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Due Diligence in Art Law and Cultural Heritage Law*

Deveres de diligência (due diligence) no Direito da Arte e de Proteção do Patrimônio Cultural

Lisiane Feiten Wingert Ody**

Abstract

The article examines the meaning and scope of 'due diligence' within the spheres of Art Law and Cultural Heritage Law, especially concerning authenticity and clean provenance, to determine what can legitimately be expected from the parties involved and thus avoid legal uncertainty *vis-à-vis* the burden of proof, and the suitability of indemnity and restitution claims. Regarding methodology, comparative methods are used to examine the legal institutes in different legal systems, induction and deduction to identify the legal sources, and the examination of case studies. The first part considers how the agreed quality of an artwork is established, particularly regarding the roles of those involved, and their responsibilities concerning due diligence in cases involving disputed authenticity, as well as the distribution of the burden of proof. Cases are analysed in which artworks or cultural goods are compromised due to the absence of clean provenance. The second part aims to systematize the due diligence requirements and expose the fundamental divergence between Common Law and Civil Law regarding the protection of the good faith possessor. An alternative solution to the costly scientific tests used as evidence to rescind sales agreements involving pieces with contested authenticity is proposed, as is the adoption of convergent understanding between the legal systems in cases of questionable provenance. The research is relevant because it impacts the formulation of public policy for the protection of cultural property and the art trade in general, while offering criteria for understanding the duties inherent to due diligence.

Keywords: Due diligence. Art Law. Cultural Heritage Law

Resumo

O artigo examina o significado e alcance da '*due diligence*' no âmbito do Direito da Arte e da Proteção do Patrimônio Cultural, especialmente quanto à verificação da autenticidade e da proveniência '*free and clean*' de uma obra, a fim de determinar o que se pode legitimamente esperar dos envolvidos e assim evitar insegurança jurídica quanto à distribuição do ônus da prova, ao cabimento de indenizações e ao julgamento de pedidos de restituição. Os métodos utilizados na elaboração do texto foram, precipuamente, os de direito comparado no exame dos institutos em diferentes sistemas jurídicos, e os

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métodos indutivo e dedutivo, na apreensão das fontes, além do estudo de casos. Na primeira parte do trabalho, examina-se como ocorre a prova da qualidade acordada da obra, para determinar as diligências cabíveis em casos de controvertida autenticidade. Na segunda, analisam-se casos de comprometimento da obra ou do bem cultural autênticos por ausência de proveniência limpa, buscando sistematizar os deveres de diligência nesse contexto, assim como expor a divergência fundamental entre *Common Law* e *Civil Law* quanto à proteção do possuidor de boa-fé. Propõe-se no trabalho a adoção de solução alternativa à dispendiosa comprovação científica para o desfazimento de negócio envolvendo peça de autenticidade controvertida, bem como a adoção de compreensão convergente entre esses sistemas jurídicos nos casos envolvendo defeito de proveniência. A pesquisa é relevante, por impactar significativamente na formulação de políticas públicas de proteção de bem cultural, bem como no tráfego comercial de obras de arte em geral, já que oferece critérios para a compreensão da *due diligence*.

Palavras-chave: Deveres de diligência. Direito da Arte. Proteção do patrimônio cultural.

1 Introduction

While being an institute that is typical of Common Law, due diligence is an issue that is constantly raised in cases involving Art Law[1] and Cultural Heritage Law[2], which is why understanding its meaning is also of enormous relevance for Civil Law. Due diligence is understood to be "*the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation*"[3], and failure to exercise it can lead to serious consequences.

The term 'due diligence' can be simply understood as *reasonably expected diligence*. In Law, however, its meaning and scope are far from simple, being closely related to Good Faith and Fairness. Within the scope of Art Law and Cultural Heritage Law, performing due diligence means studying, analysing and evaluating a piece and its past circumstances, in order to ensure its authenticity and clean provenance.

The art market moves huge sums of money, which attract not only connoisseurs and investors, but also forgers, fraudsters and other types of criminals[4]. For this reason, due diligence measures are required to prevent the circulation of false or stolen works, or to assist in the resolution of civil liability claims and claims for restitution resulting from failure to comply, in the case of the circulation of counterfeits or original works unduly removed from their dispossessed owners or in non-compliance with the cultural heritage protection law.

In the context of counterfeit works, the defect that would block or undo the transaction lies in the piece itself, which is inauthentic, while in the sale of original works of questionable provenance, the defect is in its past circumstances. However, in both cases, the defects can be overcome if those involved conduct due diligence investigations. That is why it is so important to define the scope of the duties that emanate from this concept and the distribution of the burden of proof in cases of conflict.

These considerations are applicable both to works of art in general, and to pieces considered cultural heritage. The term "art" is a relative legal concept that, according to the standards applied, can have different meanings. There is no legal concept of 'work of art' in

[1] Art law is a multidisciplinary scientific discipline, in which an object is studied using a complex set of lenses, namely public and private law, mainly constitutional law, Civil Law and copyright. On the sources of art law, see: MERRYMAN, John; ELSEN Albert. Law, *Ethics and the Visual Arts*. 5. ed. Alphen aan den Rijn: Kluwer Law, 2007; FEITEN WINGERT ODY, Lisiane. *Direito e Arte*: o direito da arte brasileiro sistematizado a partir do paradigma alemão. São Paulo: Marcial Pons, 2018.

[2] The term "cultural heritage" was introduced into UNESCO legislation in 1973. Cultural heritage law refers to the regulation and protection of culturally relevant sites and objects, and may include tangible and intangible goods, natural or otherwise. For more information, see: BLAKE, Janet. *International Cultural Heritage Law*. Oxford: OUP, 2015; CHECHI, Alessandro. *The settlement of international cultural heritage disputes*. Oxford: OUP, 2014; FRANCIONI, Francesco; GORDLEY, James (ed.). *Enforcing International Cultural Heritage Law*. Oxford: OUP, 2013.

[3] *Black's Law Dictonary,* under *Diligence*

[4] In Brazil, Ordinance No. 396/2016 of the National Historical and Artistic Heritage Institute (IPHAN), regulating Law No. 9,613/1998, which combats money laundering, established the parameters to be followed by dealers in works of art and antiques. In turn, article 9 of Law 9,613/1998 lists the professions required to report suspicious money laundering operations, namely those involved in the sale of jewellery, precious stones and metals, art objects and antiques. For more information, see: FRANCA FILHO, Marcílio Toscano; VALE, Matheus Costa do; SILVA, Nathálya Lins da. Mercado de arte, integridade e due diligence no brasil e no mercosul cultural. *Revista de la Secretaría del Tribunal Permanente de Revisión*, ano 7, n. 14, p. 260-282, ago. 2019. p. 273.

Brazilian law, which can be understood as 'free creative realization', or 'product of the artist's activity'. On the other hand, a multi-faceted concept of a work of art is admitted, a position towards which German law also leans, since its particularly diverse nature and the constant expansion of its boundaries would prevent a single concept. In the scope of copyright, as a rule, an intellectual creation that attains a certain degree of creativity and originality can be protected as a work of art. [5]

Not being an ordinary commodity, nor having any application in everyday life, the value of a work of art transcends that of the materials used in its creation, especially when the piece reflects the history or identity of a country. Such cultural goods are works that bear witness to the past and the present, so their preservation for the future is a moral obligation of any civilized nation. However, the topic is controversial, as determining to whom the past belongs is not a simple task. The concept of an artwork as a cultural good is very broadly defined, including categories such as paintings and sculptures, archaeological pieces and even human remains. They can also be pieces that constitute collections in state museums or be items of national heritage and, therefore, being public property they cannot normally be sold[6]. Rational differentiation leads these goods to be distinguished and offered legal treatment that recognises these particularities[7], thus providing for their proper protection[8].

This article aims to examine the scope of due diligence requirements within the sphere of authenticity and provenance, in transactions involving works of art or cultural property. Specifically, it intends to demonstrate that: (i) mere uncertainty as to authorship should lead to cancellation of the sales agreement; (ii) the existence of databases of lost and stolen works urges increased due diligence requirements, which should lead national judges to rule in favour of the diligent party; and (iii) Common Law and Civil Law should converge in the legal treatment of cases of questionable provenance.

Ever since there have been works of art, there have been counterfeits. Estimates suggest a significant percentage of pieces on the art market are fake and only a small proportion is absolutely authentic.[9] Authenticity is difficult to verify because it is necessary to associate the origin of the work with a specific artist, school or century[10]. If a piece cannot be attributed to an artist based on a signature – the practice of signing artworks only started in the 14th century and has only became widespread since the 18th century - authenticity of authorship stems from the consensus established among art experts regarding the technical and historical characteristics related to the artist and their work. There is also the possibility of forgery involving information relevant to the work other than authorship[11].

In this context, clarifying the due diligence require-

[5] FEITEN WINGERT ODY, Lisiane. *Direito e Arte*: o direito da arte brasileiro sistematizado a partir do paradigma alemão. São Paulo: Marcial Pons, 2018. p. 65-80.

