

**THE ACQUISITION OF ARTWORKS BY ART FUNDS:**

**DUE DILIGENCE AND AUTHENTICITY ISSUES**

MASTER'S THESIS

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LUGANO, MAY 15, 2013

ADRIANO A. SALA

*“Not only do works of art end up as commodities, but there is also an overwhelming sense in which works of art ‘start off’ as commodities”.*

*Ian Burn (1939 – 1993)*

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On a sunny warm day in April 2011, I received an e-mail from the University of Zurich. A certain Nicolas Galley was advertising a brand new executive master's program in art market studies. A few days before, I was wandering at *Miarte* in Milan, with my wife Tecla. On that occasion, we purchased a work of art by a young, but at that time still unknown artist from Hong Kong. The artist was Lee Kit (b.1978) and the work of art *Equal*. During the last two years, Lee Kit's reputation has grown. In May 2012 one of his works, *Murine Tears Plus*, was displayed at the Museum of Modern Art in New York in the Section *Print In / Print Out*. Lee Kit will represent Hong Kong at the next Venice Biennale. Apparently, we had good taste and a bit of luck in buying that artwork.



**Plate n. 1:** Lee Kit, *Equal*, 2011, acrylic and emulsion paint on cardboard, 76 x 76 cm, Private collection, Lugano (Switzerland).

I decided to apply for the Executive Master in Art Market Studies Program since I was looking for some new challenges. Furthermore, one of my clients (I am a lawyer) is a passionate collector and I have been supporting him in many issues, both legal and practical.

It has been a great experience. I had the opportunity to meet many interesting people, to learn a lot and to travel all over the world.

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Adriano A. Sala

## I. Introduction

The purpose of this work is to provide art fund managers with a useful tool for the utmost important choice when purchasing artworks. After a short introductory overview of art funds I will focus on the process of acquiring artworks, outlining in particular the major aspects that need to be considered during the due diligence proceeding. I will then concentrate my analysis on one of the most relevant issues, i.e. the verification of the authenticity of the targeted artwork, outlining three essential elements of the proceeding: connoisseurship, provenance and scientific methods. I will conclude my paper with a case study and some final remarks.

According to recent estimates, up to 40% of the artworks on the market could be forgeries or fakes<sup>1</sup>. Therefore, a careful analysis of an artwork before purchase is essential. In particular, this aspect is even more relevant for art fund managers. A fake or forged artwork represents a net loss in the assets of the fund, since its value decreases to basically nothing<sup>2</sup>. Liabilities as well as reputational risks have a huge impact on the fund management. A bad acquisition can lead not only to the failure of the art fund, but can seriously endanger the reputation of the managers; also negatively impacting any future venture.

A proper due diligence is fundamental to the limitation or exclusion of any liability claim by the investors against the fund and its managers as well as for the safeguard of the managers' reputations. Therefore, I will also conclude my paper with some guidelines for the acquisition of artworks.

As a last introductory remark, I would like to point out that, in spite of a slow growing trend, especially in China, the art fund industry is still occupying a very thin place in today's financial market life<sup>3</sup>. The assertions of the present paper are therefore also inspired by and consequently applicable to any other class of collectibles. In my opinion, one of the major future challenges of the art fund industry will be to gain a stable confidence in all the players in the financial

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<sup>1</sup> BAZLEY 2010, Thomas D. Bazley, *Crimes of the art world*, Santa Barbara/Denver/Oxford, p. 63.

<sup>2</sup> The ordinary remuneration of fund managers (i.e. the management fees) is calculated as a percentage of the net asset value (NAV). Besides management fees, fund managers have usually the right to draw performance fees in case of net profit by their management activity.

<sup>3</sup> DELOITTE 2013, Deloitte Luxembourg – ArtTactic, *Art & Finance Report 2013*, Luxembourg / London 2013, p. 48 – 51.

market. Establishing a generally accepted standard of rules, also applicable to the acquisition of artworks, goes one step in this direction.

## II. Delimitation

My paper focuses on the acquisition of so-called *Fine Art*. I exclusively deal with the acquisition of “property of artistic interest, such as: (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial design and manufactured articles by hand); (ii) original works of statuary art and sculpture in any material; (iii) original engravings, prints and lithographs”<sup>4</sup>. Therefore, the acquisition of any other artifacts, such as the product of archeological excavations or antiques, postage, archives and articles of furniture, are not handled<sup>5</sup>.

The time of production of a particular artwork is of relevance for certain specific issues, like the determination of its material authenticity as well as its provenance. The older the artwork is, the more difficult it will be to establish with certitude its authenticity as well as its origin. Therefore, I treat such aspects accordingly.

This paper does not deal with authenticity issues related to video art or computer art and installations, since those issues raise questions mostly in connection with the notion of conceptual authenticity and respect of the will of the artist, which would deserve a paper solely devoted to those questions.

Likewise, the so-called *res extra commercium*, i.e. chattels which cannot be traded<sup>6</sup>, are not addressed in this paper.

Furthermore, this paper outlines some general criteria of due diligence with the acquisition of artworks and standard of care, without focusing on the peculiarities that arise from a particular law or from a specific case. In this regard it is worth remarking that the standard of care applicable to a concrete case will depend primarily on the governing law of the investment fund and secondly on the duties imposed by the law governing the purchase agreement. I briefly introduce issues related to the governing law in the relevant sections of chapter V (“Due Diligence

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<sup>4</sup> UNESCO 1970, Art. 1 par. (g) UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of November 14, 1970.

<sup>5</sup> UNESCO 1970, Art. 1 par. (a) to (f) and (h) to (k) UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of November 14, 1970.

<sup>6</sup> As, for example, cultural goods from the *demanio pubblico* in Italy.

with the Acquisition of Artworks”). Furthermore, in practice, each case needs to be considered individually in order to apply and adjust the proposed advice to the particularity of the specific case. Since this paper aims to outline theoretical criteria and suggestions, a future prospected development can be represented by the inclusion of the analysis of the specific needs of professionals active in the art fund industry.

My paper focuses on the due diligence with the acquisition of artworks, but does not deal with the duties of care and the due diligence needed in the subsequent phases that follow acquisition, i.e. the holding of artworks by the art fund (including *inter alia* storage maintenance, transport, insurance, exploitation, lending and exhibition) and the selling. Since those last two aspects are equally important, they deserve to be focused on in a separate paper, and not in this one, which is mainly devoted to authenticity issues.

Although the topic equally deserves its own investigation, this paper does not deal with the due diligence of the custodian bank or depository of the art fund.

### III. Art Funds

#### 1. Definition

According to a current and widely accepted opinion, art has both an aesthetic and a financial value<sup>7</sup>. The moment an artwork enters the market, it immediately becomes a commodity that needs to be priced, given that it can be bought or sold<sup>8</sup>. Furthermore, as a capital asset, artworks yield a return “from their appreciation in value over time like other financial assets”<sup>9</sup>. Intuitively, the purpose of investing in art is simple: to buy cheap and resell at a higher price, minimizing all costs correlated to the purchase, holding and resale of artworks<sup>10</sup>. Although, on the one hand, the art market is characterized by a certain lack of transparency regarding information and prices and, on the other hand, artworks are considered as a rather illiquid asset, it is generally assumed that carefully selected artworks have an international marketability and a limited downside potential because of their physical nature and lower volatility than conventional equities<sup>11</sup>. Furthermore, it is widely assumed<sup>11</sup> that art, as an asset, is weakly or non-correlated to the international equities market<sup>12</sup>. Artworks are therefore considered to be very suitable for being treated as an investment asset.

Considering the above, art funds invest in art as an asset class, aiming to make earnings mainly from the purchase and sale of artworks over a certain period of time. The advantage of pooled spending in acquiring expensive artworks, as well as the diversification and the prospect of active asset management are among the major benefits of investing in an art fund<sup>13</sup>.

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<sup>7</sup> MCANDREW INTRODUCTION 2010, Clare McAndrew, *An Introduction to Art and Finance*, in *Fine Art and High Finance*, edited by Clare McAndrew, New York 2010, p. 17.

<sup>8</sup> GRAW 2009, Isabelle Graw, *High Price*, Berlin/New York 2009, p. 27 – 33.

<sup>9</sup> MCANDREW INTRODUCTION 2010, *ibid*.

<sup>10</sup> Such as transaction, shipping, storage and insurance costs.

<sup>11</sup> ECKSTEIN 2010, Jeremy Eckstein, *Art Funds as Asset Class*, in *Fine Art and High Finance*, edited by Clare McAndrew, New York 2010, p. 136.

<sup>12</sup> HOROWITZ 2011, Noah Horowitz, *Art of the deal*, Princeton and Oxford 2011, p. 147.

<sup>13</sup> ECKSTEIN 2010, *op. cit.*, p. 138.

Therefore, art funds can be defined as “generally privately offered investment funds dedicated to the generation of returns through the acquisition and disposition of works of art”<sup>14</sup>.

## 2. Historical Overview

The most famous pioneer of the art fund industry was the well-known art club *La Peau de l'Ours* (The Skin of the Bear), established in 1904 in Paris by the businessman André Level. The investment group consisted of thirteen men, who, for the period of ten years acquired artworks with the manifest intent of selling them at auction at the end of the period. They were speculators<sup>15</sup>. Over the years, *La Peau de l'Ours* acquired 145 artworks of the major artists representing the Avant-Garde of that time, including Picasso, Matisse and Gauguin. Each member of the club had to pay an annual contribution of 250 francs. The whole collection was sold at auction on March 2, 1914, fetching a total of 100,000 francs or four times the original outlay<sup>16</sup>. The star of the auction was Picasso's masterpiece from his rose period “The Family of Saltimbanques”, which was bought in 1908 for 1,000 francs and sold in 1914 for 12,500 francs (see plate n. 2).



**Plate 2:** Pablo Picasso, The Family of Saltimbanques, 1905, oil on canvas, 212.8 x 229.6 cm (National Gallery of Art, Washington, D.C.)

It is worth noting that the members of the club spontaneously returned twenty percent of the profits to the artists, indirectly recognizing the

<sup>14</sup> See the definition by THE ART FUND ASSOCIATION LLC, New York (NY – U.S.A.), [http://www.artfundassociation.com/what\\_are\\_art\\_funds/basic\\_af.html](http://www.artfundassociation.com/what_are_art_funds/basic_af.html) (last visit: April 16, 2013).

<sup>15</sup> FITZGERALD 1995, Micheal C. Fitzgerald, Making Modernism, New York 1995, p. 15-16.

<sup>16</sup> HOROWITZ 2011, *ibid.*, p. 152.

concept of *droit de suite*, six years before France adopted a specific law acknowledging artists' resale rights of their artworks<sup>17</sup>.

In spite of the successful experience for these investors and artists, the beginning of the First World War, as well as the subsequent tumultuous decades did not lead to the emergence of other similar experiences until the 1970s<sup>18</sup>. The grounded study of historical art prices by Gerald Reitlinger's *The Economics of Taste*, published in three volumes between 1961 and 1970, resulted in the consideration that "art as an investment was correlated with art's utility as an inflationary hedge"<sup>19</sup>. This conclusion helped the revival of investment schemes having artworks as targets. The British Rail Pension Fund is the paramount and most successful example of that period. The BRP Fund began to buy artworks in 1974, as a consequence of the deep economic crisis caused by the OPEC-led oil crisis in 1973. At that time, stock markets fell dramatically and inflation rates were unprecedentedly high<sup>20</sup>. The managers of the BRP Fund deemed it advisable to diversify a proportion of the fund's investments into a class of assets where there were reasonable prospects of achieving long-term growth at least equal to inflation<sup>21</sup>. Fine art was then identified as a financial safeguard. Scope was a long-term strategy. The BRP Fund invested the total amount of GBP 40 million in art from 1974 to 1980, allocating its resources to approximately 2,400 items from diverse market sectors (paintings, sculpture, books, furniture, bronze and jewelry)<sup>22</sup>. The BRP Fund began to sell its artworks in June 1987, ending in 2000. The cumulative performance of the fund's art portfolio lies at an overall cash internal rate of return (IRR) of 11.3 percent, or 4 percent per annum in real terms after allowing for inflation<sup>23</sup>. Although the BRP Fund achieved its main scope, i.e. scoring profits higher than inflation, its results were exceeded by those of the major stock markets over the same period.

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<sup>17</sup> FITZGERALD 1995, *ibid.*, p. 16-17.

<sup>18</sup> HOROWITZ 2011, *ibid.*, p. 152.

<sup>19</sup> HOROWITZ 2011, *ibid.*, p. 153.

<sup>20</sup> ECKSTEIN 2008, Jeremy Eckstein, *Investing in Art*, in *The Art Business*, edited by Iain Robertson and Derrick Chong, London and New York 2008, p. 74-75.

<sup>21</sup> ECKSTEIN 2008, *ibid.*, p. 75.

<sup>22</sup> HOROWITZ 2011, *ibid.*, p. 154.

<sup>23</sup> HOROWITZ 2011, *ibid.*, p. 155.

Other initiatives from that period were less fortunate. In 1985 the *New York Times* reported “The mutual fund approach to art, a hot idea during the art boom of the 1970’s, has no survivors”<sup>24</sup>.

Two subsequent major ventures of the 1980’s and 1990’s failed. At the end of the 1980’s Chase Manhattan Bank solicited investments from pension funds for a close-end fund in art, not reaching the necessary capital and being forced to quit the project even before it started. During the same period, the Banque Nationale de Paris (BNP) launched two art funds, which in 1998 and 1999 recorded heavy losses from the sale at auction of their collection.

In spite of the latter results of art funds, since 2000 the interest in such investment vehicles has been growing<sup>25</sup>. According to some researches, 36 funds were launched from 2000 to 2009<sup>26</sup>. Some of them did not succeed. Others are still active. The most noteworthy and successful case is the one of *The Fine Art Fund*, established in 2002 in London by the former Christie’s official Philip Hoffman and Lord Gowrie. The initial target of The Fine Art Fund was to achieve USD 350 million. After several years and according to recent information, the fund collected through four different investment vehicles approximately USD 105 million under management, producing an annual IRR of 25.5% for The Fine Art Fund I and 26.7% for The Find Art Fund II<sup>27</sup>.

Therefore, the future development of the fund industry still appears uncertain, although it has been proven that art belongs today to an established asset class among other investment opportunities. The art fund industry probably needs to gain long lasting confidence from other players in the financial markets, including corporate and private investors, in order to really succeed in the market. Time will be the ultimate judge.

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<sup>24</sup> BENDER 1985, Marylyn Bender, High Finance Makes Bid for Art”, in *Ney York Times*, February 3, 1985.

<sup>25</sup> ECKSTEIN 2008, *ibid.*, p. 78.

<sup>26</sup> HOROWITZ 2011, *ibid.*, see Table C1. Please note that the number of existing art funds is difficult to estimate, since there is no obligation to register.

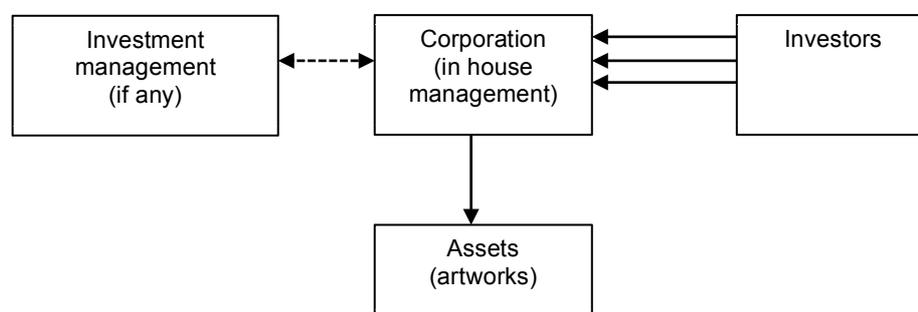
<sup>27</sup> THE FIND ART FUND GROUP (press release – September 2011), <http://www.thefineartfund.com/press/press-releases> (last visit: May 6, 2013).

### 3. Typical Structures

Corporate funds and Limited Liability Partnerships are among the most common vehicles for art funds<sup>28</sup>.

A **corporation**<sup>29</sup> is a legal entity formed according to the law of the jurisdiction of incorporation. Investors own shares in the corporation, which grant limited rights to receive dividends and to vote at shareholders' general meetings. The incorporation deed or the bylaws can create different classes of shares, conferring the financial rights to one class of shares and the voting rights to another class of shares. It is usually the case in investment funds, owning investors shares belonging to the class conferring exclusively financial rights and no voting rights. The activity of the corporation is managed by the Board of directors, which typically delegates authority to an in-house manager (CEO or management team) or to an independent external investment advisor or manager. See chart n. 1.

**Chart n. 1: Art Fund as Corporation**



A **limited partnership**<sup>30</sup> is established according to the law of the jurisdiction of incorporation. It is a type of partnership in which one party, the general partner, is responsible for the management of the activity. He has unlimited liability for the obligations of the partnership. The investors – as limited partners – have generally no rights to participate in the management of the activity and, consequently, have no liability for the

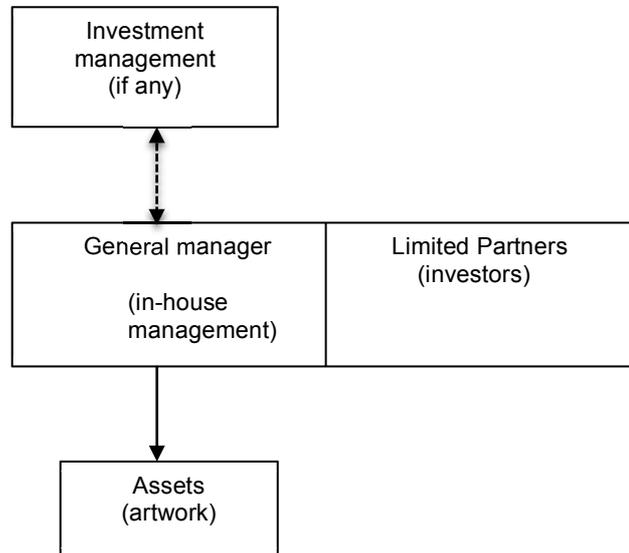
<sup>28</sup> Investment funds can also have the form of a trust. Since this form is not very common, I will not treat it in this paper.

