

## How is a “generally accepted view” about the authenticity of an artwork formed? The so-called “GAV proviso” under judicial review

Dialogue between Sharon Hecker, Art Historian and Giuseppe Calabi, Art Lawyer

### Prologue

You buy a work of art from an auction house and then discover that it is a fake: what can you do?

A recurring clause in the sales conditions of auction houses is that the seller (and the auction house) sells the work “as is” without providing any guarantee as to its authenticity. However, if, within a certain period of time (normally 5 years), the buyer submits written proof to the auction house that raises doubts as to the authenticity or attribution of the work and is able to return it in the condition in which he/she purchased it free of third-party rights, and the auction house believes that on the basis of this proof the work is a “counterfeit” (i.e. an imitation intended to deceive), the auction house may terminate the sale contract. Termination of the contract is retroactive: the seller must return the money received, the auction house must refund the commissions received, and the buyer must return the artwork.

However, some conditions provide that this provision does not apply if, at the date of the sale, the description of the work (and therefore also its authenticity or attribution to a certain author) in the auction catalogue or in the private treaty (i) is in keeping with the generally accepted views of scholars and experts; or (ii) indicates that there is a divergence of opinions; or, finally, (iii) if the only method to establish whether or not the work is a forgery was not in use at the date of the contract or would risk damaging the work.

A recent judgment of the English Court of Appeal dated 23 November 2020 in the case of *Sotheby’s v. Mark Weiss Limited & Ors* has developed the first scenario: what is meant by “generally accepted view”?

### Giuseppe Calabi

The case concerned the sale of a painting sold under the title *Portrait of a Gentleman* and attributed to the Dutch artist Frans Hals (1582-1666), who worked in the so-called Golden Age. The sale price of the painting was USD 10,750,000.

Within the terms of the contract, the buyer invoked the clause that provided for the possibility of terminating the contract by submitting evidence to Sotheby’s in this regard. The evidence was deemed by Sotheby’s to be sufficient to establish that the painting was a forgery, and the contract was terminated.

One of the co-owners of the painting challenged the decision of the auction house, among other reasons, claiming that at the date of the sale the majority of the experts had expressed an opinion in favour of the authenticity of the work.

The English Court of Appeal held that in assessing whether or not “generally accepted views” exist (the so-called “GAV proviso”) one should not conduct a simple mechanical operation of “counting” the opinions expressed at the time of the contract (for and against authenticity) and decide on the basis of a rigid majority criterion. The operation is more complex. It is necessary to identify who the scholars and experts of the work are, to examine “the strength and precision” of their opinions, evaluating their number, but above all, their importance and the level of detail that each of them has dedicated to the examination and study of the artwork.

An interesting part of the judgment’s reasoning is where the Court opines that in the case of a work which has only recently emerged, a generally shared opinion might not yet have been formed at the time of the contract and therefore the GAV proviso could not be applied.

In the case decided by the English court, the picture had emerged in 2008 and it was only from that date onwards that the experts began to study it. However, at the time of the contract (2011), no generally accepted expert opinion had yet been formed.

Consequently, the Court of Appeal upheld the judgment of the first instance, holding that the auction house had acted correctly by excluding that a generally shared opinion had been formed on the authenticity of the work at the date of the contract and therefore accepting the request for termination presented by the buyer.

In Italy, too, it is considered that the generally shared opinion on the authenticity of a work at the moment of the conclusion of the private treaty or auction sale is a fact capable of excluding the relevance of changes of opinion which may have subsequently occurred.

However, Italian case law considers that in order for the remedy of rescission of the contract to be successful, the guarantee of authenticity must be explicitly agreed upon.

If an express authenticity guarantee is agreed upon, the purchaser can exercise the remedy of rescission of the contract. In case of lack of an express agreement, the only remedy will be that of the annulment of the contract due to error. There is a substantial difference between the two claims: the first is subject to the Statute of Limitations of 10 years from the conclusion of the contract; for the second claim, the Statute of Limitations runs out 5 years after the error is discovered. Moreover, the first one can be associated with a request for damages (normally considered equal to the current economic value of the work if it was authentic); the second one can only give rise to the restitution of the price paid and to the reimbursement of the so-called “negative interest”, that is the interest of the buyer not to buy a work that later turned out to be

false, that is the reimbursement of the expenses incurred for the purchase of the work, for example the commissions paid to the auction house.

The problem that remains open is how to define, in Italy as well, a “generally accepted view”: the word must necessarily pass to the art historian.

## **Sharon Hecker**

A collector can learn important lessons from this case. The essential factor that seems to have been missing in this sale is time. As the judge aptly noted, “generally accepted views” take time to form and mature, and in this case a consensus had not yet been reached before the work was placed on the market. Let’s look more closely at how a collector might proceed more cautiously before a sale.

First, when a collector discovers a so-called ‘sleeper’ for sale, even if it is offered by a major auction house, time is needed to independently analyse and evaluate the information provided. The enthusiastic opinions of art historians or other experts who base their conclusions solely on methods of connoisseurship need to be publicly aired and debated. Pronouncements on authenticity based on examinations conducted with the naked eye are important, relying on stylistic criteria and a thorough knowledge and experience of the work of the artist in question, especially when made by scholars who are well-versed in the artist’s work. But they have at times proven to be insufficient as the sole evidence upon which to base an affirmation of authenticity, and even experts can be tripped up by clever forgeries, as in this case. Because the law does not explicitly require an auction house to report differences in opinions, collectors should independently seek out a broad base of independent experts and, if there are conflicting opinions about the authenticity of a work, should carefully consider them before making a purchase. These opinions can provide important information. Collectors should ask scholars to express any reservations they may have about a work’s authenticity, and the responses should be grounded in concrete evidence.

Second, absence of provenance should be considered suspicious. The painting that is the subject of the lawsuit was completely unknown in the scholarly literature and had no exhibition history for 350 years after the artist’s death in 1666. While it may be true that works are not always catalogued, the lack of documentation of provenance should result in particular rigor in assessing the work’s authenticity or otherwise. For reasons of conflict of interest, a collector should always refuse to accept as proof of “provenance” a catalogue commissioned by a person or institution interested in selling, such as, in this case, the catalogue published by the seller. Collectors should be especially wary of language that twists an absence of provenance into an exciting and rare find, as in this case.

Third, more time would have been needed for an independent third-party expert to question whether the scientific research conducted prior to the sale was the necessary

research, even if undertaken by a prestigious institution. The Louvre had conducted X-ray, infrared, and ultraviolet examinations, but not pigment analysis on this painting. In this case, pigment analysis is crucial given that there was no solidly documented chain of provenance leading back to the artist, and we now know that at least one scholar did not believe the work was authentic, while another was not sure. Had the pigments been deemed incompatible with the artist's era (as was revealed after the purchase), this fact should have been shared and then become part of the dossier accompanying the painting. The absence of an independent coordinator who could compare and interpret all of these aspects of authentication led to no questions being raised about the work.

*Auction Daily* has raised larger questions about this case. "A balance between the experience of expertise and the tools of science has yet to be struck in the auction industry, even as more and more forgeries are popping up". The seller claimed that it was not his job to guarantee authenticity or attribution. The auction house claims no responsibility for verifying authenticity. Until standards of authentication are established, the burden of independently confirming and connecting the information presented prior to a sale remains entirely on the buyer.

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