[6] In Brazilian law, there is a formal concept of cultural property in article 216 of the Constitution, according to which "*goods of a material and immaterial nature, taken individually or together, that bear reference to the identity, to the action, to the memory of the different groups that form Brazilian society, constitute Brazilian cultural heritage*". The set of cultural goods is denominated cultural heritage. The article goes on to detail the forms of expression included in the concept of cultural property; "*the ways of creating, making and living; scientific, artistic and technological creations; works, objects, documents, buildings and other spaces destined to artistic and cultural manifestations; urban complexes and sites of historical, scenic, artistic, archaeological, paleontological, ecological and scientific value*".

[7] SIEHR, Kurt. Mystifizierung und Entmystifizierung von Kulturgüter und das Recht. *KUR,* v. 3/4, p. 87-109, 2011; SIEHR, Kurt. Globalization and national culture: recent trends toward a liberal exchange of cultural objects. *Vanderbilt Journal of transnational law*, Symposium International Legal dimensions of art and cultural property. p. 1067-1094.

[8] In Brazil, decree 80.978/77 promulgated the Convention on the protection of world, cultural and natural heritage. In Brazilian law, Decree-Law 25/37 divides cultural heritage into immaterial and material.

[9] https://news.artnet.com/market/over-50-percent-of-art-is-fake-130821

[10] The authorship of works of art may be determined in different ways, which may or may not indicate certainty of authorship. Expressions such as '*attribuité à*' or '*est probablement de*' indicate doubt, for example. The reference '*atelier/studio de'* means that the work is by an undetermined artist, coming from the place in question. In turn, '*cercle de'* suggests a piece was elaborated by an artist with close relations with the referred painter, but not necessarily his disciple, which is usually indicated by '*école de'*. '*À la manière de*' means the work is similar in style to the referred painter, but not contemporary, while '*après*' indicates a copy. '*Signé'* means there is a signature on the work, while '*daté'* indicates the year of completion. For more information, see: WEBER, Marc. Caravaggio vor Gericht: Anmerkungen zum Urteil des Englischen High Court vom 16. Januar 2015. *Bulletin Kunst & Recht,* p. 99, 2016/2-2017/1. p. 99; WEBER-CAFLISCH, Olivier. *Faux et... défauts dans la vente d'objets d'art*. Genebra: Librairie de l'Université, 1980. p. 30-31.

[11] Authors themselves can commit forgery by altering documents or dates so that it is believed pieces were created at an earlier date and thus appear more avant-garde, or to deceive a buyer by another means. See: SCHACK, Haimo. *Kunst und Recht*: Bildende Kunst, Architektur, Design und Fotografie im deutschen und internationalen Recht. 3. ed. Tübingen: Mohr Siebeck, 2017. p. 26.

ments of those involved in the transaction is essential. That means understanding what can legitimately be expected from the owner of the piece, who places it on the market; the intermediary, who may be a private person, gallery or auction house; the specialists, such as appraisers, investigators and art experts; as well as the purchaser. This is particularly true in cases where the investigated piece is found to be a forgery, so that future losses can be avoided.

In the case of transactions involving original works of art, due diligence is part of another function, namely, that of verifying the clean provenance of the work. In most of the cases in which artworks or cultural goods have been sold illegally - whether because they had been looted or stolen before or during World War Two, or confiscated by the State, as occurred with the so-called 'degenerate art', or any other illegality, such as disregarding the rules regarding the protection of cultural heritage -, the pieces cross national boundaries, changing hands countless times and invariably remain separated from their dispossessed owners for lengthy periods time. When there is a claim for restitution, this may lead to the involvement of various jurisdictions, which may result in diametrically opposed rulings.

This is because, despite the international art market being well established, with rules designed to inhibit the illicit trafficking in artworks and, especially, those considered to be items of cultural heritage, it is *national laws* that regulate the matter and govern the restitution/return[12] of works, which results in a multiplicity of understandings.

The article is organised to reflect the examination of due diligence from the two above-mentioned perspectives. Thus, in the first part, due diligence is looked at in relation to the question of the authenticity of a work of art or cultural property, analysing how proof of the agreed quality of an artwork is established and the roles of the various specialists, as well as of the seller and the auction house. In this context, the distribution of the burden of proof is considered in the hypothesis of the delivery of a forgery. In the second part, the impairment to the artwork caused by the absence of clean provenance is examined, starting with a description of the set of measures of which due diligence is a part in such cases. The need to document and record these measures is addressed, while an argument for the requirement of proof of good faith is put forward. An analysis of the fundamental divergence between Common Law and Civil Law in claims for the restitution or return of works closes the second part.

In considering these matters, the author has borrowed: mainly from comparative, functional, factual and contextualized law, when examining the institutes in different legal systems, especially the American and the German traditions, which are taken as paradigms of *Common Law* and *Civil Law*, respectively; and from inductive and deductive reasoning in identifying the legal sources, in addition to analysis of case studies, which is fundamental in the scope of art law and the protection of cultural heritage, in which there are multiple legal sources which not infrequently arrive at contradictory conclusions.

2 Due diligence and the authenticity of the artwork or cultural property

2.1 Demonstrating authenticity

Although it is the buyer who is most interested in the certainty of authenticity of an artwork, it is the seller, as a rule, who has more information and therefore is better able to prove the quality of a piece. Among the various Western legal systems, there is a common understanding that the contracting parties have a duty to behave in accordance with good faith, which, however, does not always occur. Furthermore, even under ideal conditions, the problem of authenticity cannot be considered purely from the perspective of the seller's or buyer's responsibility, because, as a rule, they rely on the assistance of intermediaries and professional specialists who examine and evaluate the work in scientific, economic, and legal terms.

2.1.1 The role of the parties, intermediaries, appraisers and art experts

The authenticity of an artwork is verified based on scientific evidence, examination of provenance and appreciation by a *connoisseur*, who must be someone with

[12] The term 'restitution' is avoided because it is important in the understanding that the possessor's possession of the item is illicit. Therefore, the neutral term 'return' is used.

'best in the field' qualifications and experience to offer critical opinion regarding an artwork[13].

The certification of authenticity has enormous significance, importing the attribution of authorship not only for the history of art and the definition of value[14], but also for the verification of the legality of the sale or transfer of a piece, as well as any transport and insurance costs.

Among the duties that can legitimately be expected from those involved, the following can be mentioned: (i) authentication, substantiated by confirmation from as many experts as possible, whether independent professionals or linked to the artist's foundation or Estate, that the work is authentic; (ii) a duly documented, detailed physical examination of the conditions of the piece (iii) verification the seller has good title and of relevant databases of lost and stolen artworks; (iv) the confirmation of legal compliance, in the sense of examining whether the work in question is considered a cultural good or whether its sale would imply violation of the law of any jurisdiction; and (v) consideration of previous sales and transfers in the evaluation.

Determining the authenticity, or otherwise, of an artwork requires a variety of skills and resources. The task is generally carried out by a number of specialist professionals who commonly work under rules of discretion and confidentiality, inherent in the negotiation of highly valued pieces, since sellers would rather not be suspected of 'financial decadence', and buyers prefer not to be exposed to the attention of criminals or the scrutiny of tax inspectors.

There are few such specialists with the authority to impute or attribute the authorship of an artwork[15]. As Max Friedländer[16] rightly said, '*the [art] specialist creates*[17] *- or destroys*[18] *- values and therefore has considerable power*'.

Physical examination for authentication purposes is, as a rule, the responsibility of the art experts. One might think no one would be better at stipulating the authenticity of a work and its value than its creator. Nonetheless, it is neither recommended nor practical to designate the author an expert, because appreciating these aspects of a work can be an emotionally draining activity, requiring neutral judgment. That is why not even the artist's family members are recommended for such evaluations, since their impartiality may be impaired. Art historians, appraisers, restorers and connoisseurs, among others, whether self-employed or linked to museums, auction houses or insurance companies, as long as they are active in the area they will evaluate, as well as art dealers and gallery owners, are the most recommended specialists.

Scientific examination, which is continuously evolving with the development of new technologies, includes the collection of materials, such as paint and fibre samples from the canvas, which are subjected to Raman spectroscopy, a photonic technique that quickly identifies organic or inorganic material. The analysis typically

[13] AMINEDDOLEH, Leila. Are you faux real? An examination of art forgery and the legal tools protecting art collectors, *Cardozo Arts & Entertainment Law Journal*, v. 34, p. 72, 2016.

[14] For further information see: JAYME, Erik. Rechtsbegriffe und Kulturgeschichte. In: REICHELT, Gerte (org.). *Neues Recht zum Schutz von Kulturgut*: Internationaler Kulturgüterschutz. Wien: Manz, 1997. p. 11-27.