<sup>29</sup> WELLS 1999, Christopher M. Wells, The Organization of Off-Shore Investment Funds, in The Chancellor Offshore Funds Manual, London 1999, p. 2.

<sup>30</sup> WELLS 1999, *ibid.*, p. 2.

obligations of the partnership beyond their capital contributions. See chart n. 2.

**Chart n. 2: Art Fund as Limited Partnership**



No matter how they are organized, art funds generally fall into two categories: open-ended or closed-end<sup>31</sup>. **Open-ended funds** sell and repurchase, or redeem, their own shares on a continuous basis at their net asset value per share. The net asset value per share is based on the fair market value of the assets of the fund, net of all of its liabilities, divided by the number of outstanding shares.

**Closed-end funds** usually issue shares only at the beginning of their existence and do not redeem their own shares. Because of this limitation in the redemption of shares, closed-end funds are normally structured with a limited life, after which the fund is required to be dissolved and its assets liquidated (or, eventually, distributed to the shareholders). Closed-end funds are typically used when the underlying investments are illiquid and the net asset value is more difficult to determine (as it is in the case for artworks).

Most art funds are structured as five- to ten-year closed-end investment vehicles<sup>32</sup>.

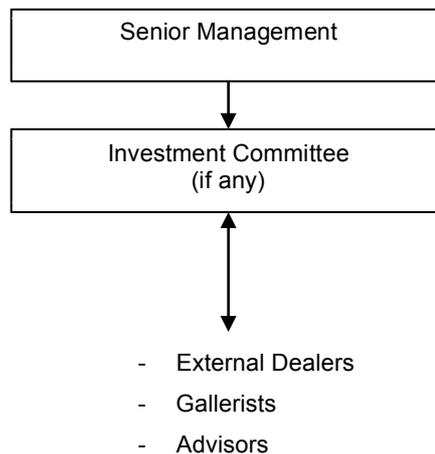
<sup>31</sup> WELLS 1999, *ibid.*, p. 2 f.

<sup>32</sup> HOROWITZ 2011, *ibid.*, p. 149.

The **fund's manager** usually receives an annual fee in order to cover overhead and operational costs (**management fee**). This annual fee is calculated as a percentage of the committed capital. Usually this percentage is 2%. Furthermore, the fund's managers are entitled to receive a fee for the performance of the fund based on the earnings (**performance fee**). Such a fee is usually equal to 20% of the earnings. Hurdle rates from 6 to 8% are pretty common.

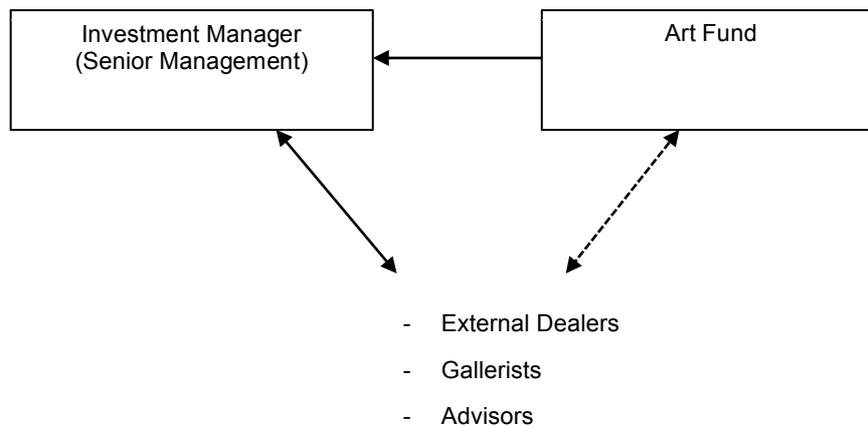
Most funds apply a **multitiered management structure**. At the top there is a senior management team or investment committee, which set the fund's vision and scope, raises capital and assists in the due diligence process<sup>33</sup>. Trading is normally executed by a team of external art buyers, like practicing gallerists, private dealers and advisors. They are experts in the field and have client contacts. Unlike senior management, the art buyers tend not to be employed by the fund's management, but they usually receive commissions for placing work within the fund, carrying also an interest in its performance<sup>34</sup>. See Chart n. 3 and n. 4.

**Chart n. 3: In-house Management**



<sup>33</sup> HOROWITZ 2011, *ibid.*, p. 150.

<sup>34</sup> HOROWITZ 2011, *ibid.*, p. 150.

**Chart n. 4: External Management**

There are three main **investment strategies** used by art funds<sup>35</sup>. In the first strategy, investments are made across multiple geographical markets and markets sectors. In the second strategy, investments are linked to a certain region, but made vertically (for example a Swiss art fund, composed of 19<sup>th</sup> century paintings as well as works by living artists). In the third strategy, investments are made in an opportunistic way, seeking to gain profit from distressed sales and informational asymmetries arising in the wider art market (for example, buying at a significant discount from the litigant inheritors of an estate). Art funds can also use a mix of the above-described strategies.

In order to determine its strategy, the art fund will follow a certain process, which can be outlined as follows<sup>36</sup>. First of all, the fund's management will have to establish the overall allocation. Then the management will have to assess the cash availability and, according to that availability, analyze potential investments. Based on those potential investments, the management will have to identify and source concrete opportunities. As soon as an opportunity has been targeted, the management will have to perform the due diligence and eventually start the negotiations. At the end of this last phase, the management will have to decide whether the selected artwork and the negotiated purchase price is sustainable with the

<sup>35</sup> HOROWITZ 2011, *ibid.*, p. 151.

<sup>36</sup> HOROWITZ 2011, *ibid.*, p. 150.

existing portfolio. If the answer is positive, the fund will acquire the artwork. As a last, but on going step, the management will continuously have to reassess cash and exposure.

## IV. The Acquisition of Artworks

### 1. The Process

The acquisition of artworks is an essential part of the activity of an art fund. It will usually be the outcome of a certain process, which will have to comply with many aspects including the following: the fund strategy, the allocation of resources, the availability of those means (essentially in cash), the search for artworks that could fit with both the fund's strategy and financial means, the execution of the due diligence on the selected artwork, the negotiation aiming to the definition of the best and fair price, and the conclusion of the transaction by the acquisition of the property and of the ownership of the artwork and determining if the negotiated price complies with the fund's financial means.

The legal framework of the acquisition of artworks can be pretty complicated, since many parties are usually involved belonging to different jurisdictions. It will therefore be necessary to ascertain the legal aspects, which need to be analyzed, in order to determine the governing law and draw the legal consequences<sup>37</sup>. Such aspects are not addressed in this paper, but it must be noted that in practice they must be considered in each individual case.

Many parties are usually involved in this process that, besides the buyer and the seller, play a role.

The Buyer of the artwork is the art fund. The Seller is the proprietor of the same.

The seller's rights and obligations, as well as the consequences of the intervention on the side of the seller of any third party, as dealers or advisors, will not be treated.

On the side of the buyer, the senior management team will usually set the directives for the acquisition of the artwork (i.e. a Picasso from his late period, target price: from USD 3 to 5 million), while external dealers will

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<sup>37</sup> The purchase agreement related to artworks between two parties belonging to different jurisdictions (countries) will be usually governed by the law chosen by the parties, or, by lack of choice, by the law of the principal place of business of the seller. Furthermore, the execution of certain services by the parties involved, i.e. external advisors or dealers, as, for example, the execution of the due diligence, will be usually governed by the law contractually chosen by the parties, or, by lack of choice, by the law of the principal place of business of the parties, who delivers the performance characterizing the contract.

search on the market for such a piece and propose it to the senior management. External art advisors can also play a role on a concrete basis; helping both the external dealers and the senior management in their duties.

It is worth noting that, from a strict legal perspective, the senior management can be part of the legal entity itself (corporation or limited liability partnership) constitutive of the art fund as one of its bodies or it can be a separate entity, like an investment management or advisory company. In the first case, the senior management will directly oblige the art fund, while in the second case, usually, it will indirectly oblige it by requiring a formal approval or ratification by the art fund itself. The relationship between an external senior management body (investment management or advisory company) and the art fund itself is normally defined on a contractual basis in an investment management or advisory agreement. The contractual agreement will set the rights and duties of each party. Nevertheless, this distinction can apparently have some legal consequences especially on the degree of liability from the acquisition of artworks. Those consequences are addressed in the next section.

Furthermore, the intervention of other parties in the acquisition process, as external dealers or advisors, other than the senior management of the art fund, will generate some other legal issues, which also deserve further exploration.

## **2. The Liability of the Senior Management**

Since the liability of the senior management from the acquisition of artworks towards the art fund itself and towards investors depends chiefly on the jurisdiction of incorporation of the fund and, consequently, on the law governing that jurisdiction, I limit my analysis to the standard duties of care that are usually applicable to the art market in the trade of artworks. I adopt the same criterion for the analysis of the role of the senior management as an external entity. Therefore, I do not address here any peculiarity deriving from the law governing those questions. However, such analysis would be necessary in a concrete case.

### 2.1. *As a Corporate Body of the Art Fund*

The senior management will directly commit the art fund by all its acts or omissions. The senior management will therefore generate the direct liability of the art fund itself towards third parties, including investors, for any consequences of its performance. These consequences will chiefly be claims by investors in the case of “bad” investments, requiring the restitution of the invested money, in whole or in part<sup>38</sup>.

Through the acquisition of artworks, the senior management is therefore responsible for the whole acquisition process, independent of the intervention of third parties acting on behalf of the art fund.

Although it would rarely be the case, if the senior management acts with no intervention by any third party, it will also be responsible for the duly personal execution of each act related to the acquisition of the artwork.

If the senior management entrusts other third parties, as dealers or advisors, with the execution of the entire acquisition process or with part of it, it will, in any event, be responsible to the investors for the outcome of such acquisition process. In this regard, the senior management’s liability will also include the adoption of the necessary duties in the selection of the involved third party. In such an event, the senior management is therefore responsible for: (i) the adoption of any decision in relation to the acquisition process (independent on any delegation authority permitted by the applicable law); (ii) the selection of the entrusted third parties and (iii) the supervision of the third party’s activity.

Although the entrusting of a third party in the acquisition process will increase the duties of care of the senior management, the latter by *de facto* tends to limit its own responsibility to any strategic decisions and to the selection and supervision of the third parties. In other words, if the senior management is supported by highly reputed art advisors in the selection of artworks and by highly reputed art dealers or gallerists in the execution of the acquisition of the artwork, the senior management will remain responsible for the strategic decision related to the investment and for the selection and supervision of the advisors and dealers entrusted

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<sup>38</sup> Consequences by intentional damages to the art fund, as embezzlements, are not treated, since they represent an obvious case of responsibility of the management.

with specific tasks. Since the latter are highly reputed, the duty in the selection by the senior management will be easily proven. Regarding their supervision, the senior management will have to adopt some standard rules of care, especially in tracking the record of the activity of dealers and advisors. The check for any conflict of interest, especially related to any financial interest of the dealer or advisor in the artwork proposed for acquisition to the art fund, will be of utmost relevance.

Regarding the topics of due diligence and authenticity issues; the senior management tends to delegate their execution, respectively verification to competent third parties as advisors and dealers. The senior management's responsibility lays chiefly in the selection of competent third parties and in their supervision. Therefore, the senior management will have to verify whether or not the entrusted advisors or dealers execute their work with the necessary standard of care. Such issues of care, for both the due diligence process and questions of authenticity, are addressed in the following chapters.

## **2.2. *As an External Entity***

The senior management does **not** directly commit the art fund by all its acts or omissions. It is basically responsible to the art fund according to the rights and duties set in the contractual agreement between the parties.

It is therefore chiefly responsible for the execution of the contractual duties with the standard of care typically due and expected for the execution of certain tasks. With the acquisition of artworks, the senior management acting as an external entity is therefore responsible for the diligent execution of the whole process. Depending on the content of the contractual agreement, the senior management can be authorized to delegate the execution of the acquisition process, in whole or in part, to third parties. The situation is then the same as the one described in the previous section.

Apparently, the senior management acting as a separate entity is exclusively responsible for the correct and diligent execution of the

contract to the art fund, but not to the investors<sup>39</sup>. In this regard it cannot be excluded that the senior management will in any event be considered as a material body of the art fund, *de facto* substituting the formal directive body in all substantial decisions, and is considered by any third party as the true directive body of the fund itself. In such a case, the separate legal entity is also held responsible for its acts and omissions to the investors. Such questions will have to be analyzed in a concrete case, according to the relevant applicable law.

### 2.3. Case Study: An Alberto Giacometti Sculpture

The following example illustrates the liability of the senior management. I differentiate between the senior management being a corporate body of the art fund (i) and being an external entity (ii).

A third party, who had no relationship with the art fund, proposed to the senior management the purchase of a sculpture of Alberto Giacometti for USD 2.6 million.

This third party delivered the following sheet:

ARTWORK:



Alberto Giacometti (1901 – 1966)

**Femme de Venise**

1950

Bronze with grey-silver patina, hand-chiseled

113 cm h

Signed by the Artist, Stamped 1950 n. 0/6 (Artist proof)

PROVENANCE:

Private Collection, Switzerland, directly acquired from a famous Spanish artist, friend of Alberto Giacometti.

Private Collection, Switzerland (by decent).

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<sup>39</sup> The consequences of fraudulent or intentional acts are not treated.

- (i) The senior management is a corporate body of the art fund. The management decided to entrust the viewing and analysis of the artwork to an external dealer, having heard that the latter deals with many bronze sculptures of Giacometti. The appointed external dealer confirmed in writing the authenticity of the artwork as well as the provenance. He also confirmed that the price of USD 2.6 million was fair. The management decided to purchase the artwork. At a later stage, the criminal persecution authorities seized the artwork. It was ascertained that the sculpture was a forgery.

In this case the fund managers are liable to the investors because they grossly disregarded the basic elements in the selection of the external dealer, whose duties were to state the authenticity, provenance and valuation of the artwork. The managers based their choice on some rumors, "having heard" that this dealer was dealing with many bronze sculptures of Giacometti. In order to have fulfilled their duties, the managers should have checked in detail the competences, reputation and impartiality of the external dealer. Furthermore, they were obligated to verify that the appointed expert executed proper due diligence with the artwork. By doing this, they would have easily discovered that the artwork did not in fact have a certificate of authenticity by the Giacometti Committee of the *Fondation Alberto et Annette Giacometti* in Paris<sup>40</sup>. The managers are therefore liable to the art fund itself, and, consequently, to its investors, for gross negligence in executing their duties. The damage is assessed based on the purchase price paid plus any additional costs.

- (ii) The management is an external entity of the art fund. The situation would be the same as the one described above, if the senior management is considered as a material body of the art fund. The situation is different however, if the senior management is effectively an external entity, acting exclusively on a contractual basis and not

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<sup>40</sup> The authority of the *Comité Giacometti* is very well established in today's art market. An advised buyer would therefore always require a certificate of authenticity by the foundation before any purchase of an artwork of Alberto Giacometti.

giving to any third party the impression of acting as a body of the art fund. Although the case is exactly the same as just described, the consequences are different. The managers are exclusively liable to the art fund (and not to the investors) for breach of the investment management agreement. To appoint an external dealer with no check of his competences, reputation and impartiality is considered gross negligence. Not verifying the execution of proper due diligence is negligent as well. Not even considering the lack of a certificate of authenticity by the Giacometti Committee is definitely gross negligence. The management is therefore liable for the loss incurred by the art fund, i.e. the purchase price paid plus any eventual further costs.

### **3. The Liability of Dealers and Advisors of the Art Funds**

In this section, I briefly address the liability of dealers and advisors, who have been entrusted by the senior management in the execution of some specific tasks related to the acquisition process of artworks by an art fund. To this end, it is necessary to distinguish between two cases, namely if the art advisor or dealer has been appointed by the senior management acting as a corporate body of the art fund or as a separate entity.

#### **3.1. Appointment by the Art Fund**

In this case, the senior management is a corporate body of the art fund. The appointment of an external dealer or advisor generally occurs on a contractual basis. The relationship between the art fund and its external advisors or dealers is defined by a contractual agreement. Mutual rights and duties will depend on the content of the contract. Usually, the advisor or the dealer is entrusted with the execution of one or more specific tasks, as, for example, identifying a potential artwork, valuating it, executing due diligence and negotiating the price.

The appointed advisor or dealer has to both carry out a given task with diligence and care, and, if contractually obligated, to provide the result owed<sup>41</sup>.

Both will be responsible to the art fund for the fulfillment of the contract as described above.

They are not usually responsible directly to investors, since there is no direct contractual or corporate relationship between them. Exceptions are possible to the extent that the external advisor or dealer is considered as a material body of the art fund. This exception is applicable to the extent that the external advisor or dealer plays an important role in the administration and representation towards any third party of the fund and that a neutral third party identifies it as the art fund itself.

