



If the Market Were more Transparent, these Things wouldn't Happen (Like Artemundi being Ripped of Thousands of Dollars)

During the last few days, the ongoing controversy between Russian art collector Dmitry Rybolovlev and Swiss freeport businessman Yves Bouvier has escalated considerably, particularly in light of Rybolovlev's return of Ms. Hutin-Blay's Picassos, which were allegedly stolen by Bouvier in the past and then sold (unknowingly) to Rybolovlev in 2013. This high-profile feud underscores yet again how the art market, otherwise reputed as highly sophisticated and intellectually refined (at least by outsiders) may sometimes be, in fact, uncouth and unwilling to follow basic legal (and moral) principles. This article poses, if not answers, some of the questions that may lead to understanding why these situations seem to arise so often in the art world and how a possible solution might begin to be proposed.¹

Some of the most vocal mainstream critics of art as a proper investment class, not a small number of which might work for recognized consulting and legal firms, respected wealth management groups and top investment banks, might say something at this point to the tone of "it's amazing how "primitive" the art market can still be sometimes." Why would legal concepts such as representation and intermediation, apparent authority, fiduciary duty, conflict of interest and even fraud be so hard to grasp, apply and enforce in the art industry? Is there something intrinsic to the art market that makes it "uncivilized", "unruly" and/or "unclear" to say the least? Perhaps there is. The answer might have to do with a small number of players in the art market and their considerable degree of power.

The New York Times, in covering the dispute between Rybolovlev and Bouvier, quote famous gallery owner Larry Gagosian to have said "I'd consider it a terrible conflict of interest and would never keep art long term in the warehouse of a dealer." "Larry Gagosian, the New York art dealer, is among those who question whether Mr. Bouvier should be both storing and selling art since running a warehouse gives him privileged information about collectors' art holdings."² Mr. Gagosian seems to hit on a central issue here. Warehouses are not only storing works, but they are advising and brokering the purchase and sale of art (amongst offering other services such as setting up transport and taking escrow deposits). There seems not even to be a "Chinese wall" that would, as happened with regulations in the

¹ Please refer to Edid, Giovana, and Federico León de la Vega. "Fiduciary Duty." Artemundi Global Fund. Artemundi Group. Web. 25 Sept.
² Carvajal, Doreen, and Graham Bowley. "The Billionaire, the Picassos and a \$30 Million Gift to Shame a Middleman." The New York Times. The New York Times, 23 Sept. 2015. Web. 25 Sept. 2015. <http://www.nytimes.com/2015/09/24/arts/design/the-billionaire-the-picassos-and-a-30-million-gift-to-shame-a-middleman.html?partner=rss&emc=rss&_r=1>. Emphasis added.



banking and securities industry, disallow the right hand to know what the left hand is doing. While a conflict of interest might seem obvious to us, the New York Times quotes Bouvier on having said, on the other hand: “That is the way of the art market [...] It’s a hunt for information. And those who collect it, he said, expect to be paid.”³ Artnet News states: “There would be a conflict of interest if Yves Bouvier would have sold to Dmitry Rybolovlev artworks coming from his company Natural Le Coultre. But he didn’t,” Bouvier spokesman Marc Comina told Artnet News over email responding to Gagosian’s comments. “None of the artworks sold to Dmitry Rybolovlev were initially stored at Natural Le Coultre facilities. None.”⁴

Allowing the same intermediaries to play the role of depositaries, brokers and even escrow agents may speak of the lack of proper business structures and customs in the art market (Artemundi have written before about arm’s-length transactions in more detail than may be covered herein).⁵ But it also speaks loudly of the *naïveté*, negligence, overconfidence, lack of reasonable care, and plain laziness of some of the warehouses’ clients. ““It is at least doubtful, even if not wholly incredible, that the respondents genuinely believed that the remuneration for Mr. Bouvier’s services was limited to the 2 percent fee that the respondents plainly knew they were paying him,” the judge in the case wrote.”⁶



Racks used in museums to store paintings.

Perhaps the mixed role played by some service providers and intermediaries in the art market is an indicator of an insufficient supply of trustworthy companies or, rather, of an unadvisable influence by a successful few, which in legal parlance might lead to anti-trust implications. “Mr. Bouvier is known as the “king of the freeports” because he is the main operator or lead private investor in three of the half-dozen or so major freeports that are known to specialize in art. His private transportation company

³ *Ibid*

⁴ Kinsella, Eileen. "Gagosian Says Freeport King Yves Bouvier's Activities Pose "Terrible Conflict of Interest" *Artnet News*. 24 Sept. 2015. Web. 25 Sept. 2015. <<https://news.artnet.com/market/gagosian-comments-bouvier-rybolovlev-335165>> .

⁵ Edid, Giovana, and Federico León de la Vega. "Arm's Length Dealing in the Art Market." Artemundi Global Fund. Artemundi Group. Web. 25 Sept. 2015. <http://artemundiglobalfund.com/wp-content/uploads/2012/08/ARM'S-LENGTH-DEALING-IN-THE-ART-MARKET.pdf> .