[15] BRÜHL, Friederike (Gräfin) von. Kunstexpertisen als Machtfaktor: die Position des Aussenstehenden. In: WELLER, Matthias (org.). *Kulturgüterschutz – Künstlerschutz*. Tagungsband des Zweiten Heidelberger Kunstrechtstags am 5. und 6. September 2008. Baden-Baden: Nomos, 2009. p. 179; BRÜHL, Friederike (Gräfin) von. *Marktmacht von Kunstexperten als Rechtsproblem*: Der Anspruch auf Erteilung einer Expertise und auf Aufnahme in ein Werkverzeichnis. München: Carl Heymanns, 2008. p. 47; JAYME, Erik. „Mercato dei falsi" e diritto civile con spunti di diritto internazionale privato. In: *Protezione della proprietà intelettualle e artística*: studi in onore di Giorgio Cian. Padova 2010, Band 2.

[16] FRIEDLÄNDER, Max. *Der Kunstkenner*. Berlin: Cassirer, 1919. p. 8.

[17] The specialist creates value, as in 1969, when *Rosenberg* published an article in the *Revue du Louvre* indicating the *Nicolas Poussin's* authorship of a canvas hitherto attributed to *Carracci's* disciple. In 1988, the picture was sold for more than 300,000 times the amount originally paid for it. For more information, see: SIEHR, Kurt. Irrtum in Kunsthandel. *Bulletin Kunst und Recht*, v. 1, p. 28-29, 2015.

[18] An example being, the notorious case from 1927 in which *Duveens* refused to refer to a replica of "*La belle Ferronière*" presented by *Hahn* as being by Leonardo. Despite the weight of evidence being in his favour, the specialist reached an agreement in which he paid USD 60,000 to end the lawsuit filed against him by *Hahn*, when the *Kansas City Art Institute* desisted from acquiring the canvas after learning his opinion. The painting did not attract a buyer for many years, not even at an auction held by a respected house in 1985, and was finally sold only in 2010, when it was acquired for just over USD 1.5 million, at an auction conducted by Sotheby's – probably having appreciated value due to the episode involving *Duveen*. Regarding the case, which is the American paradigm for *disparagement*, an action that protects the economic interests of a party harmed by false statements, analogous to the way *defamation* protects reputation, see: BRÜHL, Friederike (Gräfin) von. *Marktmacht von Kunstexperten als Rechtsproblem*: Der Anspruch auf Erteilung einer Expertise und auf Aufnahme in ein Werkverzeichnis. München: Carl Heymanns, 2008. p. 1-2; LERNER, Ralph; BRESLER Judith. *Art Law*: the guide for collectors, investors, dealers, and artists. 3. ed. New York: Practising Law Institute; 2005. p. 573.

also makes use of X-ray diffraction, which can reveal the existence of any painting hidden under the examined work. Scientific photography can reveal objects or living organisms that are only visible with the aid of the microscope (macro and microphotography). Discovered by Willard Libby, carbon-14 dating technique - applicable to wood, organic sediments, bones, shells or any material that has absorbed carbon, even if indirectly, such as through absorption by photosynthetic organisms, from the atmosphere – enables the quantity of this substance to be assessed in dead organic tissues, which decreases at a steady rate over time, thus serving to date samples that are up to about 50 thousand years old. Finally, thermoluminescence, that is, the luminescence produced in some materials when heated, can also be used in the dating process, while fingerprint analysis is also common. All of these resources are, in addition to being expensive, also known to counterfeiters, who are constantly seeking to develop ingenious ways to avoid the detection of their works by qualified specialists.[19]

The examination of provenance, the subject of the second part of this article, also contributes to the analysis of authenticity, as the specialist would seek to trace the chronological history of an artwork, based on documentation and historical records, from its creation to the present. Much of this research involves looking for images of the object in old family photographs or in newspaper reports. Ideally, provenance should be traceable from the artist to the owner, without gaps.[20]

The conclusions of *connoisseurs*, who have a detailed knowledge of the techniques and elements of a certain artist, finalise the evaluation. Their appreciation of the piece will be as good as their knowledge, which is why different specialists may occasionally disagree regarding the attribution of a work to a certain artist.

Appraisers, in turn, are professionals with above-average technical knowledge and practical experience, with the ability to prepare an assessment report, and prove its conclusions.[21] They must demonstrate reliability, impartiality and independence, which is why if they have any employment relationship, they must disclose the fact so as not compromise their professional performance. They are usually certified, committing themselves to exercise the function of an appraiser personally, independently, in a meticulous, precise and impartial manner, while they may also assume duties of conservation and documentation.

In the art world, therefore, appraisers are distinct from experts. The latter may issue a judgment of authenticity based on their knowledge of an artist's work and style, while the former provides an estimation of the value. Their opinions are valued, especially those with better reputations, whose opinion usually has greater weight and without which some works would, in practice, be impossible to sell.

The responsibility of the specialists in general, in addition to being contractually limited, can be exempted by invoking scientific freedom, so in order the specialist to be considered liable for any error, one would have to demonstrate his/her fraudulent intent.[22]

2.1.2 The essential elements of due diligence: the distinction between the obligations of professional specialists and of dilettantes

A case in German jurisprudence in which the item sold proved to be inauthentic sheds light on the essential forms of understanding of due diligence. In it, the purchaser of the oil painting signed *Campendonk*[23] and dated 1914, sued a renowned auction house, seeking compensation for having acquired a forgery.

The catalogue in which the picture, valued at €800,000-1,200,000, appeared, stated the piece had been on display at the *Flechtheim Gallery* in 1920 and

[19] AMINEDDOLEH, Leila. Are you faux real? An examination of art forgery and the legal tools protecting art collectors. *Cardozo Arts & Entertainment Law Journal*, v. 34, p. 73, 2016

[20] AMINEDDOLEH, Leila. Are you faux real? An examination of art forgery and the legal tools protecting art collectors. *Cardozo Arts & Entertainment Law Journal*, v. 34, p. 73, 2016.

[21] EBLING, Klaus; SCHULZE, Marcel. *Kunstrecht*: Zivilrecht, Steuerrecht, Stiftungsrecht. 2a ed. München: Beck: 2012. p. 243.

[22] Regarding the specialists working in auction houses, it must be considered that their opinion was hired by the auctioneer, who is responsible for their remuneration, through a service provision contract. In the light of this contract, the professional examines the work personally, evaluates the authenticity of any signature, offers historical and critical analysis of the work, in addition to carrying out scientific tests. The findings inform the conditions of the work and any limitations resulting from the means employed, and concludes with the indication of the amount of the fees. Due to the established contractual relationship, it should be noted that the specialist is accountable to the auctioneer, and liability may be contractually limited. See: SIEHR, Kurt. Haftung des Kunstexperten nach deutschem Recht. *KUR* v. 2, p. 48-56, 2013.

[23] *Heinrich Campendonk* was among the artists whose works the Nazis classified as degenerate, having emigrated to Holland in 1930 and many of his works are considered lost.

since then in the private collection of a French family, while omitting the name, *Werner-Jägers' collection*, at the request of the owner-seller Items 3 and 4, respectively, of the Auction Conditions stipulated, as is customary in these businesses, that the catalogue data is "*provided in good faith and according to their best knowledge, but without legally binding guarantees, not being part of the agreed quality of the artwork."* and that*, "in the event of any deviation from the catalogue description, the value would be returned or reduced*", while at the same time, the auction house would exercise its rights against the seller in order to reimburse the buyer. In the case of "*proven falsehood*", restitution of the commission would be sought.

After the auction, the buyer contacted the auction house, which claimed: (i) that the painting had been presented by the then owner[24], who had indicated it had been part of the *Werner-Jägers', her grandfather's* Collection (1912-1992); (ii) having already sold other works under the same conditions; (iii) an indication of authenticity being a note pasted on the back of the painting, with the inscription *Nr. 11, Heinrich Campendonk, Seeshaupt, Rotes Bild mit Pferden* - data that coincided with the 1920 exhibition catalogue, from the *Flechtheim Gallery* in Düsseldorf, although there was no image or description.

When contacted via letter and e-mail by an independent appraiser hired by the buyer, the auction house did not respond. The buyer decided to have the piece subjected to scientific analysis at the *Doerner-Institut* in Munich, which questioned its authenticity, as they found traces of rutile titanium oxide, a substance that only began to be explored industrially in the late 1930s. A similar conclusion was presented by another expert. In view of the weight of evidence, the buyer legally requested the rescission of the contract and the reimbursement of the amounts paid.

Undoubtedly, the auction house is responsible for checking the authenticity of the artwork it negotiates - which in the case in question was carried out by its own employees. The controversy lies in determining what measures the auction house took and whether they were sufficient to release it from its responsibility in relation to the later confirmation that the piece was a forgery.

At the trial, the court concluded there had been intent to commit fraud on the part of the seller because, although it was not personally "said" that the painting had been exhibited in 1920 in Düsseldorf, she had led the buyer to believe it was true by presenting the painting with the attached *Flechtheim* adhesive note - a procedure that cannot even be confirmed as being a practice of this gallery at the time. The court also decided the auction house would be liable for fraud to a third party, because, **being professional**, it knew or should have known about the flaw, and verification of the provenance of the picture is a due diligence requirement of a prudent dealer and/or professional auctioneer who is remunerated via commission.