### **3.2. *Appointment by the (External) Investment Manager or Advisor***

In this case, there is no direct relationship between the art fund and the appointed dealer or advisor. Both are linked to the “external” senior management (acting as an investment manager or advisor) by a contractual relationship with the objective of executing specific tasks related to the acquisition of artworks by the art fund. They are therefore directly liable to the “external” senior advisory for the diligent and careful execution of the contract and, if due, to the delivery of the result(s) owed.

They are usually not liable to the fund and, consequently to investors, since there is no direct contractual or corporate relationship between them. Nevertheless, it cannot be excluded in advance that the appointed advisor or dealer plays such a significant role in the management of the fund that a neutral third party, including the investors, consider them as a material body of the fund, generating as a consequence their liability also to a third party.

### **3.3. *Example***

Considering the above-described case study of the Giacometti sculpture<sup>42</sup>, the art fund, directly or through the external investment manager,

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<sup>41</sup> I refer in particular to such obligations, for whose execution a result is contractually due, as, for example, the execution of some scientific analysis of the artwork.

<sup>42</sup> See above §2.3.

appointed an external dealer in order to check the authenticity and provenance of the artwork, as well as to value it. The external advisor is liable to the appointing body exclusively on a contractual basis<sup>43</sup>, for the due and correct execution of his tasks. By not checking for the existence of a certificate of authenticity from the Giacometti Committee, he is liable for negligent breach of contract. Damages determined based on the purchase price paid by the art fund plus any eventual costs.

#### 4. Conclusion

The acquisition of artworks by an art fund is a very delicate process. Many parties are involved. Many aspects have to be considered. Furthermore, the legal framework of both the acquisition itself and the execution of various aspects related to the acquisition, for example the required due diligence, chiefly depends on the jurisdiction of the parties involved, their contractual relationship and on the governing law. It is of utmost importance to determine the applicable law to the relevant issue and, where possible, to establish in advance the most favorable law to be applied.

Considering the above, I focus my attention now on two relevant points in relation to the acquisition of artworks. The first one relates to the due diligence process which an art fund or appointed third parties have to complete in order to carefully and thoroughly execute the task of acquisition. The second one relates to the most important aspect to consider with the acquisition of an artwork, namely its authenticity.

My work here does not focus on detailed legal aspects, but, where necessary, I do point out some relevant issues that need to be considered. Therefore, the purpose of the next two chapters is to offer a useful tool to any involved party in the art fund business for the analysis of such legal aspects.

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<sup>43</sup> Exceptions are thinkable when the external advisor is considered as material body of the art fund. Those cases are very rare in practice.

## V. Due Diligence with the Acquisition of Artworks

### 1. Process

The acquisition of artworks by the art fund can vary according to the structure and the acquisition process adopted by the art fund and its management body or entity. The main purpose of each acquisition process shall be the verification of all relevant material and legal aspects related to the targeted item. The valuation of the fair purchase price and of the risks shall be the outcome of such proceeding.

The due diligence process is one of the main phases of the acquisition process, since it allows the art fund to verify if the selected artworks fulfill certain requirements, as, for example, authenticity or good condition.

Due diligence presupposes the identification of a certain artwork, which is the object of the acquisition process. The identification has to comply with the fund strategy and be affordable within the financial means allocated to the purpose of acquisition. To this end, the fund will also have to allocate the necessary liquidity for the payment of duties and levies correlated with the purchase of the artwork (as, for example, VAT or sales tax), the transport and storage as well as the insurance costs.

The senior management – alone or with the support of external advisors – is in charge with the identification of the artwork.

Once the artwork has been identified, the due diligence process can start. The first step is to have **access to the artwork**. The senior management or, usually, the appointed dealer or advisor will have to physically be in possession of the artwork in order to verify its conditions. Taking pictures will be also very important in order to keep track of the viewing of the item. Other aspects of the due diligence process presuppose the analysis of documents, the research of information or the scientific analysis of the artwork as well as related documents.

Generally, the following aspects will then be analyzed during the due diligence process:

- Ownership of the Artwork (sub 2);
- Authenticity (sub 3 and Chapter VI);

- Provenance (sub 4);
- Condition (sub 5);
- Respect of Custom and Cultural Property Law (sub 6);
- Valuation (sub 7);
- Purchase Agreement (sub 8);
- Insurance (sub 9).

It is advisable that the entity entrusted with the execution of due diligence keeps a **detailed written record** of the entire process and copying all relevant documents. The standard level of care is that **everything has to be documented**. This record will help all the involved parties in the case of claims by investors or disputes, giving evidence of the activity effectuated.

Depending on the outcome of the due diligence process, the management of the fund will be able to assess both the price and risk of the desired artwork. Regarding this last point, the art fund can decide whether to insure the assessed risk, for example in relation to eventual provenance issues, and/or to make the seller guarantee some specific qualities. Insurance can therefore play a significant role in the viability of art funds in today's market. Later in this paper, the topic of insurance is addressed further.

## 2. Ownership

Generally, the seller shall be the owner of the artwork in order to legally transfer his ownership rights to the buyer. Some European continental laws<sup>44</sup> acknowledge important exceptions to this general rule. The first main exception is the case of the acquisition in good faith from a person who, although possessor, is not legally the owner of the chattel. The second exception is the acquisition at a public auction. In both cases, the acquirer becomes owner, although the seller does not have any property right on the chattel. Such possibilities are generally unknown in common

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<sup>44</sup> As, for example, Swiss law, as other civil law countries (Italy, France, Germany).

law jurisdictions<sup>45</sup>. In those countries ownership can only be acquired from the previous owner, who is transferring it to the acquirer<sup>46</sup>.

The verification of the ownership depends therefore on the verification of the ways the previous owners acquired the goods. The place and moment of the acquisition are crucial, in order to set the applicable law at the moment of the previous acquisitions<sup>47</sup>.

In these regards, many aspects have to be considered.

The above-mentioned differences between civil and common law countries play a role in the case of loss of the good by one of the previous owners<sup>48</sup>. In particular, losses caused by such illegal acts as thefts or embezzlements, will be treated differently, depending on the jurisdiction where the loss and the subsequent transfers of possession took place. The elapse of time will also play a role, depending on the different jurisdictions and, consequently, on the different statutes of limitation.

Will the ownership of a good, once stolen in New York, then transferred to an established art gallery in Milan, and subsequently sold there to an acquirer in good faith, legally be acquired by the acquirer in good faith in Italy?

The answer is: in Italy, yes, since the acquirer in good faith will immediately become owner<sup>49</sup>. The situation will be different if an acquirer acquires the object in good faith in London, which is a common law country. There, the owner, under certain conditions, will have the right to claim its property back<sup>50</sup>.

Also, acquisitions at auctions are treated differently, depending on the place where the auction takes place, and, as a consequence, on the governing law of that jurisdiction.

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<sup>45</sup> As, for example, the U.S.A. and the U.K.

<sup>46</sup> In the Common Law countries the following ancient Roman legal principle is still valid: *Nemo plus iuris ad alium transferre potest quam ipse habet* (Ulpianus, in Dig. 50.17.54; "No one can transfer to another a larger right than he himself has").

<sup>47</sup> RASCHÈR 2009, Andrea F. G. Raschèr, Kulturgütertransfer, in Kultur Kunst Recht, Basel 2009, n. 15 ff ad §6.1, p. 269 – 272.

<sup>48</sup> MÜLLER-CHEN/RENOLD 2009, Markus Müller-Chen/Marc-André Renold, Kulturgütertransfer, in Kultur Kunst Recht, Basel 2009, n. 111 ff ad §6.2, p. 294-301.

<sup>49</sup> Art. 1153 Italian Civil Code.

<sup>50</sup> By the so-called *replevin*-action: the right to bring a lawsuit for recovery of goods improperly taken by another. Such claim is not an action in rem (as it would be in the most civil law countries), but it is an action for tort, being the unlawful act the refuse to reconstitute the good to the proprietor. The lawsuit has to be filed within a certain term, starting from the restitution request by the owner.

Any eventual transfer of ownership in the case of **inheritance** will have to be analyzed according to the law governing the succession. Depending on the applicable law, the transfer of ownership to the community of heirs or to a single heir will be subject to certain rules, varying from jurisdiction to jurisdiction. Also in this case, it will be necessary to verify – according to the applicable law – whether the acquisition occurred in compliance with the latter. Determination of the heirs' community, last will and testament, lapse of time and statute of limitation will be fundamental criteria to be checked.

For those reasons, it will be essential to verify each transfer of possession and ownership of the artwork, starting, if possible, from the artist's hands. The entity or body executing due diligence will have to focus particularly on elements which could interrupt the chain of legally transferred ownership, as thefts or other unlawful acts. It will therefore be necessary to check data banks, such as the Art Loss Register in London and the Interpol database of stolen art in Paris, for stolen or looted art. Since those databases are not exhaustive, it will be necessary to check all relevant and available databases in order to minimize the risk related to any eventual theft or embezzlement of the artwork.

Furthermore, documents related to the transfer of ownership such as: purchase agreements, deed of gifts, last wills and testaments, invoices, transport and insurance documentations will all be a helpful tools in carrying out the due diligence process.

The verification of the legal title of the owner implies also a verification of the provenance of the artwork. I will return to this issue later<sup>51</sup>.

As a last element related to ownership, art works shall be free of any burden or lien, especially from third parties. Art works shall in particular not be pledge or object of any retention right by third parties. For example, in Switzerland the possessor of a good is supposed to have good title on it. As a consequence, the owner shall always have the right and the possibility to freely dispose of the chattel. If it is not the case, the chattel is probably subject to a burden or a lien by third parties. In this regard,

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<sup>51</sup> See below Section 4.

according to the relevant governing law, it would also be advisable to verify the legal meaning of possession and any eventual public registers<sup>52</sup>.

### 3. Authenticity – An Overview

Authenticity is one of the most important criteria which has to be analyzed in the due diligence process. I will focus on some specific issues in the next chapter.

In this section, I will refer to the concept of authenticity and its relation to fakes and forgeries.

The concept of authenticity can be divided in two aspects: material authenticity on the one hand, and conceptual authenticity on the other.

**Material authenticity** of a work of art is the result of the process of authentication, through which the work of art is attributed to a particular artist or specific culture or era<sup>53</sup>. Material authenticity is therefore the attribution of a work of art to a certain artist or artistic circle, to specific periods and regions of production. Since absolute certainty can be reached only in very rare cases, the authentication process aims to intensify the probability of a certain attribution.

**Conceptual authenticity** is a subtler concept. It involves the definitions of authorship and originality of an artwork, which have been questioned especially from the 1960's onwards by certain artists or artists' groups, as, for example, the group "Art and Language", established in the late 1960's, who adopted a conceptual approach and "created works identical to the originals which would come to embody postmodernism and, in particular, appropriationism in the eighties"<sup>54</sup>. Conceptual authenticity is therefore an artistic concept or idea, questioning the concepts of authorship or originality of an artwork.

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<sup>52</sup> In Switzerland, if the possessor of a chattel is not the legal owner, the latter can let his property right be inscribed in a public register (reservation of property register).

<sup>53</sup> SPENCER 2004, Ronald D. Spencer, Introduction, in *The expert versus the object*, ed. by Ronald D. Spencer, Oxford/New York 2004, p. xi.

<sup>54</sup> HACKFORTH-JONES/ALDRICH 2012, Jos Hackforth-Jones/Megan Aldrich, Introduction, in *Art and Authenticity*, ed. by Jos Hackforth-Jones and Megan Aldrich, Farnham 2012, p. 16-17.

In the execution of the due diligence process for the acquisition of an artwork, exclusively material authenticity is relevant and consequently will be checked. I will therefore focus my further considerations to the latter, with the exclusion of conceptual authenticity.

Art experts – academic, independent art historians, museum or collection curators, art dealers or auction art experts – generally carry out the process of authentication<sup>55</sup>.

They usually have three major tools for determining the authenticity of an artwork: (i) scientific analysis, (ii) historical documentation and (iii) visual inspection by a knowing eye or connoisseur<sup>56</sup>. Since the ability of the connoisseur to perceive the legitimacy of a work usually precedes the need for scientific analysis and verification of historical documentation, the idea of connoisseurship is crucial to the whole matter of authenticity<sup>57</sup>.

Connoisseurship is considered as “one long-established way of validating the material authenticity of an artwork”<sup>58</sup>.

Fakes and forgeries on the one hand and restorations on the other are the biggest challenges to the material authenticity of an artwork.

Copies or alterations made with fraudulent intent fall into four main categories<sup>59</sup>:

- a forgery, which is a whole new work in imitation of something else;
- a fake, which is an object that has been altered such that it appears to be something else, usually more valuable;
- a pastiche, which is something made up of unrelated pieces; and
- a genuine object that has been deceptively restored, such that serious damage is hidden or disguised.

To this last point, it is worth noting that also restorations executed with no fraudulent intent have an impact on the material authenticity of an artwork, depending on the intensity and on the extension of the restoration. The wider the surface restored, the lesser the degree of authenticity of the

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<sup>55</sup> SPENCER 2004, *ibid.*, p. xi.

<sup>56</sup> O'CONNOR 2004, Francis V. O'Connor, *Authenticating the Attribution of Art*, in *The expert versus the object*, ed. by Ronald D. Spencer, Oxford/New York 2004, p. 6.

<sup>57</sup> O'CONNOR 2004, *ibid.*, p. 6.

<sup>58</sup> HACKFORTH-JONES/ALDRICH 2012, *ibid.*, p. 9.

<sup>59</sup> CRADDOCK 2009, Paul Craddock, *Scientific investigation of copies, fakes and forgeries*, Oxford 2009, p. 11.

work. Therefore, it will be necessary to analyze each case in detail in order to determine the impact of the restoration.

The purpose of due diligence in relation to the material authenticity of an artwork is the analysis of all aspects, which can confirm the attribution of an artwork to a certain artist and exclude the presence of copies or alterations made with fraudulent intent. To this end it is important to notice that the difficulties in confirming the attribution of an artwork to a certain artist will proportionally increase with the (presumed) age of the artwork. The attribution of an Old Master will be more complicated than the attribution of more recent works. Provenance research will therefore be essential as well as a deep knowledge of the artists and their methods. I will diffusely elaborate on those aspects in the next chapter<sup>60</sup>.

As a last remark, it is important to note that the selection of third-party experts for the verification of authenticity issues is of utmost importance. I will treat this argument below in Chapter VI.2.2, in relation to the topical question of the relevance of certificates of authenticity.

The management of the art fund generally appoints such experts<sup>61</sup>. A contractual relationship will link the expert with the appointing body (art fund or external investment manager). Therefore, the expert will be liable towards the appointing body (and not towards the investors) for the due and correct execution of the entrusted task. In the above-mentioned example of the Giacometti sculpture, the external dealer was acting as an expert and mistakenly confirmed the authenticity of the artwork<sup>62</sup>. He was negligent in the execution the contract, since he did not verify the existence of a certificate of authenticity issued by the Giacometti Committee in Paris. He was therefore liable towards the appointing body for the damage caused by his mistake, i.e. the price paid by the art fund to the seller as well as any other related cost.

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<sup>60</sup> See below Chapter VI.

<sup>61</sup> As a corporate body or as an external entity of the art fund.

<sup>62</sup> See above Chapter IV Section 2.3.

#### 4. Provenance

Provenance is the history of ownership. It is therefore strongly linked with the determination of the legal validity of the title of the current owner of a work of art<sup>63</sup>.

The purpose of provenance is to establish an ideal line of ownership from the current owner to the artist by the means of analyzing and collecting documents, such as the contracts, invoices, listing of collector's inventory, auction or exhibition records.

Provenance research is also helpful in determining the (material) authenticity of an artwork. For example, the proof of an interrupted chain of ownership will allow the identification of an artwork and distinguish it from copies of the same period.

In today's art market, provenance research is of utmost importance, especially in all those cases where there were wars, riots, revolutions or dictatorships before or during the production of a certain artwork.

The most famous and sad case is represented by the systematic looting of artworks by the Nazis all over Europe.

Restitution issues of looted art play an important role in today's art market and can have a huge impact on the acquisition of an artwork also by an art fund.

As an example, I will briefly describe the case of Max Silberberg's collection<sup>64</sup>. Mr. Silberberg was a German Jewish industrialist, living in the former Breslau in Lower Silesia, today Wroclaw in Poland. He was one of the most important collectors of his time, acquiring works of German artists, French Romantics, Realists, Impressionists, and also Modern artists (like Georges Braques, Paul Klee, Alexej von Jawlensky, Henri Matisse, Otto Mueller and Georges Seurat). The Nazis forced Silberberg to sell all his assets, including his collection, at very low prices. They then seized for tax fraud the profit of the sales. Max Silberberg and his wife died in the concentration camp of Auschwitz. Their death was registered on May 8, 1945. After the war, Max's son, Alfred Silberberg and his wife

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<sup>63</sup> See above, section 2.

<sup>64</sup> MÜLLER/TATZKOW 2010, Melissa Müller/Monika Tatzkow, *Lost Lives Lost Art*, New York 2010, p. 116 – 131.

Gerta (who managed to fly to London in 1939) started to look for the pieces of the collection. They managed to recover one piece in 1968. After the adoption on December 3, 1998 of the Washington Conference Principles on Nazi-Confiscated Art, Gerta started again the efforts of recovering the collection of her family. Today, the collection is scattered all over Europe, America and Asia. Many pieces have disappeared. Many pieces are in public or private museums, as, for example the painting *La Sultane* of Edouard Manet, which is located in the Emil Bührle Collection in Zurich (see plate n. 3).



**Plate 3:** Edouard Manet, Young Lady in Oriental Garb (or La Sultane), ca. 1871, oil on canvas, 96 x 74.5 cm, Emil Bührle Collection, Zürich.

