is not bound by instructions.

#### 9.2.3. Sanctions

Sanctions may be recommended by the Advisory Board and imposed by signatory art dealers association boards only after a hearing has been held. Sanctions may include a warning, loss of signatory

association membership and/or, withdrawal of certification and will be proportionate to the gravity of the breach of the BAT Guidelines or the degree of culpability. A member of the Advisory Board is to be excluded from any decision to determine a sanction if the affected art market operator or a member of the Advisory Board expresses justifiable suspicion of bias or conflict of interest. Such an event generally arises if the Advisory Board member is either personally or economically linked to the affected art market operator or is a direct competitor. The discussion and decision as to whether a member of the Advisory Board will be excluded from proceedings under such circumstances, will take place in the absence of the said member.

The signatory art dealers' associations, in cooperation with the Advisory Board, will develop harmonised rules on sanction procedures, with the aim of fostering the successful implementation of these Guidelines.

9.3. The Advisory Board may transfer its decisions under this section (9.2) to an independent, non-partisan arbitrator who is bound by the rules of confidentiality.

#### 9.4. Ethics Group

The signatory art dealers' associations in cooperation with the Advisory Board may establish an Ethics Group that will work to improve the BAT Guidelines, give opinions on cases of conflict at the request of the signatory parties, and represent the signatories on a political level.

### 10. Secretariat

#### 10.1. Responsibilities

A secretariat will be set up in order to:

- coordinate the implementation and monitoring activities;
- support art market operators in the adaptation of their internal regulations and practices,
- compile a register of the art market operators who effectively implement the BAT Guidelines
- maintain and provide access to the expert pool; and
- provide assistance in the event of conflict and coordinate contacts with mediation and arbitration institutions.

#### 10.2. Location and financing

The secretariat will be located at the Basel Institute on Governance in Basel, Switzerland. The secretariat will be financed by signatories to the BAT Guidelines.

### **E. Recommendation**

The effective implementation of the BAT Guidelines will only be possible if there is considerable improvement in the accessibility to

archives and better cooperation with respect to existing registers of lost art works. The signatory parties therefore recommend the concerned bodies to engage in constructive collaboration and to develop rules that facilitate research by third parties. As far as possible all research and access to public archives should be free of charge.

## 4. Comments by Art Trade Representatives

The draft of the BAT Guidelines, as presented above, is based on consultations with representatives of the art trade as well as on existing guidelines of national and international art trade associations and organisations. Such ‘local’ rulings, however have very little impact on the actual conduct of day-to-day business, which is mainly due to their non-binding character and lack of sanctioning power.

At present, market leaders, such as the prestigious auction houses Christie’s and Sotheby’s, operate with their own in-house guidelines. Their guidelines typically differentiate between various types of problematic provenance, for instance by treating art looted by the Nazis differently from trophies carried off by the Allied forces during World War II. Guidelines then lead to radically diverging conclusions, as auction houses readily admit themselves. This is one of the reasons why, for example, in the case of Nazi looted art, they would welcome the creation of a unified sample catalogue containing clear definitions of what constitutes a ‘forced sale’. Even though the need for such a framework has also repeatedly been emphasized by American museum associations, no concrete steps towards a cooperative approach have been taken so far.

One of the main objectives of the draft BAT Guidelines was to find a way of harmonising a quantitatively and qualitatively diverse range of ethics and due diligence standards. One of the first steps was, therefore, the creation of instruments which would facilitate this process of harmonisation, based on regulations governing conflict resolution and control mechanisms in other business sectors. The aim was to create a framework which would hold up in court and not fall below legal standards already applied to market operations today. The art market is a business sector with traditionally high levels of commercial confidentiality. Talks with art trade representatives have uncovered a pronounced gap between their perceived personal entitlement to disclose or retain information pertaining to an art object, and the actual legal requirements protecting third party interests in such matters.

The three focal points listed below should therefore be regarded as the pillars of the BAT Guidelines, especially as they have not been formulated in this way in any of the international agreements or non-binding directives currently in existence

- rules on commercial confidentiality;
- procedures for alternative conflict resolution (ACR);
- an implementation and monitoring system.

For a better understanding of the diverse nature of this business sector, the issues at stake and the corresponding difficulties in coming to an agreement on content and typology, it has been decided to list comments received on individual draft guideline paragraphs below:

### A. The name ‘Basel Art Trade Rules / Guidelines’: comments

Strong opposition to the word ‘rules’, was expressed by the Anglo-Americans. They argued the term would indicate a binding nature of

the standard, which was contrary to the declared aim of the market operators consulted. The term ‘guidelines’, was perceived to more adequately express the spirit of the initiative.

## B. Scope of the rules: comments

### 1. Art market operators

Primarily, art market operators are buyers, vendors and intermediaries involved in the sale of an art object. Often, the same person or company may adopt any one of these three roles. Even though it might be more constructive to limit the BAT Guidelines’ scope of application to these three types of operators, the reality shows that the market is furthermore dominated by insurance companies, museum curators and expert evaluators. The central role of this last group is demonstrated very nicely by the infamous Jaeger/Beltracchi case (2011), where an entire forged collection changed hands in a million dollar deal made possible by the opinion of one respected expert evaluator, who had declared the works of art genuine. During the last working group meeting it was therefore decided to include these last named groups in the BAT Guidelines’ scope of application.

### 2. Objects of the art market

#### 2.1. Cultural objects

According to feed back, this paper cannot ultimately fall back on the Unidroit Convention for a definition of the term ‘art object’, as the Convention on the whole, appears to be unacceptable to art market participants. The BAT Guidelines have therefore decided to rely on the UNESCO definition. The same applies to the term ‘collectable object’ (cf. 2.2).