According to the court's ruling, the lack of objective information about the piece and the high estimated value suggested the need to subject the piece to scientific analysis and not merely historical examination – much less so, by the auction house's employees alone. Furthermore, it considered the inclusion of the artwork in the auction catalogue to constitute reinforcement of credibility and an indication of authenticity. For which reason, the assertion that "*they would not be responsible for the data*" was ineffective, since the terms of the sale, although general in nature, must be adequate and reasonable, and not harmful and disadvantageous to one of the parties. Finally, the court's conclusion was that, if the sellers are specialized[25], they are responsible for authenticating the work, because it is their due diligence requirement to investigate the authenticity and provenance of the items that appear in their catalogues.

From the case, it can be inferred that the responsibilities understood as due diligence vary, considering: (i)

[24] The case became particularly famous because the forger, the husband of the supposed 'heiress' of the canvas, is *Wolfgang Beltracchi*, who has since been recognized as the greatest forger of paintings since World War II, who is thought to have profited around 50 million euros in sales to auction houses under conditions similar to this case. On the counterfeiter and the consequences of counterfeiting, see: KEAZOR, Henry (org.). *Der Fall Beltracchi und die Folgen*: interdisziplinäre Fälschungsforschung heute. Berlin [u.a.]: De Gruyter, 2014. In the area of entertainment, there is a Netflix documentary of his biography: *"Beltracchi: The Art of Forgery"* (dt. "*Beltracchi – Die Kunst der Fälschung"*), film directed by *Arne Birkenstock*.

[25] A case with a convergent understanding, exonerating dilettantes from the same understanding regarding due diligence, is that involving the contested authorship of the painting *Heiliger Paulus*, considered to be the creation of the Italian painter *Giovanni Francesco Barlieri*, also known as *Guercino* (OLG Hamm, 14.03.1995, 7 U 163/94, NJW 1995, 2640). In it, the court concluded that the fact that an appraiser was mistaken as to the origin of unsigned canvas does not constitute an error to cause annulment, in the hypothesis of private sale and non-specialist seller, highlighting that the sale was not conditioned to the authorship of the piece. For more information, see: JAYME, Erik. *Original und Fälschung im Spannungsfeld von Persönlichkeitsscutz, Urheber-, Marken- und Wettbewerbsrecht*. Wien: Manzsche, 2007. p. 24.

whether or not those involved are professionals; and (ii) their set of conducts, which includes not only commissive acts, but omissions.

2.2 Inauthentic work

Under American law, the scandal involving *Knoedler*, a prestigious NY gallery, provides some relevant insights into due diligence and the distribution of the burden of proof.

2.2.1 Burden of proof

The company first started trading in 1846, but its doors closed in 2011, when it became known that its director had been dumping counterfeits on the market, especially Robert Motherwell, Jackson Pollock and Mark Rothko, produced by the Chinese forger *Pei-Shen Quian*. Due to the size of the company, the customers and the values involved, the trials, with allegations of intentional sale of inauthentic works to unsuspected buyers involving millions in profits, attracted considerable public attention and revealed the extraordinary work of *James Martin*, who established the first private laboratory specialized in the expert investigation of works of art in the United States[26].

The episode began in 1994, when the art dealer *Glafira Rosales* met with *Ann Freedman*, president and director of the *Knoedler Gallery*, and claimed to have a Mexican client who wished to anonymously sell her collection of abstract expressionist works. Over the following years, *Rosales* delivered dozens of alleged 'masterpieces' to the *Knoedler Gallery*, that resold them to its customers. The pieces, however, were forgeries.

With the purpose of affirming authenticity and provenance, *Rosales* reportedly told *Freedman* that as a child she had met a Jewish couple who emigrated from Europe to Mexico, and on visits to the USA in the 1940s and 1970s, the husband, guided by the artist *Alfonso Ossorio*, had bought a series of paintings directly from American artists, which were now being sold by the couple's children.

In the context of due diligence, the fact remains that (i) members of the artist *Richard Diebenkorn's* family warned the director that at least two of the five works allegedly by the painter that *Rosales* had provided appeared not to be authentic, while also expressing concern about the lack of documentation for one of the paintings - which the family considered highly suspect, since meticulous records of the artist's works had been kept; (ii) the works were offered at well below market prices; (iii) *Freedman* did not ask about *Rosales'* background; (iv) in the sale, subject to a favourable review of the provenance and authenticity by the International Foundation for Art Research (IFAR), of a piece allegedly by *Jackson Pollock* to the collector *Jack Levy*, *Freedman* included *Ossorio's* name in the references on provenance, ignoring a report that had rejected the information and observed that there were "disturbing" differences" regarding the materials used; (v) in the light of the IFAR report, *Freedman* had discovered that *David Herbert*, who had connections with the *Knoedler Gallery*, and not *Ossorio*, had been the seller's 'advisor' - information that Freeman, however, kept confidential; (vi) in one of the works negotiated by *Freedman* and *Rosales* even the artist's signature was spelled incorrectly, "*Pollok*" instead of *Pollock*, which also went unnoticed by *Knoedler*.

There were also other indications of fraud: the collector couple *Domenico* and *Eleanore De Sole* acquired paintings supposedly by *Mark Rothko*, upon bring guaranteed of its authenticity, whereby the director reiterated the provenance and claimed the canvases had been examined by *David Anfam*, a specialist in the painter, which was untrue. *Knoedler* also sold an alleged work by *Pollock* provided by *Rosales* to collector *Pierre Lagrange* for US$15.3 million, claiming the work was genuine and had been considered authentic by countless *Pollock* specialists, which was not the case. The *Dedalus Foundation, Inc.*, responsible for *Robert Motherwell's* catalogue raisonné, informed *Freedman* that seven alleged works by the artist provided by *Rosales* to *Knoedler* were forgeries, which was confirmed in court by the expert *James Martin*.

Many of the resulting cases have been resolved in out of court agreements; others remain pending. The case of *De Soles* v. *Knoedler*[27] sheds some light on the question of due diligence, because in it the court ruled that the *De Soles* offered ample evidence to demonstra-

[26] His company, *Orion Analytical*, well recognised among restoration services, museums, the FBI, collectors, law firms and insurance companies, was recently acquired by *Sotheby's* for the purpose of integrating the authentication service into the auction house, with him becoming its Vice President and Director of scientific research.

[27] *De Sole v. Knoedler Gallery, LLC*, 974 F. Supp. 2d 274 (S.D.N.Y. 2013).

te that *Freedman* acted with intent, knowing that *Rosales'* paintings were inauthentic, for example: (i) 'fabricated' stories of provenance, that changed dramatically over time; (ii) *Freedman* did not question *Rosales'* willingness to repeatedly sell alleged "masterpieces" for a fraction of their market value; (iii) when these transactions first began, members of the *Diebenkorn* family had expressed their concerns to the director, questioning the lack of documentation of the paintings, which she failed to investigate; (iv) nor did the October 2003 IFAR report, which rejected the fictional provenance tale about *Ossorio* and raised serious concerns about the authenticity of the *Pollock* sold to *Jack Levy*, prompt her to investigate, rather she chose to conceal those facts.

To reinforce the interpretation that *Freedman* had acted in bad faith, it was pointed out that she should have called their attention to *Rosales'* inconsistent conduct in (i) neither sharing significant information about the paintings and in refusing to sign a declaration that the pieces were authentic; and (ii) nor disclosing the size and scope of the supposed Jewish collector's collection, as the ensemble "grew" over time to include more than thirty "undiscovered masterpieces." The court also found that *Freedman* "exaggerated" about the involvement of specialists who had supposedly given their opinion on *Rosales'* paintings, as the professionals testified they were never asked to authenticate the works and that made no statement regarding authenticity, contrary to what the director led her clients to believe, adding, that *Freedman* used the fact that she owned some of *Rosales'* paintings as a way to promote the sale of others.

Regarding good faith and the protection of trust, the court ruled that an experienced collector cannot claim to have purchased an item on the basis of false statements if he did not make use of the available means of verification - an understanding that clearly imputes due diligence requirements to the buyer as well. The court acknowledged, however, that in the specific case the *De Sole*'s, the couple asked additional questions, requesting, out of caution, and receiving a letter from *Freedman*, in which she confirmed information about the *Rothko* piece, including authenticity and provenance, which would require from the buyers "extraordinary effort or great difficulty" to discover that it was a forgery.

It can be concluded from the examination of the case that, in view of the particular difficulty of proof inherent in works of art, this market imposes due diligence requirements on all those involved, not placing the burden of proof specifically and exclusively on any party.

2.2.2 Prohibiting the exhibition of artworks of disputed authenticity as an alternative to rescinding the sales agreement.

The sales agreement is rescinded if a forgery is delivered in the place of an authentic artwork. To cover this hypothesis, it is common to include a liability exclusion clause in the sales agreement.