It is interesting to note how the Emil Bührle Foundation, owner of the collection, describes the provenance of this painting<sup>65</sup>:

Adrien Marx, Paris (until 1892) (1) ▪ Roger Marx, Paris (1892 until [d.] 1913) (2) ▪ The estate of Roger Marx, Paris (1913/14) (3) ▪ Durand-Ruel, Paris; Bernheim-Jeune, Paris; Paul Cassirer, Berlin (1914) (4) ▪ Durand-Ruel, Paris & New York (by 1924) (5) ▪ Max Silberberg, Breslau (1928) (6) ▪ Paul Rosenberg, Paris & New York (1937–1952) (7) ▪ Emil Bührle, Zurich (22 September 1952/18 September 1953 until [d.] 28 November 1956) (8) ▪ Given by the heirs of Emil Bührle to the Foundation E.G. Bührle Collection, Zurich, no. 62 (1960).

- (1) Received probably as a gift from the artist, cf. dedication.
- (2) Nephew of the above, acquired from the above for FF 450, Adolphe Tabarant, *Manet et ses œuvres*, Paris 1947, p. 289; *Roger Marx, Un critique aux côtés de Gallé, Monet, Rodin, Gauguin...*, (exh. cat.) Musée des Beaux-Arts Nancy 2006, pp. 31 (n. 3), 73.
- (3) *Catalogue des tableaux, pastels, dessins, aquarelles [...] sculptures [...] faisant partie de la Collection Roger Marx [...]*, (sale cat.) Galerie Manzi, Joyant, Paris (11–12 May 1914), no. 60.
- (4) Acquired at the above sale for FF 74,000, Rouart/Wildenstein no. 175; for the price O[tto] G[rautoff], "Auktionsnachrichten, Paris", in *Kunst und Künstler* (12) 1913/14, p. 557.

<sup>65</sup> Data collected from the website of the Emil Bührle Foundation: [http://www.buehrle.ch/works\\_detail.php?lang=en&id\\_pic=31](http://www.buehrle.ch/works_detail.php?lang=en&id_pic=31) (last visit: April 21, 2013).

- . (5) *Exhibition of Paintings, Edouard Manet, Pierre Renoir, Berthe Morisot*, Carnegie Institute, Pittsburgh 1924, no. 19.
- . (6) *Ausstellung Edouard Manet 1832–1883, Gemälde, Pastelle, Aquarelle, Zeichnungen*, Galerie Matthiesen, Berlin 1928, no. 35; Karl Scheffler, "Die Sammlung Max Silberberg", in *Kunst und Künstler* (30) 1931/32, pp. 9 (ill.), 14.
- . (7) Acquired from the above in 1937 for \$ 17,800, AStEGB<sup>66</sup>, Photocopy of Stock Book of Paul Rosenberg & Co., New York, entry no. 5106; Letter from Paul Rosenberg, New York, to Emil Bührle, 22 September 1952, accompanying individual invoices for 10 pictures which Bührle has acquired from him, including Manet, *La Sultane*.
- . (8) Acquired from the above for \$65,000 minus a 10% discount (\$6,500) = \$58,500, AStEGB, Invoice from Paul Rosenberg, New York, made out to Emil Bührle, 22 September 1952; Letter from Emil Bührle to Paul Rosenberg, Zurich, 6 May 1953, accompanying a check in payment of 4 pictures and scheduling payments for 3 pictures still to be effected, including Manet, *La Sultane*; [2nd] Invoice from Paul Rosenberg, New York, made out to Emil Bührle, 14 September 1953, for Manet, *La Sultane*, and Summary of invoices from Paul Rosenberg, made out to Emil Bührle, 14 September 1953, for 3 paintings valued at \$ 138,600, including Manet, *La Sultane*, and deducting \$ 19,220 for payment already effected; Payment order from Emil Bührle to Industrie- und Handelsbank, Zurich, 18 September 1953, ordering transfer of the remaining \$ 119.380 to Paul Rosenberg; Correspondence regarding the import of the 10 pictures to Switzerland, 12 January 1956–22 June 1956, the Manet figuring in the papers as "Manet, Young Woman in Oriental Costume", with a declared value of \$ 12,000.

Silberberg acquired the painting from the Durand-Ruel Gallery of Paris in 1928. No indication of price is given. In 1937 the work was acquired by Paul Rosenberg & Co, New York for USD 17,800. By reading the information provided by the Emil Bührle Foundation, it appears that Silberberg sold it to Rosenberg, although it was a "forced sale"<sup>67</sup>. At the time of the sale, Rosenberg had his gallery in Paris, but the price is given in USD. Furthermore, it is questionable how Silberberg could get in touch with Rosenberg for a private "unforced" sale, since Silberberg at that time was forbidden to leave Germany<sup>68</sup>. No answer has been given to those questions. In my opinion, the provenance of *La Sultane* remains, at least morally doubtful despite its legal acquisition by Emil Bührle in 1952.

<sup>66</sup> AStEGB: Historical Archive of the Emil G. Bührle Foundation.

<sup>67</sup> MÜLLER/TATZKOW 2010, p. 123.

<sup>68</sup> There is no certitude or evidence of the correctness of the information provided by Paul Rosenberg. Rosenberg gave such information 15 years after his supposed purchase. Furthermore, he could have had an interest in giving "inaccurate" information.

The above-described case is very representative of the risks linked with the trade and acquisition of artworks, whose provenance is doubtful or cannot be determined with certitude.

The due diligence related to provenance issues therefore shall be executed carefully.

All relevant documents shall be collected, eventually by visiting the archives of auction houses, galleries, collectors, as well as state archives (like custom records). Existing catalogues raisonnés<sup>69</sup> as well as guides to provenance research<sup>70</sup> will be very helpful in this regard.

Incompleteness and ambiguity of documents are among the most common problems in facing provenance research, especially for older works<sup>71</sup>. Due diligence will therefore aim to execute the job according to the best efforts, knowing from the very beginning that the perfect search will only very rarely be attained for old pieces. In my opinion, the higher the investment is by the art fund (proportionally to the assets under management), the more intense shall the duties of care be in the provenance research.

## 5. Condition

The condition of an artwork affects its value. Therefore, by evaluating any potential purchase, it will be necessary to draw a condition report providing information about any areas of the work that need to be cleaned, repaired, restored or that were previously restored.

Some works are already on the market in association with a condition report. Usually, auction houses provide such a report.

In the appendix, I attach the condition report of the artwork of Marino Marini (1901 – 1980) *Studio per miracolo* (1953/1954). The report is in Italian. I will translate it by indicating the typical content of the condition report:

- Name of the artist (e.g.: Marino Marini, 1901 – 1980);

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<sup>69</sup> See §VI.2.1.

<sup>70</sup> See for example the very useful Guide to Provenance Research by the American Association of Museums, published in 2001.

<sup>71</sup> O'CONNOR 2004, *ibid.*, p. 17.

- Title of the artwork (e.g.: Studio per miracolo);
- Description of the artwork (e.g.: knight on falling horse, bronze, stone support);
- Object (e.g.: sculpture);
- Technique / manufacturing (e.g.: investment casting - *fusion à cire perdue*, chiseled, patina);
- Date (e.g.: 1953/1954);
- Material: (e.g.: bronze);
- Dimensions (e.g.: height: 65 cm, length: 100 cm, depth: 52 cm);
- Entry Date (e.g.: March 21, 2012) – exit date (e.g.: March 21, 2012);
- Person in charge (e.g.: avv. Adriano A. Sala);
- Owner (e.g.: private collector);
- Condition (e.g.: the sculpture is in a good condition. There are no mechanical damages, like scratches or similar. The patina is homogeneous and compact. There are no spots of anomalous corrosion).
- Verifications (e.g.: on the horse's neck, there is a small hole, representing a defect of the cast. On the knight's right ankle, there are two white incrustations, probably some remains of the cast powder, which from the inside of the sculpture spread through the orifices of the metal. In some parts of the sculpture [knight's head and side, horse's nostrils], there is a slight loss of consistency of the patina).
- Suggestions (e.g.: by handling the sculpture, always move the sculpture together with his stone support);
- Remarks (e.g.: none);
- Place – Date (e.g. Lugano, March 21, 2012);
- Name and Signature (e.g.: Giacomo Pagurri, Restorer and Conservator SCR);
- Photograph of the artwork from different angles and perspectives, as well as of some details of it.

As in this case, it is advisable to have such a report executed by an independent expert in the field. Associations of restorers and appraisers can provide lists of experts according to their field of activity.

As an example, I mention the British Association of Paintings Conservator-Restorers, founded in 1943, whose scope is to “promote and foster the practice of paintings’ conservation in the UK and around the world”<sup>72</sup>.

## 6. Customs and Cultural Property Law

Since the beginning of the 19<sup>th</sup> century many states have issued regulations protecting cultural goods as national cultural inheritance and preventing their transfer abroad<sup>73</sup>.

The following methods have been used since then to achieve that goal:

- The export of cultural goods is forbidden by law or depends on the previous authorization by an authority (public law);
- Archeological findings are declared by law property of the state (private and public law);
- Cultural goods of particular significance are declared *res extra commercium* (“goods outside commerce”, private and public law);
- Transactions having cultural goods as object are declared null and void if the transaction violates specific statutes on the protection of cultural goods<sup>74</sup>.

Those instruments are typically national.

As a national complement to those instruments, countries control import and export through their borders by border authorities and, therefore, by customs and fiscal laws. In particular, cultural goods shall be declared to custom authorities, in order that import and export papers are perfect.

Tax consequences are also related to the transfer of cultural goods over national borders. For example, with the import of goods into Switzerland, the tax on added value; Value Added Tax (VAT) is due.

Furthermore, there are international treaties, which aim toward a supranational protection from illicit art trade.

In the European Union, there is one directive and one regulation:

- The EU Directive 93/7 (EEC) on the return of cultural objects unlawfully removed from the territory of a member state<sup>75</sup>; and

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<sup>72</sup> All information are drawn from the website of the association: [www.bapcr.org.uk](http://www.bapcr.org.uk) (last visit: April 22, 2013).

<sup>73</sup> RASCHER 2009, *ibid.*, p. 267.

<sup>74</sup> RASCHER 2009, *ibid.*, p. 267.

<sup>75</sup> EU Directive 93/7. It is worth to note that EU-Directives need to be implemented into national law to be directly applicable.

- The EU Regulation (EEC) no. 3911/92 on the export of cultural goods<sup>76</sup>.

The EU Directive has as objective return procedures of cultural goods that were unlawfully exported from EU member states since 1993. The EU regulation introduces the requirement of the export permit for the exporter of cultural goods from the territory of the EU.

At the level of the United Nations, UNESCO adopted in 1970 the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Since the Convention is not self-executing, the countries having ratified it<sup>77</sup> need to implement it through the adoption of a national law<sup>78</sup>. The scope of the convention is to fight against illicit transfer of cultural goods and encourage open and fair exchange of cultural goods. The Convention has no retroactive effect, i.e. the measures take effect only after the ratification of the relevant state.

The International Institute for the Unification of Private Law (UNIDROIT) drafted in 1995 a Convention on Stolen or Illegally Exported Cultural Objects. Today 33 countries have signed this Convention, but no country with a significant international art market has signed it yet. There are two main fields covered by the Convention. The first one is the restitution of stolen or illegally excavated cultural goods (effective on a private law level). The second one is the return (repatriation) of illegally exported cultural goods of significant cultural importance (effective on a public law level).

Considering the above, when executing due diligence for the purchase of an artwork, it will therefore be necessary to check all import and export documents (including custom and VAT documents), related in particular to all transnational transfer of ownership, of all involved countries, together with any eventual authorization for the transfer of some specific cultural

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<sup>76</sup> EU Regulation 3911/92. It is worth to note that EU-Regulations are immediately applicable (as a national law), i.e. they do not need to be implemented by a specific national law.

<sup>77</sup> To date over 100 countries have ratified it, including Switzerland, U.S.A., Great Britain, France, Italy, Germany, Japan, Canada and Australia.

<sup>78</sup> For example, Switzerland ratified the Convention in October 2003, being effective from January 1, 2004, and consequently adopted the Cultural Property Transfer Act, which came into force on June 1, 2005.

goods. Risks of smuggling, illegal import or export shall be consequently avoided.

## 7. The Valuation of the Price

The price is the sum in money or goods for which anything is or may be bought or sold. The valuation is the act of valuing, especially a formal assessment of the worth of a good.

Price and valuation are therefore different concepts. Valuation is one of the instruments by which a price can be decided and/or assessed.

In this section I will first briefly describe the valuation method of artworks, outlining the most important criteria to be considered. I will then focus on some other factors, which can be used to assess the (acquisition) price of an artwork.

One can distinguish mainly between three types of valuations. The first one concerns the assessment of the retail replacement value (RRV), the second one the fair market value (FMV) and the third one the market cash value (MCV).

The retail replacement value is the amount of money it would cost to replace an item with an item of similar quality, in a retail value and within a relatively short period of time<sup>79</sup>. It is used mainly for insurance purposes.

The fair market value is what a willing buyer would pay to a willing seller in an open market, with both parties having full knowledge of all the relevant facts<sup>80</sup>. It is used typically for estate and income tax appraisals.

The cash market value is determined by taking the fair market value of the item and subtracting it from the cost of selling the item (such as commissions, insurance costs and similar transactions costs)<sup>81</sup>. It is typically applied in situations when assets need to be divided, like divorces.

By valuating artworks, an appraiser will usually adopt the “comparative-market-data approach”. Comparative market data are based on

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<sup>79</sup> VON HABSBURG/GOODMAN 2010, Elisabeth von Habsburg/Rachel Goodman, Art appraisals, in *Fine Art and High Finance*, edited by Clare McAndrew, New York 2010, p. 36.

<sup>80</sup> VON HABSBURG/GOODMAN 2010, *ibid.*, p. 36.

<sup>81</sup> VON HABSBURG/GOODMAN 2010, *ibid.*, p. 36.

comparable sales from the same artist or, if no comparable sales from the same artist exist, from works by an artist of the same period, style and value<sup>82</sup>.

If any variation in the data for similar works is noticed, it can be attributed to one (or more) of the following factors:

- The location of the sale;
- The type of the sale (for example comparable works have been sold in different types of auctions, the one in the modern and contemporary sale, the other in the British art sale);
- The content of the sale (for example, if more desirable works of the same artist have been offered in the sale);
- The estimates in the auction catalogue (for example, high estimates prevented potential buyers from bidding);
- The condition of the work (for example, comparable works have condition issues, which influenced the winning price);
- The composition of the work (for example, some comparable works were more market-appealing because of the subject depicted. A portrait of a woman by Modigliani is more appealing than a portrait of a man);
- The provenance (for example, one of the comparable works which fetched a particularly high price came from a noteworthy collection);
- The date of the work within an artist's oeuvre (for example, comparable works which come from different periods of the artist's oeuvre fetched different prices).

Macroeconomic objective and subjective factors shall also be considered including the state of the art market, the state of the national and global economy as well as current tastes and trends<sup>83</sup>. Since such factors evolve over time, valuations will also evolve<sup>84</sup>.

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<sup>82</sup> VON HABSBURG/GOODMAN 2010, *ibid.*, p. 42.

<sup>83</sup> VON HABSBURG/GOODMAN 2010, *ibid.*, p. 43.

<sup>84</sup> Therefore, it is strongly recommended, depending on the type or category of artwork, to repeat valuations periodically. Since this aspect concerns the holding period by an art fund of a work, and, consequently, does not concern the acquisition phase, it will not be treated in this paper.

By buying an artwork, there are some elements, which can influence the value of an artwork and therefore deserve particular attention. Those elements are typical topics of the due diligence:

- Ownership (see above section 2): possible third-party rights on a work (as an ownership claim) can heavily impact the valuation of a work;
- Authenticity (see above section 3 and below chapter VI): doubts on the attribution of a work, misattributions, fakes and forgeries can also heavily impact the value of an artwork, reducing it to almost nil;
- Condition (see above section 5): poor conditions or need for restoration will typically reduce the value (and the appeal) of a work<sup>85</sup>
- “Quality”: major works of an artist (i.e. by period, subject, size) will tend to maintain their value;
- Rarity: rare works by a particular sought-after artist will tend to have a greater value than more common works, especially if those rare works are considered major works of the artist;
- Provenance (see above section 4): as already mentioned, a noteworthy provenance usually has an impact on the value of a work (as does, for example, royal provenance or celebrity provenance). It is a consequence of the emulation effect.

Considering all of the above, there are other objective and subjective factors, which (can) have an impact in determining the value of an artwork<sup>86</sup>. Among the objective factors are the artist’s reputation and standing (i), the characteristics of the work itself (ii) and the characteristic of the sale (iii). Among the subjective factors, are the emotional impact and the reference price effect.

In relation to the first objective factor, i.e. the artist’s reputation and standing, the following aspects have to be considered: the fame among the artist’s peers and the artist’s role in the history of a particular genre as

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<sup>85</sup> It is worth to note that an appealing work, which need to be restored, can represent an interesting investment, especially if the restoration cost is less than the prospected increase of the value after restoration.

<sup>86</sup> MCANDREW DETERMINING 2010, Clare McAndrew, Determining Art Prices: Objective and Subjective Valuations, in Fine Art and High Finance, edited by Clare McAndrew, New York 2010, p. 50-1.

well as in the broader art market<sup>87</sup>. The greater the fame is and the importance in art history of an artist, the greater the value.