## C. Standards for art market operators: comments

### 3. Identification of buyer and seller

#### 3.1. Principle

Standardised ‘know your client’ (KYC) rules have already been initiated, developed and adopted by most major auction houses.

#### 3.2. ‘Balancing interests’

This article was rejected altogether by the Anglo-Americans, on the grounds that it fails to adequately take into account the specific conditions and circumstances of the art market, which they believe to be unable to function at all without the current levels of commercial confidentiality. However, the same individuals criticised the lack of in-depth rules on price fairness and ring behaviour. The authors are yet to receive constructive criticism on how to adequately address this dilemma.

As a matter of fact, the BAT Guidelines have been drafted along the lines of two fundamental principles of commercial as well as civil law:

1. A market operator's risk of liability is directly proportional to the amount of due diligence applied: the less diligence, the higher the risk.
2. As much transparency as necessary, as much freedom to act as possible.

The authors have decided to include a range of universally known legal terms such as 'evidence', 'residual doubt', and 'legitimate legal interest', so that market participants may apply criteria to their professional activities that could also be quoted in court.

As a basis for discussion, the proposed rules on disclosure do not, in any event, exceed the legal principles generally applicable today, such as the principle that unlawful behaviour is exempt from legal protection. It is the prerogative of art market operators themselves to establish more stringent rules or to enhance the general legal provisions with best-practices relating to their specific field of operation.

Newly introduced forms of legal procedure, like, for instance '*in camera* proceeding' have their roots in both European continental (i.e. German and French) and Anglo-American jurisdictions ('Freedom of Information Act').

#### 4. Due diligence before sale

Those without a legal background found it somewhat difficult to assess the various provisions regarding unclear or doubtful provenance and residual doubt. However, elucidation on this (and other) finer points of the BAT Guidelines will be a projected part of the implementation procedure.

Some criticism was directed at what was termed the 'excessive and unrealistic' scope of the Guidelines, especially with respect to the requirement of a second expert opinion. The authors hope that the example of the counterfeit Jäger/Beltracchi collection, which highlighted the need to apply scientific methods in the assessment of art objects, will heighten general awareness of the need to address this issue.

Opinions diverge widely across the sector regarding the various ways in which legal ownership of an art object can be proven. Under most continental European codes of civil procedure, documentation is only one kind of a whole range of evidence that may be produced. The BAT Guidelines therefore apply the far reaching fundamental principles of many civil procedure codes and include legal inspection, expert opinion and witness statements as well as any other evidence designed to prove ownership to the court.

The Guidelines' proposals on implementation matters attracted some criticism. Due to the heterogeneous nature of the art market the establishing of an the Advisory Board were declared unacceptable especially to the market-leading auction houses. However, no alternatives and no further discussions regarding the final version of these guidelines have taken place so far.

## 5. Conclusion

It can be assumed that the problem of illegal trafficking in art objects and measures taken to combat it are destined to become more significant over the next years. This tendency has already been witnessed since 2008. The latest example is the ‘Art and Cultural Heritage Mediation Program’ which was presented by ICOM (International Council of Museums) und WIPO (World International Property Organisation) in September 2011. Mediation of disputes over art objects is now open to members and non-members of ICOM. This organisation supplies a list of mediators and conducts specialist mediator training programmes.

Unfortunately, the art trade has shown a pronounced lack of interest in constructively dealing with the proposed draft BAT Guidelines and the issues it addresses. Reactions to a letter sent out to key representatives of the art trade industry by the Basel Institute on Governance in July 2011 were met with reservation and outright refusal to engage. Both the arbitrating role of the Institute and the Guidelines as such have remained unacceptable or unimportant to art market participants.

This, and the fact that even trials such as the Jäger/Beltracchi case go largely unnoticed in the USA, may point to the possibility that the art trade is simply not ready for self-regulation at this moment in time. As it happens, it may have to be the role of legislators and judges to form the framework for a better regulation of this particular business sector.

Nevertheless discussions with reputed exponents of the global art trade have shown that in principle market operators agree on the need to take self-regulatory action on matters discussed in this paper and in the BAT Guidelines, under the condition however that such collective action does not directly undermine the commercial interests of their trade. In other words, what seems legally and morally appropriate continues, at least at this present time, to be seen as economically harmful.

However, the authors of this paper are of the opinion that today’s deregulated art market risks being contaminated by doubtful or even criminal market players. It is therefore not the primary motivation of the BAT Guidelines to focus on single cases of trade with stolen or forged art objects. These matters are already taken care of by national jurisdiction and by specific legal provisions protecting the damaged parties and sanctioning the perpetrators. Rather, the BAT Guidelines seek to self-regulate two matters that have not yet been sufficiently addressed at a global level, namely the provenance of an art object and the provenance of the funds. If the BAT Guidelines address these matters, they do so with the intention of preventing the international flow of illicit funds and the trade in stolen or fake art objects. The latter might well be instigated or organised by the same dubious organisations or individuals involved in money laundering.

In addition to the financial value pertaining to these matters, the global art market should be seriously concerned with considerable reputational risks as again illustrated by the Jäger/Beltracchi case of 2011 which, according to the media, is the largest case of art forgery since the Second World War. It is interesting to note that in this case, the European media did not focus much on the person having forged the art

objects but much more on the doubtful role of the market operators, i.e. galleries and art experts who were involved. The large auction houses stress that illicit funds and art objects of dubious provenance, forged or extorted expert opinions continue to make up a small portion of the global art trade only. In this light, one would think that a self-regulation initiative as proposed by the authors of this paper is no threat to their operations and should be an ideal opportunity to position themselves in a positive light in the global market. However, it seems that despite an increasing number of relevant cases having recently come to light, no rethinking of this position has yet taken place.