Toolkit for Art Market Intermediaries



Responsible Art Market

RAM

Toolkit for Art Market Intermediaries

Responsible Art Market (RAM)

Updated on 28 February 2022

Preamble: Purpose and scope of the Toolkit

Professional intermediaries play an important role in facilitating the sale of works of art. Dealers and auctioneers have dominated the art market since the 17th century and over time have been joined by other professional intermediaries, such as galleries and art advisors.

Today most art transactions involve at least one or more of these intermediaries. Direct sales between a seller and a buyer without the involvement of an intermediary are less common. For high-value transactions, several intermediaries are often involved in the sale chain between the ultimate seller and the ultimate buyer.

Where the existence, role and/or remuneration of intermediaries in a transaction is not disclosed to the underlying client or "principal" (be they a seller or a buyer), problems can arise.

The purpose of this Toolkit is therefore to:

- Highlight the important roles played by intermediaries in facilitating sales of works of art (the "**Intermediary/Intermediaries**");
- Identify risks and issues which Intermediaries can encounter; and
- Provide a practical tool kit of measures Intermediaries can take to avoid or mitigate such risks and issues.

This Toolkit focuses on art transactions. There are other roles which Intermediaries may play in assisting clients both in the primary market (e.g., promotion of an artist) and in the secondary market (e.g., valuations, inventories).

A) Who is this Toolkit aimed at?

An "Intermediary" is a person who acts as a link between people to bring about an agreement[1].

This Toolkit is principally aimed at professional art market Intermediaries who transact or facilitate the sale of works of art. These include dealers, galleries, auction houses and art advisors.

Other professionals involved in art transactions (including experts, lawyers, and other advisors) as well as collectors considering appointing an Intermediary to sell or acquire an artwork on their behalf, may also find this Toolkit helpful.

B) Toolkit

1. Roles of the intermediary

Professional Intermediaries involved in art transactions, typically fulfil one or more of the following roles. The roles may overlap. If so, Intermediaries should take into account the duties and obligations pertaining to both roles. Intermediaries should consult the RAM Art Transaction Due Diligence Toolkit with respect to responsible transaction practices as well:

[1] Oxford dictionary of English

1.1. Advisory Role

An Intermediary may perform a purely advisory role, advising a buyer or a seller about the authenticity, condition, quality, marketability or value of an artwork, or indeed the legality surrounding its sale. These advisory services may take the form of a report or statement prepared at the request of a buyer or a seller. Examples include, an artwork valuation report, prepared for insurance purposes or with a view to a possible sale.

1.2. Agency Role

In other situations, an Intermediary may act as the agent or proxy for an underlying seller or buyer of an artwork.

An "Agent" is a person who acts for, or in the place of, another (the principal), by authority from that principal[2].

It therefore requires the client (or "principal") to have conferred on the Intermediary powers to represent the client in the transaction and conclude certain acts on the client's behalf.

In art transactions the authorised acts typically include the marketing of the artwork, negotiating and concluding a sale transaction on behalf of the underlying client. Such authorisations are typically recorded in a written agreement between the Intermediary and their client.

Such "agency" arrangements are common in art transactions as they enable the client to remain discrete and leverage the expertise and network of a professional art intermediary, to secure the best deal and price for the sale of the artwork.

In this position of trust, the Intermediary owes fiduciary duties to act in the best interests of their client (or principal). Such Intermediaries are therefore subject to obligations deriving from the laws of agency. See Section 2 below for further details.

1.3. Transitioning from one role to another

The role of an Intermediary in an art sale transaction may evolve over time and a professional intermediary may transition from an advisory role into an agency role. It is important that professional intermediaries are aware of this possibility and identify the point at which their role changes, as different duties and obligations arise depending on the role they are performing. See section 2.

1.4. Identifying an Intermediary's role

Their role is not determined by the professional title the Intermediary bears, but it is defined by the understanding between the Intermediary and their client. To help identify the role they are performing in an art transaction at any given time, Intermediaries should ask themselves the following questions:

1.4.1. Who is your client?

- Who are you acting for, the principal or an agent? Have you identified the ultimate beneficial owner?
- Have you obtained the necessary "Know Your Client" information and verified it against official documentation?
- Who else is involved in the transaction, what is your relationship to them, and what are their roles and responsibilities?

1.4.2. Are you acting only as an advisor or also as agent for your client?

- What role are you performing for your client?
- What specific tasks and responsibilities do you have?

[2] Oxford dictionary of English

- Has your client authorized you to market the artwork for sale and/or conclude a sale transaction on their behalf?