In relation to the second objective factor, i.e. the characteristics of the work itself, the size and the medium plays a role in defining the value of an artwork, besides the already mentioned subjects, condition and provenance. The bigger the size is of an artwork, the higher the price<sup>88</sup>. Furthermore, some mediums are typical for certain artists, characterizing their work. The market rewards works done in typical mediums, which have a greater value than works in other mediums. For example, Alberto Giacometti's bronze sculptures of his mature period<sup>89</sup> have a greater value than paintings of the same period.

In relation to the third objective factor, i.e. the characteristic of the sale, venue and timing of the sale can have an impact on the price. For example, works of the Swiss artist Albert Anker (1831 – 1910), will fetch higher prices at sales in Switzerland – where there are some more important collectors of his works – than abroad.

Regarding subjective aspects, the emotional impact on prices shall always be considered. Some works achieve high prices because in that very moment of the acquisition (usually at auction) subjective irrational and emotional factors are called into play. The typical example is the competition between two bidders at auction, who absolutely want to have a certain work and keep bidding well above any estimate, until the other bidder gives up.

The other subjective aspect relates to the effect that an above-the-estimate high price has on the prices of similar works of a certain artist. Usually, the future potential buyers will be influenced by that particular high price, being ready to invest more than they would have been ready to do.

In conclusion, executing a proper valuation is essential for the due diligence in the acquisition of artworks. The senior management of the art fund needs to have the most accurate value of the selected artwork, in order to negotiate the best purchase price and, at the end of the

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<sup>87</sup> MCANDREW DETERMINING 2010, *ibid.*, p. 51-2.

<sup>88</sup> Although too big-sized works can be worth less than normal-sized works, since they need a lot of space to be exhibited, and, therefore, the potential market of buyers tend to diminish.

<sup>89</sup> Starting from the late 1940's.

negotiation, to decide whether to buy or not. In this regard it is worth noting that the senior management will speculate on the positive evolution of the prices of the selected artist, and, in particular, of the selected work. Predicting the evolution of prices of a certain artist is however very complicated, and is beyond the scope of this work. As a general rule, the better the due diligence is in the valuation of a work during its acquisition, the greater the chances are that the value will not diminish but rather, occasionally, will increase.

Today in the art market there are many indexes, which study the past evolution of prices of artworks of certain artists or categories of artists. Among these indexes are the Mei Moses World All Art Index and the Artnet Indexes. A proper use of those indexes can be a useful tool in order to confirm or sustain the valuation of an artwork. Therefore, the selection of the suitable index will be very important. In order to select the most suitable index, it will be necessary to know which method the index is based upon and which criteria the index uses. Since the topic is very complex, and is not directly related to the main topic of this paper, a separate paper ought to be devoted to it.

## **8. The Purchase Agreement**

The acquisition of an artwork by an art fund will occur based on a purchase agreement and by paying a purchase price<sup>90</sup>. Depending on the type of the sale, this agreement can have various forms. There are mainly two types of sales: the private sale and the sale at auction.

In both case the outcome is the purchase of a certain artwork.

With private sales, it is essential to consider the following elements:

- The parties shall draft a contract in writing;
- The parties, i.e. the seller and the buyer, shall be carefully identified;
- The object of the purchase shall be exactly identified and described.  
A picture of the work shall be included;

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<sup>90</sup> No transfer of property for other causes will be treated (for example: donations or inheritance), as well as the intervention of intermediaries or brokers.

- The condition of the purchase object shall be described. It is advisable to attach a condition report (see appendix n. 2) to the contract. Both parties shall sign it as sign of acceptance;
- The price and the payment modes and details shall be indicated, as well as the payment of taxes and levies (for example: tax on the added value in Europe or the sales tax in the U.S.A.). The delivery of the artwork usually occurs versus payment of the price. Therefore, it will be essential to coordinate the delivery of the artwork with the payment of the price. Art funds will usually buy works through external dealers, who are acting on behalf of the fund. Those dealers will act as escrow agent of the art fund, granting the delivery of the artwork. To this end, the purpose of any contractual provision shall be the guarantee of the timely and effective delivery of the artwork.
- A provision about the resale right<sup>91</sup> of the artist, if applicable;
- Representations and warranties having as object title (i.e. ownership free of any lien or encumbrance), authenticity, provenance, condition and respect of custom and cultural property law shall be included. It would be advisable to attach to the contract any relevant document (for example, the authorization to export a certain artwork from a certain country). Since the guarantees offered by the seller are normally limited in time, this aspect has to be verified.
- Details on the delivery of the artwork, including transfer of ownership and possession clauses. It is advisable to indicate in the contract the exact moment and place of the transfer of possession, outlining the duties of transport and of insurance of the artwork. It shall be clear which party is bearing the risk of eventual losses, damages, thefts or other mishaps.
- Choice of the governing law and of the jurisdiction in case of litigation. The governing law sets the rules applicable to the contract. Especially in the international transfer of goods, the choice of the

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<sup>91</sup> The resale right (or *droit de suite*) is the artists' right to receive royalties on their works if they are resold. The royalties have to be paid by the seller. The resale right applies only if professional parties or intermediaries such as auction houses, galleries or dealers are involved in the transaction. The resale right is not applicable in sales that are exclusively private. Furthermore, some countries, as Switzerland and the U.S.A. (except California), do not know the resale right. Resale rights statutes are now compulsory in the whole European Union. I will not treat the resale right in my paper, because it represents an aspect of the sale of works by the art fund, not the acquisition (which is object of this paper).

governing law is essential, since it will avoid potential conflicts of application between different national rules. Furthermore, the governing law will also define potential rights or claims deriving from any breaches of contract, warranties, faults in the formation of will, or mistakes in the mutual declaration by the parties. Statute of limitation, especially of contractual or legal warranties, also plays an important role.

The choice of the jurisdiction will allow the party to know where any eventual litigation will take place.

With sales at auction, it will be essential to verify the general terms and conditions of the auction house applicable to the sale. Such terms and conditions will define the rules between the bidders, and, among them, the winning bidder, and the auction house. The following elements shall be checked:

- Representations and warranties: normally auction houses do not guarantee any quality of the items they sell. The bidder usually has the opportunity before the sale to see and inspect the object he wants to buy<sup>92</sup>.
- Statute of limitation of eventual claims, mainly for defects or faults in the formation of will. Usually, the party claiming his right will have to notify any defects to the auction house in a reasonable period of time since the discovery of the defect.
- Buyer's premium and taxes. Generally, the winning bidder will have to pay in addition to the hammer price a commission to the auction house (or buyer's premium, usually between 20 and 30% of the hammer price<sup>93</sup>) as well as any eventual tax due (for example, the tax on the added value).
- Resale rights provision<sup>94</sup>.

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<sup>92</sup> The two major auction houses, Christie's and Sotheby's, may, depending on circumstances, guarantee the attribution of a work to a certain artist for a limited duration.

<sup>93</sup> Depending on the volume of the transaction(s), art funds managers will be able to negotiate lower rates with any auction house. In the U.S.A. today Christies applies a buyer's premium of 25% of the final bid price of each lot up to and including USD 75,000, 20% of the excess of the hammer price above USD 75,000 and up to and including USD 1,500,000, and 12% of the excess of the hammer price above USD 1,500,000. In the U.S.A. Sotheby's has similar rules: A buyer's premium will be added to the hammer price and is payable by the purchaser as part of the total purchase price. The buyer's premium is 25% of the hammer price up to and including USD 100,000, 20% of any amount in excess of USD 100,000 up to and including USD 2,000,000, and 12% of any amount in excess of USD 2,000,000.

<sup>94</sup> See footnote 91.

- Payment and delivery conditions: usually, the winning bidder will have to pay the hammer price plus premium plus any eventual tax within a certain deadline. The payment will have to occur before the delivery of the artwork. The buyer will have to take care of the delivery, the transport and the insurance. In connection with those issues, auction houses can support the buyer. The risk of loss, damage, theft or other mishaps will usually be transferred at the moment of the delivery at the auction house's storage, i.e. with the act of delivering to the buyer or, most usually, to the transport company.
- Governing law and jurisdiction: the governing law will set the rules applicable to the relation between the parties, besides the general terms and conditions of the auction house. Place of jurisdiction will usually be the place, where the auction house has its registered offices.

In conclusion, all the above-mentioned aspects have to be verified and evaluated before the acquisition of the artwork, in order to have a clear picture of rights and duties of the buyer in relation to the seller.

## **9. Insurance**

Insurance plays an important role in the art world, especially in relation to mishaps such as loss, damage or theft by the handling, transport, storage and display of artworks. Since it is a very broad and detailed field, it is not possible to cover it in this paper, considering also that the above-mentioned insurance issues are related to the phases after the acquisition of the work.

Therefore, I will dedicate the following lines to a delicate aspect, typically in relation with the acquisition of artworks by an art fund.

As we have seen, despite the execution of due diligence in relation to the artwork, certain risks cannot be excluded. Such risks normally refer to authenticity or provenance (including ownership) issues.

It would therefore be advisable – as a tool for both the risk management and the protection of the investors – to insure those risks.

In today's art market, I found one insurance company, i.e. ARIS Title Insurance Corporation (ARIS), domiciled in the State of New York and licensed by the New York Department of Insurance, covering risks related to ownership and provenance<sup>95</sup>. No insurance coverage of authenticity was found.

An art fund manager shall subscribe such an insurance policy in order to grant both the management of the investor risk and the integrity of financial results.

The policy covers the following risks:

- (i) Art provenance/chain of title risks:
  - Theft – contemporary or historical (e. g. WWII);
  - Illegal import or export

In this case, the risks occurring at any time before the policy is issued.

- (ii) "Classic"
  - Security interests
  - Creditor liens
  - Authority to sell

In this case, the risks arising at any time during the seller's ownership (or most recent period of ownership) are covered. These risks include: the authority to sell, any lack of legal authority to sell at the time of the transaction and policy issuance.

The coverage is for the face value of the policy plus the cost to defend against a claim. The term of the policy is indefinite, until the insured work is re-sold or otherwise transferred as a charitable gift or donation. It is automatically extended to the insured's successors in interest according to the law (e.g. heirs). A shorter term of coverage can be agreed. The coverage is excluded: - for misrepresentation, - the policy is a "tell us what you know" policy, but it is not contingent on what the insured "should have known", - exclusions for claims against ARIS and its reinsurer(s) in

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<sup>95</sup> All the information provided has been drawn from the following website: [www.aristitle.com](http://www.aristitle.com) (last visit: April 26, 2013).

the nature of defamation of title, impairment of value or damage to reputation of transaction principals because of the ARIS Art Title Protection Insurance application or underwriting.

With regard to due diligence in the acquisition of artworks by an art fund, the subscription of the above mentioned policy covering specific title risks, such as provenance and ownership, is strongly advisable, especially since some elements in the due diligence process cannot be discovered in advance (e.g. ownership claims by the heirs of the owner of the past looted art by the Nazis).

## VI. Authenticity

Following the introductory notes in Chapter V, Section 3, I will now focus on the process of determining the material authenticity of an artwork, addressing first the three usual methods, i.e. connoisseurship, scientific tools and provenance (or historical research). I will then deal with two useful but tricky tools, i.e. the *catalogues raisonnés* and the certificates of authenticity, ending with one significant case study.

### 1. Authenticating an Artwork

As an introduction, it is worth noting that authenticating an artwork is not an exact science. It pursues the determination of the material authenticity of an artwork, trying to minimize the risk of a wrong attribution.

Since such an aspect is essential when acquiring an artwork, its verification is one of the most important tasks when following due diligence. The management of the art fund will therefore have to execute it (or let it be executed) at best in order to limit its potential liability for the acquisition of fakes or forgeries. To this end it is necessary to point out that the authenticating process is linked with a given cost, which will have to be assumed by the fund. Therefore, the management will have to decide whether or not to bear such a cost (of part of it) depending on the proposed acquisition price and its prospected development. In other words, if the art fund wants to purchase a certain work, whose proposed price is pretty moderate (e.g. less than CHF 5'000. — for a work by a 19<sup>th</sup> century Swiss artist) the complete process of authentication (including the verification by a connoisseur, checking the provenance and some scientific analysis) will probably cost more than the acquisition price. In such cases, the management of the art fund will have to assess the risk, and decide what verifications, if any, shall be executed. In my opinion, the management of the art fund will have to adopt that solution, which is proportional to the prospected investment and return. Acquiring such works with some contractual warranties would be advisable.

Furthermore, the verification of the attribution of an artwork is usually executed by experts entrusted with this task by the senior management of the art fund or by the advisory of the management. Therefore, it will be

necessary to select the appropriate team of experts in relation to the targeted artwork. Such experts shall be independent and impartial, disclosing in advance any potential conflict of interests<sup>96</sup>. Such disclosures shall occur in a written contract.

In this respect it is important to note that there are several authentication committees for specific artists. Such committees provide certificates of authenticity. The reliability of such certificates depends on the reliability of the scientific committee. I will further address this argument in Section 2.2 of this chapter.

### 1.1. *Connoisseurship*

The connoisseur bases his work on the visual inspection of an artwork with his knowing eye. Authenticating an artwork is therefore “a method of judgment based on an informed perception and interpretation of the form and the facture specific to the artist who created it”<sup>97</sup>.

There are two relevant concepts: form and facture.

Recognizing the **form** of an artist is therefore a crucial step in authenticating. The form of the artist can be defined as “those complex characteristics identifying a particular artist’s unique way of making images”<sup>98</sup>.

The process of recognizing the form is difficult to explain, since it is mainly based on the deep knowledge that the connoisseur has about a certain artist. Intuitive judgment, which is almost not understandable to the layperson, may therefore be regarded as a necessary evil<sup>99</sup>. It is a matter of informed and experienced perception of form<sup>100</sup>. The connoisseur – through his study of an artist – “absorbed into visual memory the artist’s characteristic form – shapes, compositional devices, linear rhythms, typical colors and habit of facture – to the extent that such an expert can tell, at a glance, that the work presented is authentic or fake”<sup>101</sup>. The form

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<sup>96</sup> It is pretty usual that there are a few experts worldwide for certain artists, especially as connoisseurs. Such persons have normally constant relationships with dealers and collectors of a certain artist. Conflict of interests are therefore pretty common.

<sup>97</sup> O’CONNOR 2004, *ibid.*, p. 7.

<sup>98</sup> O’CONNOR 2004, *ibid.*, p. 6.

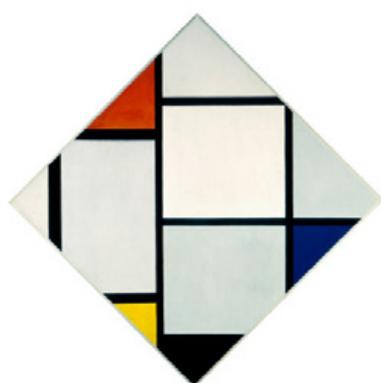
<sup>99</sup> FRIEDLÄNDER 1942, Max J. Friedländer, *On Art and Connoisseurship*, London 1942, p. 175.

<sup>100</sup> O’CONNOR 2004, *ibid.*, p. 7.

<sup>101</sup> O’CONNOR 2004, *ibid.*, p. 8.

is usually established early in the artist's career, and is subject to evolution over time, along with the development of artistic path<sup>102</sup>.

**Facture** is the way an artist manufactured the work, or, in other words it "is the way the artist's hand expresses its possessor's temperament"<sup>103</sup>. In this regard, the knowledge of how an artist was used to working, the place where he worked, the materials he used and the techniques he adopted is essential in order to attribute a work to a certain artist. For example, Piet Mondrian (1872 – 1942) utilized a particular painting technique for his famous early black grids, outlining the reflective sheen of varnish. He wanted to take the black "as a color", and to avoid reducing the grids to simple, dull dividers (see plate n. 4).



**Plate n. 4:** Piet Mondrian, Tableau No. IV; Lozenge Composition with Red, Gray, Blue, Yellow, and Black, c. 1924/1925, oil on canvas, overall (diamond): 142.8 x 142.3 cm, framed: 150.8 x 150.5 x 6.3 cm, National Gallery of Art, Washington D.C. (U.S.A.).

The above-described approach of the connoisseur – based essentially on the visual analysis of the form and of the fabric of an artwork – apparently lacks scientific grounds. It is therefore advisable that the expert explains his approach, his methodology and the outcome of his analysis in order that the layperson has the most relevant elements to understand his work. Such explanations will be very useful especially in litigation cases in court.

In any event, it is also advisable that the connoisseur's opinion is shared with an established group of experts on the same artist. This will be far more persuasive than the opinion of only one expert. Those experts will base their judgments of authenticity on a clearly defined and shared process of formal perception<sup>104</sup>.

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<sup>102</sup> O'CONNOR 2004, *ibid.*, p. 10.

<sup>103</sup> O'CONNOR 2004, *ibid.*, p. 11.

<sup>104</sup> O'CONNOR 2004, *ibid.*, p. 8.

Connoisseurship is therefore the first essential step in the attribution of a work of fine art to a certain artist and, consequently, in the determination of its material authenticity. In my opinion, the sole judgment of the connoisseur is not enough in order to comply with the necessary due diligence in the acquisition of an artwork. Such judgment needs to be validated, at first by the support of documents about the provenance and, in many cases, also by the means of scientific analysis. I will elaborate on those aspects in the following two sections.

## 1.2. *Provenance*

I have generally addressed this topic above in Chapter V, Section 4. There, I described provenance, what relationships it has with the question of ownership, the research of provenance and I gave an example of a delicate case.

In this section I will exclusively focus on the provenance analysis as an essential tool for the further validation of the authenticity of a piece of art.