Therefore, first of all, it should be noted whether the authenticity of the artwork has been expressly certified[28] or if it follows from the general rules of interpretation, such as the presentation of a certificate, and if the guarantee was not excluded due to a valid contractual provision. Thus, if the artwork is not expressly authenticated, it is considered free from defect if it is in accordance with the purpose or destination foreseen in the contract, which occurs, for example, in the purchase of original painting for inclusion in an art collection. In such cases, in the event of a defect, that is, if it is a forgery, the buyer may demand not only that the sale be rescinded but also occasionally, indemnity.[29]

Cases where there is disagreement between *connoisseurs* are particularly complex, because, although there may be no proof of authenticity, there may also be no demonstration that piece is a forgery. Such a case involved the widow of the restorer *Giannino Marchig* and the auction house Christie's[30], in which the authorship of a drawing on vellum paper, known as *La Bella Principessa*, was a cause of controversy. The story begins with *Jeanne Marchig* delivering the drawing to *Christie's*, and

[28] Regarding the concept of authenticity in Civil Law, see: BRÜHL, Friederike (Gräfin) von. Der Begriff der Echtheit von Kunstwerken im Zivil- und Strafrecht. In: ODENDAHL, Kerstin; WEBER, Peter (org.). *Kulturgüterschutz – Kunstrecht – Kulturrecht*: Festschrift für Kurt Siehr zum 75. Geburtstag aus dem Kreise des Doktoranden- und Habilitandenseminars „Kunst und Recht". Baden-Baden: Nomos, 2010. p. 303-313.

[29] In Brazilian law, the delivery of a defective item is dealt with in Article 441 CC, according to which the item received by virtue of a commutative contract or onerous donation can be rejected due to hidden vices or defects, which make it unfit for the intended use, or decrease its value. The matter is dealt with in German law as from § 434 BGB.

[30] AMINEDDOLEH, Leila. Are you faux real? An examination of art forgery and the legal tools protecting art collectors. *Cardozo Arts & Entertainment Law Journal*, v. 34, p. 86, 2016.

stating that her late husband believed it to be the original work of the Italian Renaissance – a statement with which, however, the auction house expert did not agree. The painting was auctioned in 1998 as a "19th century, German" work. The bidder paid $ 21,850, and sold the work in 2007 to Peter Silverman for $ 22,000. The new buyer, however, suspected the work was by *Da Vinci*, which is why he referred it to a specialist for testing and dating. With the findings, some experts supported the attribution to *Da Vinci*, including Martin Kemp[31] and Nicholas Turner, specialists in the artist, which led to the drawing being valued at more than US$ 150 million!

In 2009, when informed by Christie's of the fact, *Marchig* warned the company that she considered it responsible for the erroneous attribution, and subsequently sued the auction house. However, the case was closed due to the statute of limitations. Moreover, even if that were not the case, it would not have been possible to imply negligence on the part of Christie's due to the dating error, since the technology subsequently used did not existent at the time the house received the piece.

Furthermore, doubts remain regarding its authorship today, although analysis indicates the same fingerprints present in other works by *Leonardo Da Vinci* are found in *La Bella Principessa*[32]. The provenance of the piece is curious, as there is no record of it, not even in Vasari's biography. It turns out, however, that the drawing was 'hidden' in an unlikely place, in the National Library of Poland in Warsaw. A probable explanation for the fact is that Leonardo was commissioned by *Galeazzo Sforza*, whose granddaughter, *Bona*, married *Sigismund I* of Poland, in 1517 - when he would have taken the work with him[33].

Another interesting example of a lack of consensus is the intriguing controversy surrounding the "Red, Black, and Silver" painting, in which renowned experts differ as to *Pollock's* authorship. A recent expert analysis identified polar bear fur in a layer of paint - a fact that for some would reinforce the artist's authorship, because in his studio there was a rug made of that animal's skin. However, uncertainty prevails, because other experts believe the presence of the fur would not necessarily mean that it was made by his hands[34].

As can be seen, the main issue involving inauthentic artworks is the burden of proof: a buyer who wants to rescind the sales agreement due to forgery needs to prove it. As demonstrated, while scientific means of examining an artwork exist, confirming authorship is a very complex issue, as the cases of the *La Bella Principessa* and *Red, Black, and Silver* reveal.

That said, in cases of an impasse regarding authentication, an alternative basis for rescinding the sales agreement should be admitted. The affected buyer, who is surprised by **justified** suspicion, could claim a hidden defect in the piece, which is therefore unsuitable for use[35], since the right to exhibit is understood to be a natural use of works of art. In fact, the inaptitude for exhibition, due to controversial authenticity, would be sufficient *per se* to rescind the sales agreement.

This solution satisfies the particular features of the market, since confirming authenticity is not an exact science, as divergence of opinion or mistakes by the appraisers are perfectly feasible occurrences. However, the point is that when appraisers make mistakes, they suffer indirect consequences to their reputations, while the auction house or the buyer suffer direct economic effects from such mistakes[36].

The lack of transparency in the art market is a weakness of the art market that cannot be ignored: the buyer is unaware of who offers the object to the market and, thus, is also oblivious of the circumstances surrounding them. While French law offers greater protection to the buyer, providing guarantees regarding the information contained in the catalogue[37], other legal systems expressly allow their exclusion. Under Brazilian law, which

[31] KEMP, Martin; COTTE, Pascal. *La Bella Principessa:* The Story of the New Masterpiece by Leonardo da Vinci. London: Hodder & Stoughton, 2010.

[32] *Thomas Hoving* e *Carmen Bambach*, entre outros. Sobre a polêmica, leia-se: https://www.newyorker.com/magazine/2010/07/12/the-mark-of-a-masterpiece

[33] Regarding how the drawing might have come to the *Sforziada* of Warsaw, a book that exalts the achievements of *Duke Francesco Sforza*, see: http://www.lumiere-technology.com//news/Study_Bella_Principessa_and_Warsaw_Sforziad.pdf

[34] https://www.nytimes.com/2013/11/25/arts/design/a-real-pollock-on-this-art-and-science-collide.html

[35] JAYME, Erik. *Original und Fälschung im Spannungsfeld von Persönlichkeitsscutz, Urheber-, Marken- und Wettbewerbsrecht*. Wien: Manzsche, 2007. p. 36-37.

[36] JAYME, Erik. Pflichten und Obligenheiten im Kunstauktionswesen: Einlieferer, Experte, Auktionshaus, Ersteigerer – einige Fallstudien. In: WELLER, Mathias; KEMLE, Nicolai; DREIER, Thomas (org.). *Kunsthandel - Kunstvertrieb*. Tagungsband des Fünften Heidelberger Kunstrechtstags am 7. und 8. Oktober 2011. Baden-Baden: Nomos, 2012. p. 40.

[37] See Decree 81-255, of March 3rd, 1981, which aims to suppress fraud in transactions involving works of art and collectibles.

admits culpable civil liability (Article 927 Civil Code), it would be possible to bring an action for damages against the art expert or appraiser, even if the seller's liability was contractually excluded[38]. However, in addition to the foreseeable difficulties of proof, given the limited universe in which such professionals work, in the event of a possible conviction, it is unlikely that the defendant would have the same creditworthiness as a large auction house.

Therefore, if there is uncertainty as to authorship and authenticity, because the existing steps fail to provide unequivocal proof, the equitable solution should be to rescind the sales agreement, due to the objective impossibility of the piece satisfactorily serving its purpose, which, in the case of artwork, is its exhibition.

3 Provenance of the artwork or cultural property and due diligence

3.1 Demonstrating *clean* provenance

The term provenance originates from the Latin '*provenire'*, simply translatable as *'from where it comes'* and generally indicates the origin of a person or thing. It has a particular meaning in terms of the origin of works of art and cultural goods, in which the term 'provenance research' is consolidated.

When investigating the provenance of an artwork, researchers examine the existing records, including sales receipts, catalogue publications and any other historical evidence indicating the who has owned the work and where it has been kept.

The complexity lies in the lack of consensus regarding to what extent such research satisfies the requirements of due diligence, that is, which databases should be consulted, which documents are admitted or how gaps in information should be filled, for example. Furthermore, there is also no agreement about how such information should be presented who is responsible for the disclosing it[39].

3.1.1 Extent and scope of due diligence requirements: consulting historians, appraisers, databases, museums, catalogue raisonné etc.

In German jurisprudence, the *Carracci*[40] case illustrates the uncertainty regarding due diligence in relation to provenance, offering insights into the scope of the guarantees and the extent of the seller's obligations while raising profound questions regarding the provenance of artworks and how cases involving pieces lost or looted during the Nazi regime should be examined. In this particular case, *Richard L. Feigen*, a prominent NY art dealer, sued the *Lempertz* auction house, from Cologne, to obtain compensation in virtue of the acquisition of the painting by *Ludovico Carracci*, '*Der Heilige Hieronymus mit dem Löwen und zwei Engeln*'[41].