⁶ Carvajal, Doreen, and Graham Bowley. "The Billionaire, the Picassos and a \$30 Million Gift to Shame a Middleman." *The New York Times*. *The New York Times*, 23 Sept. 2015. Web. 25 Sept. 2015. <http://www.nytimes.com/2015/09/24/arts/design/the-billionaire-the-picassos-and-a-30-million-gift-to-shame-a-middleman.html?partner=rss&emc=rss&_r=1> .



and high-tech warehouses in Switzerland, Luxembourg and Singapore draw business from wealthy collectors who want to store and trade their possessions privately with tax advantages.”⁷

It is true, as Rybolovlev is quoted to have said to the New York Times, that often in the art market buyers do not know the identity of the sellers and that “if the market were more transparent, these things wouldn’t happen.”⁸ Certainly there is room for improvement, but how exactly? That seems to be the real question. Artemundi has questioned before how much less wiggle room players in the market should have and commented on other occasions on what the right level of regulation might be. We have also highlighted many of the advantages of the free, albeit risky, still “unregulated” art market for those who see art as a serious asset to invest in and are willing to commit the effort required to know the intricacies of the art market better.⁹

One of the most common sources of conflict in art transactions seems to be the lack of clear contractual terms and roles in a particular transaction.¹⁰ Not only in the art industry do brokers sometimes agree to secret commissions and mark-ups on the purchase price to gain from both sides, or even in detriment of their own client. It happens with real estate all the time for example. And we have in fact highlighted the problem before insofar as it relates to the art market.¹¹ Disputes arising from these kinds of circumstances can be solved based on the current legal provisions, both of statute and precedent, which address conflicts of interest, fiduciary duty and fraud. They can also be solved by new regulations that extrapolate these general provisions and mold them to the specific needs of the art industry. In addition, a knowledgeable party in the art investment industry, such as ARTFA (The Artfund Association, LLC) could issue a set of recommendations through, for example, its Best Practices Committee that help buyers of art ensure that the intermediaries they are working with are aligned with them and bear a duty towards the protection of their interests.

Breach of trust is an old civil law figure, broader and comparable in many respects to fiduciary duty. It applies to all kinds of interactions between civil and commercial parties, not only to the

⁷ *Ibid*

⁸ *Ibid*

⁹ Please refer to Edid, Giovana, and Federico León de la Vega. "Managing Art Investment Risks." Artemundi Global Fund. Artemundi Group. Web. 25 Sept. 2015. <<http://artemundiglobalfund.com/wp-content/uploads/2012/08/Investment-Risks.pdf>>.

¹⁰ “Bouvier and Rybolovlev have publicly squabbled in media reports and legal documents about Bouvier's role and obligations in several transactions, including whether he is a broker or an independent dealer, and how much information he was required to disclose to Rybolovlev on various art deals.” Kinsella, Eileen. "Gagosian Says Freeport King Yves Bouvier's Activities Pose "Terrible Conflict of Interest" Artnet News. 24 Sept. 2015. Web. 25 Sept. 2015. <<https://news.artnet.com/market/gagosian-comments-bouvier-rybolovlev-335165>> .

¹¹ For further case study, please refer to: Please refer to Edid, Giovana, and Federico León de la Vega. "Fiduciary Duty." *Artemundi Global Fund. Artemundi Group*. Web. 25 Sept. 2015. <http://artemundiglobalfund.com/wp-content/uploads/2012/08/Fiduciary-duty.pdf>



purchase of art. The concepts have existed since Roman times, the laws are in place (we agree that they may be further tailored to suit the art industry's specific needs), and agreements are executed. Why then, do breach of trust disputes still seem to arise so often in the modern art world? Why would art intermediaries cheat on their own clients, not to mention someone as powerful as Rybolovlev? In sum: because they can; because the art market is still highly concentrated and even more so at the top echelons.

“It is a good idea to store works in countries where there is strong political, social and economic stability. Several Swiss cities have earned this reputation; they are international and multicultural, wealthy and cultivated, and there is a very open art market policy [...]”¹² There are, of course, exceptions. Again Mr. Gagosian makes a good, albeit perhaps one-sided, argument in pointing out the conflict of interest in which warehouses incur by both running storage facilities and dealing in art, given the privileged information they receive about the holdings of art collectors who are their clients. And you don't have to be a billionaire to be an attractive prey.

For example, Artemundi is still trying to recover thousands of Dollars from a supposedly reputable Swiss storage facility called ViaMat Artcare (acquired by Loomis –a large international group- in 2014) that were wrongfully spent while they were held in escrow years ago, even when such warehouse acknowledged the pending balance in writing. Suspicions of collusion between the warehouse and the sell-side dealer are well founded in this case, where Artemundi agreed to leave the funds in deposit for the shipment of the artwork, in case the sale of one of its paintings went through. The transaction was cancelled but yet, the funds have not been returned. It is speculated that the warehouse was known for filtering information to certain dealers. Whether it is hearsay or not, choosing a reputable warehouse remains critical in art investing. Artemundi has worked with many other warehouses, for example with Fortress (in excess of twenty years) and never has had any reasons to believe that they were sharing information with non-authorized parties. In the specific case of ViaMat however, we resorted to filing a complaint for breach of contract. It has served of little purpose yet, other than to underline the importance of preventive measures and clear agreements, as well as the obligations of each party (including strict confidentiality on the works in storage) right from the beginning.

By Federico León de la Vega and Giovana Edid

¹² Lumbreras, Javier. *The Art of Collecting Art*. Fomento Cultural Banamex, First Edition, Barcelona, 2011, p. 389.



SOURCES CONSULTED:

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