The research of documents, proving the existence of the artwork before the prospected acquisition, is a useful tool for the verification of the authenticity. The most effective documents are normally pictures portraying the artist executing the work or posing with the work. Exhibition catalogues, especially showing the first display of the work, as well as auction catalogues or collectors' inventory lists are also very helpful. Catalogues raisonnés of a certain artist usually collect all the above documents and information in relation to the known artworks and are therefore very supporting.

Some difficulties may arise in connection with older exhibition or auction catalogues, since in those catalogues the description of the work is often inaccurate (e.g. many works do not carry any title and are indicated as "untitled" or carry another title, and very rarely are dimensions given).

Furthermore, the older the work, the more difficult it will be to track the provenance of the work up to the artist's studio with the support of

documents. Fake catalogues and documents also have to be considered as a possibility<sup>105</sup>.

If there are still doubts about the authenticity of a work, or if the prospected investment in the work of art is of relevance according to the art fund's strategy and policy, the support of scientific methods will be unavoidable.

### 1.3. *Scientific Methods*

Depending on the peculiarities of the considered artwork, there are many scientific methods that are used in order to validate attributions to a specific artist. Those methods are supporting both the connoisseur's approach and the provenance research. They do not provide attribution on their own. Their results need to be interpreted in accordance with the artist's life, oeuvre, form, fabric, style and technique. Therefore, both connoisseur and scientific expert have to cooperate in order to correctly interpret the results of the scientific analysis.

Scientific methods can include the following<sup>106</sup>:

- Visual examination
- Analysis of the material
- Physical dating techniques

**Visual examination** is usually executed with the support of light microscopy and where appropriate, and available, ultraviolet, infrared, electron microscopy and radiography. The purpose of using such means is to ascertain the techniques of the artist, the evidence of repair or alteration and usage, as well as the sequence of manufacture, wear damage and repair<sup>107</sup>.

The **analysis of material** pursues the following objectives. On the one hand, it will establish the composition of the original materials, together with that of later additions. On the other hand, it will allow determining physical or chemical changes to the materials indicative of age or treatment.

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<sup>105</sup> BAZLEY 2010, *ibid.*, p. 75.

<sup>106</sup> CRADDOCK 2009, *ibid.*, p. 10-11.

<sup>107</sup> CRADDOCK 2009, *ibid.*, p. 10.

**Physical dating techniques** aim to determine the age of a certain artifact. The most common techniques are radiocarbon, thermoluminescence and dendrochronology.

To exemplify the above-mentioned methods, I will now briefly describe the analysis of **paintings**.

The different components of the painting can be subject to scientific analysis, notably the support, the ground and preparatory layers, the paint layer and the varnish layer<sup>108</sup>.

The support is usually wooden or fabric (canvas). Examination of the wooden panels should reveal the type of wood, the cut of the wood and the construction of the panel<sup>109</sup>. Carpentry details should also be noted. Visual investigation is usually supported by an X-Radiography. Dendrochronology can provide some chronological information on the age of the panel<sup>110</sup>.

Visual examination of the fabric can be supported as well by X-Radiography, revealing possible lining of the canvas<sup>111</sup>. Radiocarbon can be useful for dating the fabric, due to its organic nature<sup>112</sup>.

Grounds and preparatory layers are difficult to study, because they are between the support and the painted layer. The visual examination can occur by verifying the edges with a magnifier or using raking light. X-Radiography can be helpful in revealing intentional texturing, losses or discontinuities in the ground layer<sup>113</sup>. Infrared can reveal any eventual incising of the ground layer. The examination of the white pigments of the ground and preparatory layers can occur through different techniques, aiming at determining the age of the pigment<sup>114</sup>.

The visual examination of the painted layer usually occurs through direct viewing, by daylight or raking light. Using of magnifier or microscopy is

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<sup>108</sup> It is worth to note that the back of the painting as well as the frame can provide very useful information, e.g. labels and collectors marks.

<sup>109</sup> KIRSH / LEVENSON 2000, Andrea Kirsh / Rustin S. Levenson, *Seeing through paintings*, New Haven/London 2000, p. 14.

<sup>110</sup> CRADDOCK 2009, *ibid.*, p. 290.

<sup>111</sup> KIRSH / LEVENSON 2000, Andrea Kirsh / Rustin S. Levenson, *Seeing through paintings*, New Haven/London 2000, p. 29.

<sup>112</sup> CRADDOCK 2009, *ibid.*, p. 291-2.

<sup>113</sup> KIRSH / LEVENSON 2000, *ibid.*, p. 72.

<sup>114</sup> CRADDOCK 2009, *ibid.*, p. 293-296.

also common. X-Radiography is employed to study the way a painting is developed and detect damage<sup>115</sup>. Ultraviolet light can reveal repaints or retouch<sup>116</sup>. Infrared studies often reveals underdrawings<sup>117</sup>. Pigments and binding media analysis can provide useful information about the dating of the painting, especially if those pigments and media existed at the time the artist was supposed to have made the work.

The visual examination of the varnish layer begins with viewing it in natural light. Ultraviolet light is helpful to distinguish among types of varnish. Chemical or physical analysis of the varnish layer provides confirmation about the contemporaneity of both painted and varnish layer.

In sum, scientific analysis can provide very useful information. The support of experts is essential in order to ascertain the best method to verify any doubt in the authenticity of the artwork. A proper and duly executed due diligence will therefore include a scientific analysis of the artwork as a support to the intervention of the connoisseur and the provenance research.

## 2. Two Particular Tools

I will now briefly describe two useful tools for the attribution of a work of art to a certain artist, i.e. the catalogue raisonné and the certificates of authenticity. I selected those tools since they are pretty tricky and their use requires knowledge of the market and of the artist.

### 2.1. Catalogues Raisonnés

The catalogue raisonné is “a systematic listing of all known works by an individual artist, usually presented in chronological order and accompanied by details such as date, medium, dimensions, provenance, references, and, sometimes exhibition history”<sup>118</sup>.

In today’s art market, the catalogue raisonné is used as a standard reference tool, generally in order to determine or verify the attribution or provenance of an artwork.

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<sup>115</sup> KIRSH / LEVENSON 2000, *ibid.*, p. 182.

<sup>116</sup> KIRSH / LEVENSON 2000, *ibid.*, p. 179.

<sup>117</sup> KIRSH / LEVENSON 2000, *ibid.*, p. 186-7.

<sup>118</sup> FINDLAY 2004, Michael Findlay, *The Catalogue Raisonné*, in *The expert versus the object*, ed. by Ronald D. Spencer, Oxford/New York 2004, p. 55.

Especially in the last decades, catalogues raisonnés have flourished. It is not uncommon that different scholars drafted more than one catalogue for a single artist<sup>119</sup>.

Players in the art market therefore need to rely upon the information included in the catalogue raisonné.

In this regard, it is important to note that there is no standard catalogue raisonné, nor supervising body. Catalogues raisonnés can be drafted following the initiative of art dealers, scholars or for the purpose of an artist's estate<sup>120</sup>. Dealers or influential collectors can finance scholars for the drafting of the catalogues. Potential conflicts of interest exist.

Therefore, some criteria shall be considered in evaluating the reliability of a catalogue raisonné.

First of all, the qualifications of the authors must be verified. Being relatives of an artist does not automatically mean being an expert. Secondly, check if the catalogue is still not considered definitive and therefore subject to revisions. If so, be careful in accepting the conclusion drawn from the first oeuvre. Thirdly, check the reproduction quality of the catalogue and verify how the work was financed. High reproduction quality could mean that a third party, who could have interest in the publication (and in its content), financed the author or the editor. As a last point, verify if the major auction houses use the catalogue raisonné as a reliable source, quoting it with the presentation of works of an artist. The major auction houses have resources and means to verify the reliability of the catalogue, especially since they can guarantee the authenticity and the provenance of a work for a certain period of time.

Considering the above, it is essential to realize that the catalogue raisonné is a work in progress and that it can take several years or decades before it is accomplished<sup>121</sup>. Revisions are sometimes necessary, since the scholarship of a certain author can evolve with time.

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<sup>119</sup> For example, different catalogues for different media of the same artist can exist (e.g. dividing paintings, sculptures, prints and drawings), as well as different catalogues covering the same media of the same artist (usually edited during different times).

<sup>120</sup> FINDLAY 2004, *ibid.*, p. 57.

<sup>121</sup> FINDLAY 2004, *ibid.*, p. 60.

Therefore, before using the catalogue raisonné as a tool for the verification of both authenticity and provenance, the party entrusted with the due diligence needs to check the reliability of the catalogue raisonné itself, in order to fulfill his obligations.

One of the most prestigious and respected catalogues raisonnés is the one of Christian Zervos (1889 – 1970) about the oeuvre of Pablo Picasso (1881 – 1973). Zervos was an editor of many publications on artists as well as the magazine *Cahier d'art*. He is well known as an important scholar of Picasso. He started his work in 1932, after he met the artist, with whom he remained in close contact for the rest of his life. The catalogue – composed by 33 volumes – was completed after Zervos' death. In the appendix, I enclose an excerpt of Zervos' catalogue. The reputation of Zervos, his artistic knowledge as well as his close direct contact with Picasso contributed to the success and reputation of Zervos' catalogue raisonné. Consulting it therefore will be essential before buying a Picasso. It has to be noted, that the work of Zervos does not include the works in Picasso's own collection. Consequently, further investigations will be necessary.

## 2.2. *Certificates of Authenticity*

In the art world, certificates of authenticity are written declarations stating the attribution of a work of fine art to a certain artist. They are usually released by the artist himself, the estate of the artist, an expert or a pool of experts (so-called scientific committees).

Certificates of authenticity are therefore – at least apparently – useful tools in order to confirm the authenticity of a certain artwork.

But are those certificates really reliable? Commonly in such cases, there is no conclusive answer. It is therefore necessary to analyze each certificate of authenticity, focusing in particular on the authors and consequently on their reliability.

The first case appears to be the most simple: the artist himself confirms that he is the author of a certain work. Two possible issues can arise. On the one side, the certificate can be a fake. On the other side, the artist has already passed away. Both cases may also occur simultaneously. With a

living artist it would be very easy to verify the validity of the certificate. Acquiring an artwork equipped with a certificate of authenticity released by the artist himself, who in the meantime died, makes the potential buyer pay particular attention. It would therefore be advisable to execute proper due diligence with the work in relation to authenticity and provenance. The certificate itself and in particular the signature of the artist can be the objects of analysis by experts. All known circumstances and documents play an important role as well. If there is a scientific committee – whose authority is well established and in particular recognized by the major auction houses – the prudent buyer will require from the seller the release of a statement by such a committee in order to reduce the risk related to the authenticity of the artwork.

This last consideration introduces the second case, i.e. the release of certificates by an expert or pool of experts. The latter can act on behalf of or be appointed by the estate of the artist. If an expert or a pool of experts is intervening, the artist is generally, but not necessarily dead<sup>122</sup>. The reliability of certificates released by experts depends on different factors.

First of all, those experts have to be independent and impartial. They must not have any interest in attributing or misattributing a work to a certain artist. To this end, it is especially advisable to verify who is financing the expert or the scientific committee<sup>123</sup>. Usually, such experts or pool of experts work on a flat-fee basis, covering exclusively the cost for the verification of the work and the release of the statement concerning the attribution of a work<sup>124</sup>. Furthermore, the experts need to be qualified and have a good reputation. As evidence of their reputation and, consequently, of their reliability, the certificates released by them are usually included in the documents and information provided by the major auction houses. Since false certificates are not uncommon, the verification of their validity by the releasing body or entity is strongly advisable. Also in this case, it is

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<sup>122</sup> Some living artists already have a body or entity dealing with the archiving of their work and upon request releasing the confirmation that a certain work has been filed in the official archive (e.g. Archivio Bonalumi S.r.l., Milan for the work of Agostino Bonalumi or Fondazione Arnaldo Pomodoro, Milan).

<sup>123</sup> For example, Gagosian Gallery is now representing the estate of Piero Manzoni. It is unclear which relationship (if any) there is between the gallery and the Fondazione Piero Manzoni, Milan.

<sup>124</sup> Experts, whose fees depend on the value of the artwork do not grant the sufficient independency and impartiality.

recommended that the buyer be prudent by executing his or her own due diligence.

The last case I want to cover is related to the release of certificates of authenticity by the estate of the artist. The latter normally has the copyright on the work of the artist. Copyrights last for a certain period after the death of the artist<sup>125</sup>. Copyrights also include the so-called *droit moral*, which in turn includes the right of authorship. The estate of the artist can therefore have an impact on authenticity issues, especially since it has the right to claim for the protection of the right of authorship, causing the seizure of the artwork. The estate of the artist can therefore indirectly declare the misattribution of a work of art. Nevertheless, “as far as the law is concerned, the holder of the *droit moral* is just another legal expert, whose opinion is only as good as his qualifications and the arguments he puts forward”<sup>126</sup>. It means that sometimes the opinion of the heirs of the artist is not followed, but rather the one of the expert(s). Therefore, any eventual certificates of authenticity by the heirs of an artist will have in particular a defense effect against any claim of authorship. On the contrary, their effect as a positive confirmation of the attribution to the artist is questionable. Considering the above, the prudent buyer will have to check if there are any copyrights still in force. If yes, then he will have to verify the authenticity of the work with both the heirs and experts of the artist<sup>127</sup>. Also, in this case, it is recommended that the buyer carries out a proper due diligence process

### 3. Case Study: The Russian Avant-Garde

#### 3.1. Introduction

In recent years Russian Avant-Garde artists have fetched incredible results. In 2000 Kasimir Malevich's *Suprematist Composition* – a 1919/1920 oil on canvas, 80.5 cm x 80.5 cm – was sold at Philips in New York for USD 14,830,000.— (see plate n. 5), while in 2008 another *Suprematist Composition* – a 1919 oil on canvas, 88.5 cm x 71 cm – was

<sup>125</sup> In Switzerland: 70 years. In the U.S.A.: 70 years (work created by a person) / 95 or 120 years if the work was a work for hire (e.g. those created by a corporation).

<sup>126</sup> LEVY 2000, Steven Mark Levy, Authentication and Appraisal of Artworks, in Art Law Handbook, edited by Kaufmann Roy S., New York 2000, p. 844.

<sup>127</sup> For this reason, very often the estate of an artist entrust a scientific committee with the task of attributing or misattributing works of art.

sold at Sotheby's in New York for the astonishing price of USD 53,500,000.—<sup>128</sup> (plate n. 6).



**Plate 5:** Kasimir Malevich, Suprematist Composition, 1919/1920, painting, oil on canvas, 80.5 cm x 80.5 cm, sold in New York, at Phillips, on November 11, 2000 for USD 14,830,000 (estimate: USD 15 – 20 Mio.).



**Plate 6:** Kasimir Malevich, Suprematist Composition, 1915/16, painting, oil on canvas, 88.5 cm x 71.0 cm, sold in New York, at Sotheby's, on November 3, 2008 for USD 53.5 Mio. (no estimate given).

Parallel to those great results, scandals about fakes and forgeries related to Russian Avant-Garde artists arose. In March 2009 an exhibition at the Château Museum in Tours (France) devoted to Aleksandra Ekster (1882 or 1884 – 1949), a major artist of the Avant-Garde, was abruptly shut down by the police when the expert Andrei Nakov said that 190 of the 192 displayed works were fakes. This was perhaps the most striking event among many other rumors, doubts and scandals about the authenticity of artworks by Russian Avant-Garde artists.

Today the art market is heavily penalizing the trade of works of the Russian Avant-Garde.

<sup>128</sup> No buyer's premium included.

### 3.2 *The Avant-Garde*

The Russian Avant-Garde includes many artistic streams, roughly flowing from the last decade of the 19<sup>th</sup> century until the beginning of the Thirties. In pre-war Czarist Russia, avant-garde art could be seen almost as well as in Paris, for exhibitions of contemporary Western art were regularly held in Moscow and St. Petersburg from 1910 onwards<sup>129</sup>. Russian artists were thus aware of all the latest trends, i.e. Symbolism, Fauvism, Futurism and Cubism. At the end of the first decade of 1900, Mikhail Larionov (1881 – 1964) and Natalia Goncharova (1881 – 1962) experimented with neo-primitivism art<sup>130</sup>. Then, in 1912/13, influenced by the Cubo-Futurism tendencies, they developed the first abstract movement, which was called Rayonism<sup>131</sup>. This movement was characterized as a form of abstraction marked by fractured lines and luminous colors (plate n. 7).



**Plate 7:** Mikhail Larionov, *Cock (Radiant Study)*, 1912, painting, oil on canvas, 68.8 x 65 cm, Moscow, Tretyakov Gallery.

Cubo-Futurism was characterized by a synthesis of elements of Italian Futurism, especially movement and speed, and of French Cubism (plate n. 8). According to Malevich, in Cubo-Futurism, objects “contain a mass of temporal moments. Their forms are diverse, and consequently, the ways in which they are painted are diverse”<sup>132</sup>. Most – if not all – of the Russian Avant-Garde artists went through this phase.

<sup>129</sup> FOSTER/KRAUSS/BOIS/BUCHLOH 2004, Hal Foster/Rosalind Krauss/Yve-Alain Bois/Benjamin H. D. Buchloh, *Art Since 1900*, London 2004, p. 118 f.; HONOUR & FLEMING 2010, Hugh Honour & John Fleming, *The Visual Arts: A History*, Upper Saddle River/Toronto/Sidney/Tokyo/Singapore/Mexico City/Hong Kong 2010, p. 793.

<sup>130</sup> FOSTER/KRAUSS/BOIS/BUCHLOH 2004, op. cit.

<sup>131</sup> FOSTER/KRAUSS/BOIS/BUCHLOH 2004, op. cit.