Prior to the auction, *Feigen* had consulted *Lempertz* on the provenance of the work, having been informed there was no doubt with respect to its legitimacy and forwarded a facsimile of the following content "*Die Provenienz des Gemäldes ist, clean'. Wir verkauften es 1937 (Die Bestände der Galerie Stern, Düsseldorf) an einen Sammler im Rheinland.*"[42] The future winning bidder also required that the "*Art Loss Register*"[43] be consulted and to ensure there was no suspicion of theft, confiscation or even forced sale of the work - which was carried, *Feigen* having purchased the painting for about 100,000 DM.

On April 22, 2009, the *New York Times* published an article on the restitution of the painting '*Porträt eines Sackpfeifenspielers*' (1632), painted by an unknown Dutch master, which had been sold in Dusseldorf in 1937, at the same auction as the recently purchased painting, and which had also belonged to the owner and collec-

38 Even if it is a gallery, the Consumer Protection Code would be inapplicable, because a work of art is not considered a product or service.

39 PHELAN, Marilyn E. Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork. *Seattle University Law Review*, v. 23, p. 688, 2000.

40 OLG Köln, 8.7.2016.

41 http://www.artnet.com/artists/ludovico-carracci/der-heilige-hieronymus-mit-dem-l%C3%B6wen-und-zwei-dMBzuy0B-2zRtJzE4dHCPg2

42 According the author's own free translation, the auction house claimed "*…the provenance of the painting is 'clean'. We sold it in 1937, coming from the collection of the Stern gallery in Düsseldorf, to a collector from the Rhineland.*"

43 Since 1976, the International Foundation for Art Research (IFAR), has gathered information on stolen/confiscated art. In 1991 the *Art Loss Register* (ALR) was founded by IFAR, Sotheby's, Christie's, Phillips and various insurance companies and art dealers. It is based in London, but there are offices in New York, Cologne, Moscow, New Delhi and Amsterdam. Currently, hundreds of thousands of works are registered. For more information, see: http://www.artloss.com/

tor *Max Stern* (1904-1987). *Feigen* then consulted the *Art Loss Register* and found that, since 2004, the painting he had just acquired had been listed as being stolen by the Nazi regime, and was part of the "*Max Stern Restitution*" project at the University of Montreal, that had started in 2002, with the aim of gathering together the works of this art dealer, who emigrated from Germany in 1937, through Britain, to Canada.

After this contact, American authorities sought out *Feigen*, and submitted a request for the restitution of the work, to which he acquiesced. Then, he immediately sought damages from the auction house, demanding € 300,000, corresponding to the estimated value of the painting. However, the court's decision was unfavourable to him. Although it was confirmed that the work had belonged to *Max Stern*, it was found it had been sold voluntarily in 1937, for 4,320 *Reichsmark*, which were paid in full. The appeal court, in turn, confirmed this ruling, understanding that *Feigen* was the legitimate owner of the painting and that there was no 'defect' of provenance in this property neither under German law, nor under American law, which is why there was no reason why *Feigen* should have returned the painting to the family of the deceased gallery owner. The court concluded, therefore, that having done so, it was of his own free will.

The court ruled that the provenance did not constitute a hypothesis of legal defect, that it would only do so if the ownership, possession or unlimited use of the purchased object were impaired by a third party based on private or public law. Essential to the interpretation was the fact that the dealer had put up the work for sale at auction and received payment, and had not sought to recover it after the war, as he had done with the pieces subsequently taken by the *Gestapo*.

Although the court ruling clearly applies the law and does not lack adequate legal grounds, there is no ignoring the fact the work was sold amid the period of persecution of Jews by the National Socialist regime. It is, therefore, reasonable to believe, considering the flight, that the sold the painting because he was under pressure, seeking to gather the resources to save his life. Given this context, examining the case from *Feigen's* perspective, he could never have refused the request for restitution, without definitively sacrificing his reputation in the North American market. The moral and social pressures for restitution would be so strong that he would have been unable to trade any other pieces.

The case does not deal with an isolated fact, which is why the court should have reached a different solution, notably because it was expressly agreed that the provenance of the work was *'clean'*. As this was not confirmed, with the use/destination of the painting being compromised, which could no longer be exhibited and disposed of freely, the court should have ruled that due to the work's questionable provenance, the *marchand* should have been awarded indemnity.

To overcome the problems resulting from the vague parameters of the provenance investigation, one could draw an analogy with the steps taken when acquiring real estate. As any young scholar, whether of Civil Law or Common Law, knows, this requires establishing a protocol of examination of the provenance that satisfies the understanding of due diligence.

Considering the large number and importance of the artworks that have been removed from their owners, an investigation of provenance must begin in *Commercial Stolen Art Databases*, such as: (i) *Artive*[44], which is a private database of stolen, lost, looted and disputed, art works, antiques and items of cultural heritage that is maintained by *Art Recovery International*; (ii) *Salvo*[45], which keeps information on items of salvaged architecture and antiques, such as doors, fireplaces, garden furniture and statues; (iii) *Report My Loss*[46], a system accredited by the British Police to register online losses of art work, available in the US and UK; and (iv) *The Art Loss Register* (ALR)[47], established in 1991, based in London and NY, which offers a permanent database of stolen art, with images, and which facilitates identification of the piece[48].

In addition, non-commercial databases of stolen cultural property should be consulted, such as: (i) *The Central Registry of Information on Looted Cultural Property 1933-1945*[49], which gathers information on more than

[44] https://www.artive.org/database/

[45] https://www.salvoweb.com/stolen

[46] https://www.reportmyloss.com/uk

[47] http://www.artloss.com

[48] Its shareholders include major auction houses, such as Sotheby's, Christie's, Phillips and Bonhams, as well as several commercial organizations, such as the International Confederation of Art Dealers (CINOA), the Society of London Art Dealers (SLAD), the British Association de Antiquarians (BADA) and the Society of Auctioneers of Fine Arts (SOFAA). In addition, 193 insurance companies in Europe, North America, Australia and New Zealand have signed the ALR.

[49] https://www.lootedart.com/

25,000 missing pieces of looted cultural heritage in more than 15 countries; (ii) The Lost Art Internet Database[50], a German database, which contains information on cultural assets that disappeared as a result of Nazi persecution or that were removed and relocated, stored, seized or looted from their owners as a direct consequence of World War II, as well as pieces that, due to gaps in their provenance, such possibilities cannot be discarded; and (iii) INTERPOL Stolen Art Database[51], which stores data on objects that have been officially registered as stolen by member states.

In addition to consulting these databases, it is advisable to consult the *catalogue raisonné*, which is a registry/directory of works of art that have been attributed to authors based on scientific evidence[52].

Certainly among the requirements of due diligence would be that of informing and consulting places where the piece is likely to emerge in the legal market, such as galleries and auction houses. Likewise, experts in a particular artist, as well as the artist's foundations or *Estates* must be informed of the removal of the work and consulted before a piece is purchased.

Museums, in particular, are subject to the ICOM Code of Ethics, which requires all managers and curators of heritage collections to be fully familiar with the requirements of international conventions, stipulating that: (i) an object or sample should be acquired by purchase, loan, 'gift', *donatio causa mortis* or exchange, unless the museum is certain its title is valid, remembering that proof of legal ownership from one country does not necessarily constitute a valid title; (ii) every effort must be made prior to the acquisition to ensure that the object was not obtained illegally, exported from its country of origin or from any intermediate country where it may have legally belonged to another person. The establishment the complete history of the object since its discovery or production is understood to be a requirement of due diligence; (iii) an object should be acquired if there is any reasonable suspicion regarding its recovery from unauthorized or unscientific fieldwork, or the intentional destruction or damage to monuments, archaeological or geological sites or species and natural habitats, or if there is any failure to disclose its discovery to the land owner or occupier, or to the appropriate legal or government authorities; and (iv) they must refrain from buying or acquiring cultural objects from an occupied territory, fully respecting all laws and conventions that regulate the import, export and transfer of cultural or natural materials.

Furthermore, it is recommended to contact professional specialists, such as collectors, dealers, restorers, insurance agents and journalists in the world of the arts.

Finally, such due diligence requirements must be extended to the State, so that sellers and buyers check legal compliance, in order to avoid the trade in pieces that do not comply with the regulations regarding the protection of cultural heritage.

In theory, everyone is interested in protecting works of art threatened with destruction, which is why the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 and the Second Protocol of 1999 refer to 'world's cultural heritage', that is universal heritage, rather than just national heritage - which, however, does not guarantee the integrity of those goods that are important to all humanity, as was seen from the attacks by the Taliban on pieces in museums in Kabul and on the *Bamiyan Buddhas*, considered heretical by the fundamentalists, and similarly by Islamic State on the Roman ruins of Palmira in Syria. On the other hand, reaching an international understanding to protect cultural goods and avoid their illegal export can be even more difficult in peacetime, since countries with more resources want to invest in art and those less favoured want to keep their works in their respective territories. The free negotiation of works of art, driven by the law of supply and demand, allowed European museums in the 19th century and American museums in the 20th century to form diverse collections, enriched with works from countless countries.