1.5 Multiple Intermediaries

Where more than one Intermediary is involved in the transaction, it is advisable to try to identify the other intermediaries in the chain and the roles and responsibilities of each.

2. Duties of the Intermediary

Professional Intermediaries should be aware of the legal duties and obligations which arise where they are performing an intermediary role in an art transaction.

2.1. Fiduciary Duties to the client

Where a professional Intermediary is performing an **"Agency" role,** representing their client, the laws of agency impose on them fiduciary duties to act with the highest degree of care and loyalty in the best interests of their client (or "principal"). In practice, this means putting the principal's interests above the interests of all others, including those of the Intermediary. In this way the Intermediary avoids conflicts of interest or perceived conflicts of interest arising. See Section 4.

Such "fiduciary duties" include the following:

2.1.1. Not making a Secret Profit

Where a fiduciary relationship exists, the Intermediary may not make a secret profit. In practice this requires the Intermediary to disclose to their underlying client, all fees, commissions, and other payments which the Intermediary (and other Intermediaries in the sale chain), may deduct from sale proceeds destined for the seller or add to the purchase price payable by the buyer, or other discounts that is not passed on to the end client.

2.1.2. Disclosing Introductory Commissions

For genuine introductions to sellers which result in the sale of an artwork, dealers and auction houses can be known to make introductory commission payments to the individual who introduced the seller to them. Whilst these introductory commission payments are typically paid from the commission earned by the dealer or auction house on the sale, a failure by that Intermediary to disclose the introduction commission to their client can constitute a breach of fiduciary duty.

2.1.3. Respecting confidential information and not using it for personal gain

For example, an Intermediary should not, without the client's consent, use confidential information obtained from a valuation of the client's property to tip off another professional about a potential sale of the property in return for a secret introductory commission which is not disclosed to the client.

2.1.4. Acting in the client's best interests

Advice given by Intermediaries acting in an agency capacity, should be impartial, balanced and in the client's interests. The intermediary must put the client's interests above their own interests to avoid a potential or perceived conflict of interest arising.

2.1.5. Acting with skill and care

This is particularly relevant when it comes to such acts as valuing artworks. The standard of care by which such professionals are typically judged is that of the reasonably competent professional offering the services. For this reason, professional intermediaries should clearly inform their clients about the scope of their work, including the analysis and research they undertake and what they have intentionally not conducted. Intermediaries will want to communicate clearly with their clients about the limits of their undertaking and what outcomes may be expected from it.

Professionals giving opinions on the authenticity and/or value of artworks may want to consult the RAM Authentication Guidelines for responsible practices in providing relevant expertise.

2.1.6. Keeping accurate accounts of the client's transactions

2.1.7. Caring for the client's property

If the work must be transported to another location for authentication or sale, the Intermediary should agree with the client who will be responsible for insurance, transport and customs formalities.

2.2. Legal Obligations

Separate to the fiduciary duties owed to their clients, professional Intermediaries may also be subject to additional obligations imposed on them by law or regulation by virtue of their role as an intermediary in an art sale transaction.

2.2.1. ***Anti-Money Laundering Regulation:*** In certain countries professional art Intermediaries are regulated for Anti-Money Laundering compliance and required to carry our Know Your Client identification and verification checks on their clients as well as the contracting parties to any sale transaction which that Intermediary is responsible for concluding (i.e. where the intermediary invoices the buyer and pays sale proceeds to the seller).

2.2.2. ***Taxes.*** Intermediaries who are responsible for concluding sale transactions on behalf of their clients, may be required by law to add certain taxes to the voice (e.g., VAT or sales tax), or to withhold certain taxes (for example Hong Kong consignment tax and French Taxe Forfaitaire) arising on the transaction and pay them to the relevant tax authorities on the client's behalf.

2.2.3. **Artist Resale Royalties (ARR)** For sales of artworks transacted in countries which are subject to the payment of Artist Resale Royalties (ARR) (also known as Droit de Suite) the Intermediary transacting the sale will need to be clear which party to the transaction will be charged the ARR. Unless this is clear and the relevant amount collected, the professional Intermediary can be held liable for the ARR.

The Intermediary's fiduciary duty of loyalty and good faith to their client can conflict with the Intermediary's ethical (and sometimes legal) obligation to be transparent with other counterparties to the transaction. For example, an Intermediary's duty to keep confidential its client's identity, can be frustrated and overridden by legal obligations arising under Anti-Money laundering laws and regulations to identity the contracting parties to a transaction.