<sup>132</sup> MALEVICH 1915, Kasimir Malevich, *From Cubism and Futurism to Suprematism*, 1915, quoted in GURIANOVA 2012, Nina Gurianova, *The Aesthetics of Anarchy*, Berkeley/Los Angeles/London 2012, p. 115-117.



**Plate 8:** Nathalya Goncharova, *Les arbres en fleurs (Pommiers en fleurs)*, 1912, painting, oil on canvas, 100.3 cm x 84.5 cm, sold in London, at Christie's, on September 2, 2011, for GBP 3.5 Mio.

In 1913 Malevich founded a movement called Alogism, in which painting became a sort of rebus but devoid of any logic whatsoever, a riddle with no solution (plate n. 9)<sup>133</sup>.



**Plate 9:** Kasimir Malevich, *Cow and Violin*, 1913, painting, oil on wood, 48.8 x 25.8 cm, The State Russian Museum, St. Petersburg.

Although the beginning of World War I slowed down the turbulent progress of artistic life, in 1915 two main events were organized in the now-called Petrograd. The first event was called *Tram B The first Futurist Exhibition of Paintings*. Featuring the core of the Avant-Garde movement, including Malevich and Vladimir Tatlin (1885 - 1953), the purpose of the exhibition was to illustrate the variety of the new art as a whole<sup>134</sup>.

<sup>133</sup> GURANOVA 2012, p. 112 – 117; SHATSKIKH 2012, Aleksandra Shatskikh, *Black Square*, New Haven and London 2012, p. 2 – 11; SARABIYANOV 2012, Andrey Sarabiyanov, *The Russian Avant-Garde: A Brief History*, in *Russian Avant-Gardes, Malevich, Kandisky, Chagall, Radchenko, Tatlin and the others*, Rome, Museo dell'Ara Pacis, 5 April – 2 September 2012, Milano 2012.

<sup>134</sup> SHATSKIKH 2012, p. 23 – 24 and p. 55 – 56.

The second event was called *0.10 – The Last Futurist Exhibition of Paintings* and occurred in December 1915. The show owes its name to the fact that its ten participants were all seeking to determine the “zero degree”, the irreducible core, and the essential minimum of paintings or sculpture<sup>135</sup>. This is considered to be the founding moment of Suprematism. The term itself implied the supremacy of this new art in relation to the past<sup>136</sup>. Malevich saw it as purely aesthetic and concerned only with form, free from any political or social meaning. He stressed the purity of shape, particularly of the square, and he regarded Suprematism as primarily an exploration of visual language comparable to contemporary developments in writing. Malevich is considered to be the founder of Suprematism and his painting *Black Square* the first Suprematist work (plate n. 10).



**Plate 10:** Kasimir Malevich, *Black Square*, oil on canvas, 1915, 79.5 x 79.5 cm, Tretyakov Gallery, Moscow.

While Malevich's direct followers at *0.10* were Ivan Kliun and Mikhail Menkov (1885 – 1926), artists like Rozanova, Popova, Udaltsova, Aleksander Vesnin (1883 – 1959) and Aleksander Rodchenko (1891 – 1956) were also influenced by Suprematism and created their own variation of it<sup>137</sup>.

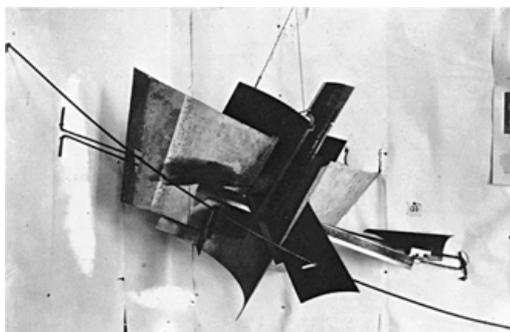
Another significant movement of the Russian Avant-Garde was Constructivism. Characterized by the new forms of object making such as the construction, it was challenging figurative sculpture, as the old focus on the human body was displaced by the need for explorations of

<sup>135</sup> FOSTER/KRAUSS/BOIS/BUCHLOH 2004, p. 131-132.

<sup>136</sup> GROOVE ART ONLINE – query “Suprematism”, drawn from [www.oxfordartonline.com](http://www.oxfordartonline.com) (last visit: May 5, 2013).

<sup>137</sup> SARABIYANOV 2012, p. 14.

industrial materials and commercial products<sup>138</sup>. Pablo Picasso developed the technique of constructing sculpture from separate elements, as opposed to modeling or carving, in 1912, extending the planar language of Cubism into three dimensions. This method was elaborated in Russia, initially by Vladimir Tatlin from 1914 onwards and then by his many followers who, like him, made abstract sculptures that explored the textural and spatial qualities of combinations of contemporary materials such as metal, glass, wood and cardboard (plate n. 11)<sup>139</sup>. Tatlin was considering the work of art for itself, and no longer as a representation of reality. Tatlin's work represents the experimental phase of Constructivism, which drew other young artists into it.



**Plate 11:** Vladimir Tatlin, Corner Counter-Relief, 1915, iron-aluminium-primer, dimensions unknown.

Russian artists did not begin to call their work 'constructions' and themselves 'constructivists' until after the Revolution of 1917. Construction was said to be based on a "scientific" mode or organization in which "no excess materials or elements" were involved (plate n. 12)<sup>140</sup>.



**Plate 12:** Alexander Rodchenko: view of Workers' Reading Room, exhibited at the International Exposition of Modern Decorative and Industrial Arts, Paris, 1925 (New York, Museum of Modern Art).

Another significant movement of the Russian Avant-Garde developed between 1917 and 1922 in Vitebsk<sup>141</sup>. In the hometown of Marc Chagall, in

<sup>138</sup> FOSTER/KRAUSS/BOIS/BUCHLOH 2004, p. 125.

<sup>139</sup> GROOVE ART ONLINE – query "Constructivism", drawn from [www.oxfordartonline.com](http://www.oxfordartonline.com) (last visit: February 9, 2013).

<sup>140</sup> FOSTER/KRAUSS/BOIS/BUCHLOH 2004, p. 177.

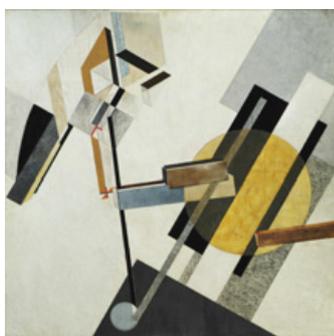
<sup>141</sup> SHATSKIKH 2007, Aleksandra Shatskikh, Vitebsk – The Life of Art, New Haven and London 2007, p. 1.

1918, the painter was appointed commissar of art for the region. He founded a museum and art school and worked on stage designs<sup>142</sup>. Malevich arrived in Vitebsk in November 1919<sup>143</sup> and his pupils formed the UNOVIS group the following year for the purpose of promoting the new art by disseminating the master's artistic ideas and theories (plate n. 13)<sup>144</sup>. A flowering of Suprematism took place<sup>145</sup>. Malevich and his followers left the city in 1922<sup>146</sup>. Among the most prominent artists who followed Malevich was El Lissitzky.



**Plate 13:** El Lissitzky: Beat the Whites with the Red Wedge, lithographic poster, 1919–20.

El Lissitzky developed his own abstract paintings, which he called *Prouns* (an acronym based on the Russian phrase “for the affirmation of the new”, see plate n. 14)<sup>147</sup>.



**Plate 14:** El Lissitzky, Proun 19D, gesso, oil and collage on plywood, 97.5×97.2 cm, c. 1922, New York, Museum of Modern Art.

In 1925 the Soviet Communist Party issued a decree proclaiming the need for literature (to be understood as the whole of art) to be conceived for the real enjoyment of the industrial and agricultural workers. Some years later, in 1932 another decree definitely subordinated all of the creative bodies to the Party and confirmed the predominant role of Soviet Realism. This was the end of the Russian Avant-Garde<sup>148</sup>.

<sup>142</sup> SHATSKIKH 2007, p. 20 – 29.

<sup>143</sup> SHATSKIKH 2007, p. 67.

<sup>144</sup> SHATSKIKH 2007, p. 108-119.

<sup>145</sup> SHATSKIKH 2007, p. 117.

<sup>146</sup> SARABIYANOV 2012, p. 17.

<sup>147</sup> FOSTER/KRAUSS/BOIS/BUCHLOH 2004, p. 228.

<sup>148</sup> HONOUR & FLEMING 2010, p. 821; SARABIYANOV 2012, p. 17.

### 3.3. *The Market*

According to a six-month journalistic investigation lead by the ARTnews magazine, the number of Russian avant-garde fakes on the market is so high that they far outnumber the authentic works<sup>149</sup>. Although it is impossible to know an exact figure, it is widely acknowledged that almost every artist whose prices have risen in recent years has become the victim of forgers<sup>150</sup>.

The demand related to Russian Avant-Garde art increased in the first half of the Nineties, fostered by the appearance on the market of Russian buyers<sup>151</sup>. This situation – together with the existing interests by Western collectors since the Seventies on Russian art of the first three decades of the 20<sup>th</sup> century – caused a massive growth in the production and distribution of forgeries<sup>152</sup>.

In these years hundreds of doubtful works have appeared at auction houses and galleries all over Europe. All those works are characterized by a sketchy provenance, in which certain assertions are constantly repeated: the works are said to come from an unknown private collection or to have been smuggled to Israel by immigrants in the Seventies, or to have been deaccessioned by provincial museums in the former Soviet republics (although this practice was strictly forbidden) or to have been confiscated and hidden for a half century by the former KGB (although experts say there is not a single documented case)<sup>153</sup>.

Other works come on the market with certifications by Russian art historians or institutions. In particular, after the collapse of the Soviet Union, the major Russian state museums and conservation institutes – including the Tretyakov Gallery and the Grabar Restoration Center – began to issue certificates of authenticity<sup>154</sup>. It has to be pointed out, that the income of art historians and experts in the former Soviet Union was (and partially still are) very modest. Therefore, those experts were easy to bribe in order to get false certificates of authenticity. But most of these

<sup>149</sup> ARTNEWS 2009, K. Akinsha/S. Hochfield/Z. Artemiev/N. Fitzgerald, *The Faking of the Russian Avant-Garde*, in ARTnews, July 1, 2009, p. 1.

<sup>150</sup> ARTNEWS 2009, p. 1.

<sup>151</sup> ARTNEWS 2009, p. 2.

<sup>152</sup> ARTNEWS 2009, p. 2 and p. 7.

<sup>153</sup> ARTNEWS 2009, p. 2.

<sup>154</sup> ARTNEWS 2009, p. 3.

certificates stating the authenticity of a work – although coming from an official institution – are fake, i.e. they certify the authenticity of a work although this work is a fake. Following some internal investigation in those institutions as well as some major scandals<sup>155</sup>, in 2006 the Russian ministry of culture prohibited institutions under its control from being involved in the commercial certification of artworks<sup>156</sup>. In spite of this prohibition, such certificates are still on the market.

Prominent art historians often claim to be compiling catalogues raisonnés and promise to include the works they certify in future publications, which gives additional weight to their certificates<sup>157</sup>.

Questionable works are also sometimes reproduced in academic books or in catalogues of exhibitions.

Today there is no element upon which a buyer can rely in order to buy an artwork from the Russian Avant-Garde, without incurring the risk of purchasing a fake. Certificates of authenticity are often fakes or misleading, as well as recent publications or studies.

This situation is literally paralyzing the market of Russian Avant-Garde artworks, threatening to lead it to death.

### 3.4 Conclusion

Scandals, forgeries, unreliable references, doubtful certificates of authenticity, hazy provenance and abetting academics and institutions are everyday reality in the market of the Russian Avant-Garde.

The massive demand for authentication faces a situation where no reliable source seems to exist.

The market of Russian Avant-Garde art is heavily struck. Apparently no solution is given, considering the growing numbers of forgeries and fakes supported by corrupted players in the market.

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<sup>155</sup> In 2004 a landscape advertised as a masterpiece by Ivan Shishkin (1832 – 1898) – a famous Russian painter of the 19<sup>th</sup> century– was put for sale at Sotheby's London with an estimate of GBP 700,000.—, only to be unmasked as the work of the Dutch painter Marinus Koekoed, slightly repainted, russified, given Shishkin's signature and then certified by the Tretyakov Gallery's department of expertise.

<sup>156</sup> ARTNEWS 2009, p. 3.

<sup>157</sup> ARTNEWS 2009, p. 3; KRAUS 2004, Peter Kraus, The Role of the Catalogue Raisonné in the Art Market, in *The expert versus the Object*, edited by Ronald D. Spencer, Oxford 2004, p. 63 – 64.

Hopes lie mostly in the **self-correcting** effect of the art market, which tends to recognize and exclude doubtful pieces from the trade<sup>158</sup>. All involved parties, who are interested in the commerce of authentic pieces, therefore have to be very careful in analyzing artworks. Due diligence is the keyword.

The most relevant criterion appears to be the provenance of a piece. Direct links to the artist or to the artist's family have to be documented with written or photographic evidence. The proof of the existence of the artwork during the artist's lifetime is essential. Primary sources should be old catalogues of exhibitions or pictures. The more recent documentation is seldom of relevance. Academic studies should also be handled with care, since the moral and intellectual integrity of their author is often questionable.

All other means, including **scientific analysis**, should also be considered. The latter will be increasingly deemed as essential.

Notwithstanding the above, the risk in the paralysis of the market is still there, since an accurate due diligence is expensive and requires time and reliable experienced people. Not all market players have the money or the interest in facing such a proceeding.

In my opinion the self-correcting effect of the market will gradually exclude from the trade the most obvious doubtful pieces. But the market for Russian Avant-Garde art will remain very difficult and, probably, no longer appealing.

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<sup>158</sup> THAW 2004, Eugene Victor Thaw, The Authentic Will Win Out, in The expert versus the Object, edited by Ronald D. Spencer, Oxford 2004, p. 77.

## VII. Conclusion: The Need for Guidelines for the Analysis of Artworks

Since the finance world became acquainted with art as an asset class, the idea of investing in art through different vehicles started to take shape. At the beginning of the Seventies, art funds began to appear. In the last years – until the crisis of 2008 – prices of artworks have raised continuously. Approximately a year after the crisis, the growing trend started again.

Today art funds are gaining prominence in the market. The example of Philip Hoffman's The Fine Art Fund is paramount.

The purpose of my paper was to analyze an important aspect of an art fund's activity: the acquisition of artworks. I focused my work on the importance of due diligence and in particular the necessary due diligence for the verification of the authenticity.

My main concern was to establish a set of rules or pieces of advice bound to the (senior) management of the art fund, in order to limit its liability towards the investors.

Independent of the legal structure chosen by the art fund, the (senior) management is fully liable for its activity towards the investors. The management can execute due diligence by itself or, most likely, will delegate the task to third parties. In both circumstances it is responsible for the proper and correct execution of due diligence. In the first case, this responsibility derives directly from its acts or omissions in the execution itself. In the second case, its responsibility is grounded in the proper and diligent choice and supervision of the person or the entity entrusted with the due diligence.

The due diligence process that I described is valid in both situations. In the first case, it will be used to determine any direct liability of the management for bad execution of the due diligence. In the second case, it will be used to verify the standard of care adopted by the management in selecting and supervising the party executing the due diligence.

I do not purport that the set of rules and advice I proposed are exhaustive. On the one hand, each and every case must be analyzed *in concreto*, in order to find the proper solution. On the other hand, some other aspects need the intervention and the competences of a specialist (e.g. the adoption of scientific methods of

analysis). Those aspects have not been addressed in detail. Through the proposed set of rules and advice, the management will be able to understand when a specialist has to be consulted and what can be expected from such consultancy.

Due to the particular nature of the art market, which is characterized by a general lack of transparency and by a significant number of crimes related to it, the process of due diligence for the acquisition of artworks cannot reduce the risks for the management to nil. Among those risks are the acquisition of stolen or looted art, or the acquisition of fakes and forgeries.

The purpose for the adoption of a minimum standard of rules and advice is to reduce such risks to the best applicable efforts. In spite of doing so, there will be circumstances where the acquisition of artworks will be deemed too risky and therefore, the purchase should not occur. Transactions considered to be too risky are those where the management cannot exclude issues in relation to the material authenticity, to the ownership and to the provenance of an artwork.

Following what has been said above, the management of an art fund should exclusively buy art works for which no doubts at all in connection with title, authenticity and provenance exist. Contractual warranties, especially by major auction houses, are a helpful tool in order to reduce any potential liability towards investors. The delegation of some tasks to established experts or dealers is also advisable. In doubtful cases the management of an art fund has in our opinion the obligation to ensure the risk of invalid title and provenance, and, if this service is provided by the insurance company, of inaccurate authenticity

The purpose of future research would be to offer to the management of an art fund a complete analysis of the proper due diligence for the acquisition, holding and sale of artworks. Furthermore, the due diligence of the custodian bank is also relevant. The following specific issues deserve attention as well: the valuation of artworks, with special regard to the conflict of interests between the remuneration of the management and the discretion in valuation of the works; and the insurance policies covering the risks in relation to title, provenance and authenticity.

The management of an art fund must carefully consider each single investment. The valuation of risk as well as the financial impact on the fund, and

consequently on the investors, also need to be considered, including all costs in relation to the acquisition, holding and sale of artworks. *Minimize* each risk should be the managers' key word. Excluding each risk such as issues of ownership, authenticity and provenance need to be the managers' golden rule.

The art fund industry – in spite of its still modest size – is slowly becoming part of the financial market. The strategies implemented by art funds are increasingly very professional in order to attract investors among all the players in the financial market, i.e. not limited to art lovers or collectors.