Without forgetting the European Union directives dealing with the issue, the 1970 UNESCO Convention on the means of prohibiting and preventing the illegal import, export and transfer of cultural property, signed by 115 countries. Its signatories have taken steps to enforce its fundamental precepts, namely: (i) archaeological discoveries are the property of the State; (ii) cultural

[50] http://www.lostart.de/Webs/EN/Datenbank/Index.html

[51] https://www.interpol.int/Crimes/Cultural-heritage-crime/Stolen-Works-of-Art-Database

[52] In the well-known case *DeWeerth* v. *Baldinger*, examined below, *Dorothea DeWeerth* had her request for the restitution of a painting removed in 1945 dismissed because the court found she had failed to perform due diligence, as she could have located the painting if she had simply consulted Monet's *catalogue raisonné*, which had included the work since 1957.

goods deemed to be of special significance to cultural heritage will be considered *res extra commercium*; and (iii) the export of cultural goods of special significance to cultural heritage is prohibited or requires specific authorization.

Despite the fact that, in theory, all these precautions can be systematized as due diligence in relation to provenance, widespread practices in the art market, in which anonymity and secrecy are acceptable, lead to other complications. In addition, mistakes are common, especially when it comes to works of less significant value, and to make matters worse, it is easy to "*create*" provenance.

For all these reasons, the due diligence criteria cannot be fixed: the prosperity/wealth of those involved, the availability of resources, access to information and sophistication in the art world are variable. For this reason, due diligence must follow flexible, rather than mechanical, parameters: in the words of *Holmes*, what is usually done may be evidence of what should be done, but what must be done is set according to a reasonable standard of prudence, whether it is generally carried out or not.[53]

3.1.2 Registering compliance with due diligence and the question of proof of good faith

One of the issues on which Common Law and Civil Law differ substantially is that the former rejects the idea that legitimate possession can result from illegitimate possession, while the latter admits the protection of a good faith possessor – which is generally assumed.

In Common Law the understanding one cannot offer more than one has (lt. *Nemo plus iuris transfer potest quam ipse habet*) prevails, while Civil Law generally admits that the buyer may be acting in accordance with good faith, even if the possession was transferred to the buyer by someone who acted in bad faith.

These diametrically opposed understandings are reflected in the distribution of the burden of proof in relation to due diligence, as well as in the legal grounds underpinning rulings in cases of requests for the return of artworks or cultural goods of questionable provenance, which is a particularly sensitive issue. For this reason, especially in view of the fact that art works may circulate illegally within the scope of the two systems, registering the due diligence as a means of proving the good faith of a third party acquirer is highly recommended.

Although occasionally distant in terms of some aspects of their formation, continental Civil Law and Common Law share a common source in their understanding due diligence. For the former, it is an emanation of good faith, while for the latter it is the construction of Equity. In both cases, however, the purpose is to protect trust, which is why even in Common Law, in which good faith does not, as a rule, lead to the acquisition of the property by the possessor, **it can lead to their compensation, in the event losing the stolen property to the rightful owner**.[54] In addition, proof of compliance with due diligence can, for example, dispel any suspicion of participation in criminal activities, such as money laundering, the financing of terrorism and looting of archaeological pieces in war zones, which are regrettably associated with the art market.

On the other hand, the existence of database with registers of lost and stolen artworks induces an increased obligation for due diligence in relation to provenance, allowing judges to adopt **interpretations favouring the "diligent party"** at the national level, **regardless of whether it is the dispossessed owner or possessor - which does not offend the essence of either of these legal systems, which have similar institutes, as discussed below.**

Since the effects that may result from conducting the due diligence are significant, there is nothing more natural than that their compliance be documented. In addition to records of database consultations and contacts with the aforementioned authorities, measures of due diligence include checking the form of payment, to ensure the money has been transferred by a recognized institution and not via offshore havens, and exhaustively checking receipts and contracts etc. to rule out any forgery, even if not apparent/evident. An example worth following is that of France, whose Bar Association ad-

[53] Literally: "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it is usually complied with or not." Holmes *apud* PHELAN, Marilyn E. Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork. *Seattle University Law Review*, v. 23, p. 692, 2000.

[54] GIROUD, Sandrine; BOUDRY, Charles. Art lawyers' due diligence obligations: a difficult equilibrium between law and ethics. *International Journal of Cultural Property,* p. 404, 2015.

vocates a high standard of due diligence, not limited to guiding professionals to question their clients and protect confidentiality, but recommending that they gather evidence to support their responses[55], in order to avoid becoming involved as accomplices in criminal activity.

3.2 Questionable Provenance: return or restitution of works

3.2.1 Fundamental divergence between Common Law and Civil Law

There are many precautions to be taken, especially considering the myriad rules regulating the issue. In this context of legislative plurality, there has been an attempt to minimize legal insecurity, at least in the sphere of cultural property, which is an ostensible interest of States, through the 1995 UNIDROIT Convention on stolen or illegally exported cultural goods. The convention establishes rules to facilitate legal harmonization on the subject, including the extent of the requirements of due diligence and the distribution of the burden of proof. It simply states that "*the possessor of a cultural object which has been stolen shall return it"*[56]*;* and that *"the possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object"*[57]. The convention provides that consultations with national and international databases dedicated to the protection of cultural assets can be used as proof of due diligence. Furthermore, in articles 5 and 6, which governs the hypothesis of exporting cultural goods in violation of national export restrictions, it also attributes to the possessor the burden proving he did not know and could not reasonably know, at the time of acquisition, that the object had been illegally exported - which applies even if the goods are received as an inheritance or gift.

Nonetheless, the convention has limited effectiveness because countries that play a leading role in the market, such as the USA, UK, France and Switzerland, have refused to ratify it, as their legal systems differ radically in terms of the protection owed to the dispossessed owner and good faith possessor.

Against this background of divergent legal systems, the EU instituted DIRECTIVE 2014/60 / EU, which deals with the "*return of cultural objects unlawfully removed from the territory of a Member State*". Article 10 provides that **due diligence is enforceable against the possessor, thus inclining in favour of the dispossessed owner**. This device approximates Civil Law and Common Law. The latter operates according to the maxim "*nemo dat quod non habet*" and, therefore, understands that whoever acquires the property of a bad-faith possessor, can only have acquired it in this condition, which results in an interpretation favourable to the dispossessed owner, even if the third possessor has acted in good faith. On the other hand, in the Civil Law tradition, of which Brazil is a part, the onus is on the owner to locate his lost property, which favours the good faith possessor, who has a valid title for the acquisition and a more limited statute of limitations. This favouritism is even more significant, considering the judicial understanding that the possessor's bad faith must be proven,[58] which may be very difficult to accomplish.

Although adverse possession is unknown in Common Law, there is extinctive prescription of the possessor's claim to recover the possessor's good. In English law (Limitation Act 1980), section 2-4 provides a statutory period of 6 years for conversion[59], counting from the illegal taking of possession, after which the owner loses the title, and not just the claim[60]on the thing. If it is stolen property, the period does not begin when the property is taken, but when it is transferred to a good faith third party - the proof of which circu-

[55] GIROUD, Sandrine; BOUDRY, Charles. Art lawyers' due diligence obligations: a difficult equilibrium between law and ethics. *International Journal of Cultural Property,* 2015, p. 407.

[56] Chapter II, article 3 (1)

[57] Chapter II, article 4 (1)

[58] According to German and Austrian law, those who demand the return of property stolen from the possessor do not need to prove his/her bad faith, the owner has to demonstrate that he acted in good faith at the time of the transfer of the object (§ 1006, I, 2 BGB and § 368, I, 1 ABGB). In Swiss law, similar to Brazilian law, good faith is presumed, and it is up to the plaintiff requesting the refund to prove that the transfer of ownership occurred in bad faith (Article 3, I, ZGB). See: SIEHR, Kurt. Guter Glaube im Kunsthandel. In: Bulletin Kunst und Recht, 2012 (3), 12.

[59] The institute is equivalent to the Roman *rei vindicatio* and may be applied even after the object has been transferred by the illegal possessor – in which case the plaintiff will merely receive compensation.

[60] SCHÖNENBERGER, Beat. *Restitution von Kulturgut*: Anspruchsgrundlagen, Restitutionshindernisse, Entwicklung. Bern: Stämpfli, 2009. p. 131.

mstance is incumbent upon that same party. In American law, there is the theory of adverse possession, according to which the statute of limitations starts at the moment when possession becomes hostile, open and notorious, which rarely occurs in the case of a work of art. Incidentally, in the latter case, the American states are divided in invoking the theory of *demand and refusal* - the statute of limitations begins when the dispossessed owner becomes aware of the location of the stolen item and asks the possessor to return it, which prevails in NY - and the *discovery rule* - which further adds the requirement that the owner take 'the necessary steps' to find the thing. These issues are exemplified below.

Criticism of the '*demand and refusal*' theory is based on details, firstly, that in practice, the statute of limitations may be systematically postponed, which does not contribute to legal certainty, and secondly, the fact that it is not used in the case of bad-faith possessors, who is not asked to return the object, the period being counted from the taking of the good, receives more favourable treatment than the good faith possessor. According to the '*discovery rule'*, the statute of limitations starts when the dispossessed owner of the stolen object finds it and has sufficient information about the possessor, necessarily having taken steps to find the object.