3. Remuneration

Intermediaries may be compensated in a variety of ways; time spent, fixed fees, contingent fees based on the success of the transaction or fees calculated as a percentage of the sale or purchase price realised.

Professional art market intermediaries (such as dealers, auction houses, galleries and art advisors) are typically remunerated through commissions deducted from the sale proceeds realised from the sale of a work of art.

Intermediaries are advised to communicate the price of their services and any extra costs to their clients at the outset, and have them approved by the client, in advance of undertaking any work. It is advisable to communicate this in writing, to avoid misunderstandings.

Certain professionals (such as art appraisers and experts involved in authenticating works of art), are typically forbidden by their supervising bodies from being compensated based on the result of their examination or the opinion they reach in relation to an artwork[3]. This avoids conflicts of interest arising.

3 For further details see RAM's Guidelines for Experts authenticating fine works of art

Useful questions Intermediaries can ask themselves to clarify the arrangements, include

a) Who is paying you for your services? Is it the party you are representing or someone else?

b) How will your fee be calculated? In particular, are expenses (e.g., shipping, insurance, condition report, travel) included, contingent, or charged separately?

c) Have you disclosed the fee arrangements to your client? Has this disclosure been made before the transaction completes?

d) Is your client aware of the fee arrangements and the amount you could receive if the transaction goes ahead?

e) How will you be paid? Are you authorized to deduct a sale commission from sale proceeds you may be handling?

4. Conflicts of interest

Overlapping and sometimes conflicting loyalties are among the most difficult challenges faced by professional Intermediaries, or by those working with Intermediaries. [Navigating these challenges can be particularly difficult if the identity of the ultimate beneficial owner of the artwork being sold or bought, is unknown to one or more parties in the sale chain.]

Conflicts of interest arise where the Intermediary is in a position to derive a personal benefit from actions or decisions which they make when acting in a professional or fiduciary capacity for a client.

A conflict of interest would also arise if the intermediary sought to represent both the seller and the buyer in the same sale transaction. The interests and objective of the seller (to secure the highest possible price for the artwork) is diametrically opposed to that of the buyer (to purchase the artwork at the most reasonable price). If the Intermediary sought to act for both, they would not be able to fulfil the fiduciary duties which arise under the laws of agency (see section [ ] above).

Is there an actual or potential conflict of interest?

The following questions can help identify if a conflict or potential conflict of interest exists:

a) Are you acting for two parties in the same transaction that do not share the same interests?

b) Are you performing two different roles in the same transaction (for example providing an opinion on authenticity and brokering a sale)?

Intermediaries face conflicts of interest first and foremost when they fail to delineate clearly to their clients or other counterparties in a transaction, the role they are performing and the basis of their remuneration. Where multiple Intermediaries are involved in a transaction, there is an increased risk that the incentive to generate fees will conflict with the intermediaries' duties outlined above.

Transparency is the guiding principle underlying all fiduciary relationships. When faced with a conflict of interest (or a potential conflict), professional Intermediaries should therefore look to resolve the situation by:

a) making a full disclosure to their client; and

b) Only proceeding if their client (having full knowledge of the situation) expressly consents.

Identifying who your client is and maintaining full transparency with that client and other counterparties can help mitigate potential conflicts of interest.

Before accepting an appointment to act as intermediary in a transaction, Intermediaries should therefore:

- Take steps to establish who they are acting for. Where the intermediary is acting for a company. organization or another person who they know is themselves acting as agent for another person, they will need to identify the ultimate physical individual on whose behalf the transaction is being carried out.

- Establish who their counterparty is: it may be the Owner or an intermediary (e.g. art advisor and/or broker) acting for the Owner (together the "**Client**");

- Not accept financial compensation that creates a conflict of interest unless such compensation is fully disclosed to the client and any person making such payment and both give the Intermediary their express consent to such financial compensation.

5. Liability and dispute resolution

In addition to the fiduciary duties and responsibilities outlined above and any contractual obligations recorded in agreements with their clients, Intermediaries are required to comply with national laws and regulations applying to their activities in the locations where they are being performed. Any requests from clients aimed at subverting those appliable laws should be refused.

Intermediaries are well advised to use written contracts and waivers with their clients wherever possible and to ensure such contracts and waivers comply with applicable national laws.

Those contracts should identify the substantive law that will apply to the agreement between the Intermediary and their client. Ideally, those agreements will also specify a dispute resolution mechanism and forum (mediation, court or arbitration service) for resolving any disputes that cannot be resolved amicably through good faith discussions.