The introduction of the Directive of the European Union on Alternative Investment Fund Managers (AIFMD)<sup>159</sup> represents a useful mean for art fund managers in order to provide:

basic requirements for those who would manage assets, minimum requirements ensuring the adequate safekeeping and conservation of such assets, minimum requirements for independent and transparent valuation of such assets, and minimum requirements for the management of risks associated with investments in such assets<sup>160</sup>.

The impact of such a directive can be the object of a further study that could be complementary to this paper.

In conclusion, my paper represents an incentive for the introduction of a general set of rules for art funds and art fund managers aiming to follow the due diligence process in the acquisition, the holding and the sale of artworks. To this end, the support of professional associations such as the Art Fund Association<sup>161</sup> in the U.S.A. would be very helpful and effective in order to issue and implement the application of such rules. The ultimate scope is to establish a standard of practice in the art fund business, which could be generally accepted by the financial market. Art funds shall become an ordinary investment instrument, comparable with all other ordinary instruments, like bonds or shares.

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<sup>159</sup> See Directive 2011/61/EU of June 8, 2011.

<sup>160</sup> DELOITTE 2013, p. 52.

<sup>161</sup> See [www.theartfundassociation.com](http://www.theartfundassociation.com) (last visit: May 14, 2013).

## Bibliography

ARTNEWS 2009, K. Akinsha/S. Hochfield/Z. Artemiev/N. Fitzgerald, The Faking of the Russian Avant-Garde, in ARTnews, July 1, 2009.

BAZLEY 2010, Thomas D. Bazley, Crimes of the art world, Santa Barbara/Denver/Oxford 2010.

BENDER 1985, Marylyn Bender, High Finance Makes Bid for Art", in Ney York Times, February 3, 1985.

CRADDOCK 2009, Paul Craddock, Scientific investigation of copies, fakes and forgeries, Oxford 2009.

DELOITTE 2013, Deloitte Luxembourg – ArtTactic, Art & Finance Report 2013, Luxembourg / London 2013.

ECKSTEIN 2008, Jeremy Eckstein, Investing in Art, in The Art Business, edited by Iain Robertson and Derrick Chong, London and New York 2008, p. 69 - 81.

ECKSTEIN 2010, Jeremy Eckstein, Art Funds as Asset Class, in Fine Art and High Finance, edited by Clare McAndrew, New York 2010, p. 135 – 151.

FINDLAY 2004, Michael Findlay, The Catalogue Raisonné, in The expert versus the object, ed. by Ronald D. Spencer, Oxford/New York 2004, p. 55 – 62.

FITZGERALD 1995, Micheal C. Fitzgerald, Making Modernism, New York 1995.

FOSTER/KRAUSS/BOIS/BUCHLOH 2004, Hal Foster/Rosalind Krauss/Yve-Alain Bois/Benjamin H. D. Buchloh, Art Since 1900, London 2004, p. 118 f.

FRIEDLÄNDER 1942, Max J. Friedländer, On Art and Connoisseurship, London 1942.

GRAW 2009, Isabelle Graw, High Price, Berlin/New York 2009.

GURIANOVA 2012, Nina Gurianova, The Aesthetics of Anarchy, Berkeley/Los Angeles/London 2012.

HACKFORTH-JONES/ALDRICH 2012, Jos Hackforth-Jones/Megan Aldrich, Introduction, in Art and Authenticity, ed. by Jos Hackforth-Jones and Megan Aldrich, Farnham 2012, p. 8 - 19.

HONOUR & FLEMING 2010, Hugh Honour & John Fleming, The Visual Arts: A History, Upper Saddle River/Toronto/Sidney/Tokyo/Singapore/Mexico City/Hong Kong 2010.

HOROWITZ 2011, Noah Horowitz, Art of the deal, Princeton and Oxford 2011.

KIRSH / LEVENSON 2000, Andrea Kirsh / Rustin S. Levenson, Seeing through paintings, New Haven/London 2000.

KRAUS 2004, Peter Kraus, The Role of the Catalogue Raisonné in the Art Market, in *The expert versus the Object*, edited by Ronald D. Spencer, Oxford 2004, p. 63 – 71.

LEVY 2000, Steven Mark Levy, Authentication and Appraisal of Artworks, in *Art Law Handbook*, edited by Kaufmann Roy S., New York 2000, p. 829 ff.

MALEVICH 1915, Kasimir Malevich, *From Cubism and Futurism to Suprematism*, 1915

MCANDREW - INTRODUCTION 2010, Clare McAndrew, An Introduction to Art and Finance, in *Fine Art and High Finance*, edited by Clare McAndrew, New York 2010, p. 1 – 30.

MCANDREW DETERMINING 2010, Clare McAndrew, Determining Art Prices: Objective and Subjective Valuations, in *Fine Art and High Finance*, edited by Clare McAndrew, New York 2010, p. 50 – 62.

MÜLLER/TATZKOW 2010, Melissa Müller/Monika Tatzkow, *Lost Lives Lost Art*, New York 2010.

MÜLLER-CHEN/RENOLD 2009, Markus Müller-Chen/Marc-André Renold, Kulturgütertransfer, in *Kultur Kunst Recht*, Basel 2009, p. 292 – 313.

O'CONNOR 2004, Francis V. O'Connor, Authenticating the Attribution of Art, in *The expert versus the object*, ed. by Ronald D. Spencer, Oxford/New York 2004, p. 3 – 27.

RASCHÈR 2009, Andrea F. G. Raschèr, Kulturgütertransfer, in *Kultur Kunst Recht*, Basel 2009, p. 265 – 292.

SARABIYANOV 2012, Andrey Sarabiyanov, *The Russian Avant-Garde: A Brief History*, in *Russian Avant-Gardes, Malevich, Kandisky, Chagall, Radchenko, Tatlin and the others*, Rome, Museo dell'Ara Pacis, 5 April – 2 September 2012, Milano 2012.

SHATSKIKH 2007, Aleksandra Shatskikh, *Vitebsk – The Life of Art*, New Haven and London 2007.

SHATSKIKH 2012, Aleksandra Shatskikh, *Black Square*, New Haven and London 2012.

SPENCER 2004, Ronald D. Spencer, Introduction, in *The expert versus the object*, ed. by Ronald D. Spencer, Oxford/New York 2004, p. xi – xviii.

THAW 2004, Eugene Victor Thaw, *The Authentic Will Win Out*, in *The expert versus the Object*, edited by Ronald D. Spencer, Oxford 2004, p. 73 – 77.

VON HABSBURG/GOODMAN 2010, Elisabeth von Habsburg/Rachel Goodman, Art appraisals, in *Fine Art and High Finance*, edited by Clare McAndrew, New York 2010, p. 32 – 50.

WELLS 1999, Christopher M. Wells, The Organization of Off-Shore Investment Funds, in The Chancellor Offshore Funds Manual, London 1999.

YEIDE/AKINSHA/WALSH 2001, Nancy H. Yeide/Konstantin Akinsha/Amy L. Walsh, The AAM Guide to Provenance Research, Washington D.C. 2001.

### Other sources

The definition of art funds provided by The Art Fund Association LLC, New York, New York, U.S.A. has been drawn from: [http://www.artfundassociation.com/what\\_are\\_art\\_funds/basic\\_af.html](http://www.artfundassociation.com/what_are_art_funds/basic_af.html) (last visit: May 15, 2013).

All data related to sales at auctions and prices have been drawn from [www.artprice.com](http://www.artprice.com) (last access: May 15, 2013).

All information related to the British Association of Paintings Conservator-Restores are drawn from: [www.bapcr.org.uk](http://www.bapcr.org.uk) (last visit: May 15, 2013).

All data related to Grove Art Online or to Benezit Dictionary of Artists have been drawn from [www.oxfordartonline.com](http://www.oxfordartonline.com) (last access: May 15, 2013).

The press release of September 2011 of The Fine Art Fund Group has been drawn from: <http://www.thefineartfund.com/press/press-releases> (last visit: May 15, 2013).

## List of abbreviations

§	paragraph
AIFMD	Directive 2011/61/EU of the European Parliament and of the Council of June 8, 2011 on Alternative Investment Fund Managers
art.	article
ARIS	ARIS Title Insurance Corporation
AStEGB	Historical Archive of the Emil G. Bührle Foundation
BNP	Banque Nationale de Paris
ca.	circa
cat.	catalogue
CEO	chief executive officer
CHF	Swiss Francs
cm	centimeter(s)
Dig.	Digesta
ed.	edited
EEC	European Economic Community
e.g.	exempli gratia (= for example)
EU	European Union
exh. cat.	exhibition catalogue
FMV	fair market value
f/ff.	and the following page(s)
FF	French Francs
GBP	Great Britain Pound
i.e.	id est (= in other words)
ill.	illustrated
ibid.	ibidem (= the same place)
IRR	internal rate of return
LLC	limited liability company
MCV	market cash value
n./no.	number
NAV:	net asset value
op. cit.	opere citato (= in the work cited)

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OPEC	Organization of the Petroleum Exporting Countries
p.	page(s)
par.	paragraph(s)
RRV	retail replacement value
	s.r.l. società a responsabilità limitata (=limited liability company)
SCR	Swiss Association for Conservation and Restoration
sub	below
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNIDROIT	International Institute for the Unification of Private law
UK	United Kingdom
USA	United States of America
USD	United States Dollar
VAT	value added tax
WWII	Second World War

## Appendix n. 1: Table of plates

- Plate 1:** Lee Kit, Equal, 2011, Equal, 2011, acrylic and emulsion paint on cardboard, 76 x 76 cm, Private collection, Lugano (Switzerland).
- Plate 2:** Pablo Picasso, The Family of Saltimbanques, 1905, oil on canvas, 212.8 x 229.6 cm, National Gallery of Art, Washington, D.C.
- Plate 3:** Edouard Manet, Young Lady in Oriental Garb (or La Sultane), ca. 1871, oil on canvas, 96 x 74.5 cm, Emil Bührle Collection, Zürich.
- Plate 4:** Piet Mondrian, Tableau No. IV; Lozenge Composition with Red, Gray, Blue, Yellow, and Black, c. 1924/1925, oil on canvas, overall (diamond): 142.8 x 142.3 cm, framed: 150.8 x 150.5 x 6.3 cm, National Gallery of Art, Washington D.C.
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- Plate 8:** Nathalya Goncharova, Les arbres en fleurs (Pommiers en fleurs), 1912, painting, oil on canvas, 100.3 cm x 84.5 cm, sold in London, at Christie's, on September 2, 2011.
- Plate 9:** Kasimir Malevich, Cow and Violin, 1913, painting, oil on wood, 48.8 x 25.8 cm, The State Russian Museum, St. Petersburg.
- Plate 10:** Kasimir Malevich, Black Square, oil on canvas, 1915, 79.5 x 79.5 cm, Tretyakov Gallery, Moscow.
- Plate 11:** Vladimir Tatlin, Corner Counter-Relief, 1915, iron-aluminium-primer, dimensions unknown.

**Plate 12:** Alexander Rodchenko: view of Workers' Reading Room, exhibited at the International Exposition of Modern Decorative and Industrial Arts, Paris, 1925 (New York, Museum of Modern Art).

**Plate 13:** El Lissitzky: Beat the Whites with the Red Wedge, lithographic poster, 1919–20.

**Plate 14:** El Lissitzky, Proun 19D, gesso, oil and collage on plywood, 97.5×97.2 cm, c. 1922, New York, Museum of Modern Art.

## Appendix n. 2: Condition report of Marino Marini's *Studio per miracolo*

Stato di Conservazione Condition Report		No. L.	1-0312
<b>Artista</b>	Marino Marini 1901-1980	<b>No. Inv.</b>	
<b>Titolo</b>	Studio per miracolo		
<b>Descrizione</b>	Cavaliere su cavallo accasciato in bronzo su base in pietra		
<b>Oggetto</b>	Scultura	<b>Datazione</b>	1953/1954
<b>Tecnica / Lavorazione</b>	Fusione a cera persa/cesellato/patinato	<b>Materiale</b>	Bronzo
<b>Dimensioni (cm)</b>	h 65    l 100    L 52    Ø	<b>Peso (gr)</b>	
<b>Data d'entrata</b>	21.03.2012	<b>Consegnato</b>	<b>Responsabile</b> Avv. Adriano A. Sala
<b>Data d'uscita</b>	21.03.2012	<b>Ritirato</b>	<b>Proprietario</b> Privato

### Stato di conservazione

La scultura è in buone condizioni di conservazione, non vi sono danni meccanici come p.es. graffi, scalfiture o simili. La patina si presenta in modo omogeneo e compatto non vi sono macchie di corrosione anomala

### Constatazioni

Sul collo del cavallo si nota un difetto di fusione (piccolo forellino)  
 All'altezza della caviglia destra del cavaliere, vi sono due piccole incrostazioni di colore bianco, probabilmente si tratta di resti della terra di fusione che dall'interno si diffonde attraverso i pori del metallo.  
 Nei parti esposte della scultura (testae fianco del cavaliere, narici del cavallo) si nota una leggera spatinatura.  
 Lo stucco di fissaggio della zampa destra del cavallo presenta delle fessure e un frammento è staccato.

### Indicazioni-suggerimenti

Durante la manipolazione dell'opera sollevare sempre con la base in pietra.

### Osservazioni

nessuna

Luogo	Data
Lugano	21 marzo 2012
<b>Cons/Rest.</b>	Pegurri Giacomo Conservatore/Restauratore SKR giacomo.pegurri@zg.ch

Photo documentation

Marino Marini "Studio per miracolo"



View from both sides



Photo documentation

Marino Marini "Studio per miracolo"



Front view



melting plaster or soil



Light damage of the patina on the head

Photo documentation

Marino Marini "Studio per miracolo"

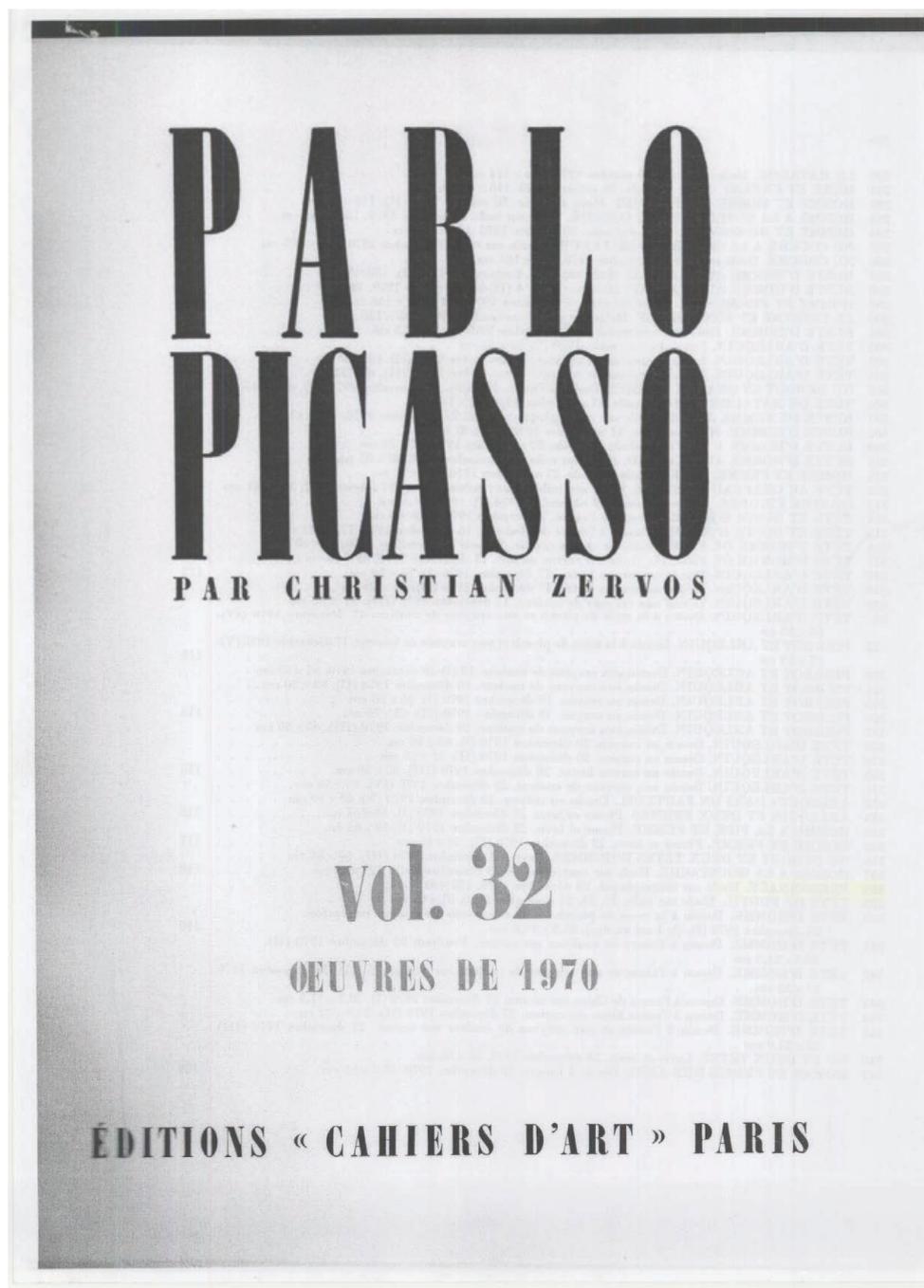


On the neck: small melting hole



Detail: small melting hole

Appendix n. 3: Excerpt of Christian Zervos' catalogue raisonné of the oeuvre of Pablo Picasso



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