The *common law* also makes use of *laches*[61] objection within the scope of *Equity*, which highlights the lack of diligence in making a legal claim. Its content corresponds to the maxim often heard by members of academic juries, that "*the law does not help those who sleep*", and can be invoked as a response in the context of the demand and refusal rule, as long as there is delay, unreasonableness and prejudice, that is, the dispossessed owner has taken an unjustifiably long time to formalize their restitutionary claim[62] to the detriment of the defendant[63]. The legal consequence for the party invoking the objection is comparable to the acquisition of the property by adverse possession under Civil Law systems.

The understanding in Common Law is illustrated by the following cases, *Solomon R. Guggenheim Foundation v. Lubell*[64] and *DeWeerth v. Baldinger*. In the first, the *Guggenheim Foundation* sued the *Lubell's* (a couple), who, in 1967, in good faith, acquired, from the renowned art dealer *Robert Elkon,* the painting *Ménageries* by *Chagall*, which had been stolen in 1965. In the trial, in 1991, the following assumptions were established regarding the merits of a restitutionary claim: (i) the time taken to seek the object by the dispossessed, there being no possibility of a claim being subject to prescription; (ii) the defendant must demonstrate to have been vigilant, as well as the plaintiff of the restitutionary claim, diligent, that is, the reasonableness of the efforts of both must be considered: the buyer must prove to have taken precautions to avoid acquiring stolen property and the dispossessed owner must prove that to have diligently sought to resolve the theft, not merely waiting to, when the work emerged, harm the possibly good-faith possessor. To the disadvantage of the museum, *Laches* was not applied because it was considered that a public search for the object could have been harmful to the museum itself, causing the work to disappear in the *underground* art world.[65]

By contrast, the case of *DeWeerth v. Baldinger* illustrates the application of *Laches*. In which *Gerda Dorothea DeWeerth*, a German citizen and owner of the painting *Champs de Blé à Vetheuil*, by *Claude Monet*, dated 1879, demanded from *Edith Marks Baldinger* the restitution of the painting, stolen from her sister's castle, where American soldiers were stationed before of the end of WWII, in 1945.

For three years after the painting disappeared, *DeWeerth* wrote letters to a lawyer, an art history professor and the West German federal investigation office, requesting assistance in locating the missing painting, with no discovery being made. In 1957, however, *Edith Marks Baldinger* purchased the painting from an art gallery in the city of NY, allegedly in good faith.

In 1982, a nephew of *DeWeerth* read that the painting had been sold in the United States, which lead to mea-

61 The term originates from the French *'lâchesse'*.

62 In the application of *Laches*, the damage, which can be the death of a witness, the destruction of documents, expenses with the maintenance of the piece, change in financial situation, frustration of plans, change in market value, etc., is not presumed. See: PHELAN, Marilyn E. Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork. *Seattle University Law Review*, v. 23, p. 705, 2000.

63 LERNER, Ralph; BRESLER Judith. *Art Law*: the guide for collectors, investors, dealers, and artists. 3. ed. New York: Practising Law Institute; 2005. p. 272.

64 569 N.E.2d 426 (N.Y. Ct. App. 1991).

65 Regarding the case, see: SIEHR, Kurt. 50 Jahre nach Entdeckung von Dürer-Portraits in New York – zum Rechtsstreit „Kunstsammlungen zu Weimar v. Elicofon" im Kontext neuer amerikanischer Rechtsprechung. *Bulletin Kunst & Recht* 2016/2-2017/1, p. 39-40; LERNER, Ralph; BRESLER Judith. *Art Law*: the guide for collectors, investors, dealers, and artists. 3. ed. New York: Practising Law Institute; 2005. p. 272.

sures being taken to ensure its recovery. The restitution being 'requested and refused', *DeWeerth* sued *Baldinger* in NY District Court in a further attempt to recover the painting. The original decision favoured the plaintiff, as the court considered she was the owner of the work and had been illegally dispossessed, having made reasonable diligence efforts in its location. *Baldinger* appealed, arguing that the delay in requesting the restitution of the work would make the decision unreasonable, since he had had the painting for about 30 years.

In the final ruling, the original decision was reversed. It was decided that *Balinger* would be allowed to keep the painting, because *DeWeerth's* investigation had been minimal, and it would be 'unfair' to oblige the buyer to returning the work so long after having purchased it, since, with reasonable effort, the original owner could have discovered the location of the painting, simply by consulting *catalogue raisonné* of *Monet's* work, where the work had been recorded since 1957.

This case is used in beautiful detail to exemplify the workings of the American legal system, with copies of the procedural documents, in the book 'Whose Monet?'[66]. The ruling, however is open to criticism, as it makes no sense to consider this interpretation applicable to cases such as that of the *Monet*, in which the owner knows neither with whom nor where the work is. In fact, what other steps would be demanded of a dispossessed owner besides to seek legal advice and assistance from state authorities, especially considering post-war conditions?

As can be seen, the different interpretations of due diligence result in legal instability and insecurity - which highlights the need for convergence towards a unitary treatment of the topic.

3.2.2 The need for convergence between different legal systems and unitary treatment of the topic

The moral question of the provenance of a work of art, self-evident in the context of the holocaust, becomes a political question when acts of confiscation were carried out beyond the context of persecution of Jews under the Nazi regime - and even more so when it comes to cultural heritage.

Due to their enormous importance, cases involving questionable provenance should have equal in law, since the fact does not observe borders, given the risk of encouraging illegal transnational transactions.

However, any uniform approach regarding the question of the provenance of works of art and cultural goods comes up against the enormous difficulty of introducing a standard of public international law of this magnitude, considering that such pieces are dispersed, potentially in many countries around the world, each one with its own legal system.

Given these conditions, a more effective solution for such cases could be based on jurisprudential construction. This would assume questionable provenance to be a defect of the work, since it compromises its normal use. It being incumbent upon the seller to ensure its absence, and not exclude his/her responsibility in the event of it being found to be present. While it would be the purchaser's duty to investigate the origin of the work (due diligence), and not to attribute the responsibility exclusively to the seller, especially when he/she is not a professional.

On the other hand, in the case of auction professionals, who are in a position of trust in relation to the seller and the bidder, especially, the exclusion of liability could not be admitted in cases where they have included information in the catalogue that has inspired the confidence of the buyer. In any event, gross failure to observe these duties regarding provenance research, by the seller or the buyer, should result in the imputation of the damage to the opposite party.

4 Conclusion

Provenance and authenticity are often related. The lack of provenance recommends an investigation of authenticity, demanding different degrees of due diligence from professionals and dilettantes, as the *Campendonck* case shows. Although a work of art might be assessed by experts and appraisers, who carry out various tests - such as Raman spectroscopy, X-ray diffraction, scientific photography, carbon-14 dating, thermoluminescence and fingerprint analysis -, the conclusions are not always reaching unambiguous, because it is a highly complex issue, as the case of *La Bella Principessa* and the controversy about the *Red, Black and Silver* painting

[66] HUMBACH, John. *Whose Monet*? An introduction to the american legal system. New York: Wolters Kluwer, 2016.

reveal, while even the most renowned connoisseurs may reach an impasse.

The *Knoedler Gallery* saga, on the other hand, reveals that the lack of authenticity is always accompanied by questionable provenance - and it could not be otherwise, since the counterfeit work does not have a previous, much less a clean provenance, suggesting that collectors must not only ask questions, but also conduct their own research and receive independent advice from a sales intermediary, and they should also reinforce contractual guarantees, rather than just 'trusting' the reputation of those involved.

This article argues that, given the high cost of authentication and, especially, the difficulties of achieving unequivocal authenticity in some cases, the existence of **justified doubt** is considered a defect of the painting, because it prevents its normal use, since works of art are intended for exhibition and it is not possible to exhibit a piece with questioned authenticity.

It is also argued here that once the work of art has been authenticated, the existence of databases for recording lost or stolen artworks would increase the due diligence requirements, allowing judges to nationally adopt **understandings in favour of the "diligent party" in cases of questionable provenance, regardless of whether it is the dispossessed owner or good faith possessor - which is why it is essential to document compliance with the requirements of due diligence**.

Finally, in the light of the cases involving *Carracci*, *Guggenheim Foundation v. Lubell* and *DeWeerth* v. *Baldinger*, this paper concludes by highlighting the need for convergence between *Civil Law* and *Common Law* to ensure unitary treatment regarding the issue of restitution. As this issue comes up against the political difficulty of approving a treaty of this magnitude, it is argued that an effective solution for such cases could be based on jurisprudential construction, which would assume questionable provenance to be a defect in the work of art, since it compromises its normal use, thus making it incumbent upon the buyer and seller to undertake due diligence, and auction professionals to ensure the quality indicated in the catalogue, while whoever grossly fails in establishing the provenance must bear the loss.

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