

Art & Law

By Dominique Calcò Labbruzzo

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Dominique Calcò Labbruzzo is a Swiss attorney at law admitted to the Swiss Bar. She has worked in law firms in both Germany and Switzerland. She gained experience in one of the most reputable business law firms in Ticino/Switzerland. She also practiced at the Civil District Court of Lugano/Switzerland. Furthermore, she dealt with Public Law at the Public Appeals Commission of Ticino. Afterwards she worked in Zurich for one of the world's major insurance companies. She now advises private clients and companies on contract design and represents them in litigation and criminal proceedings. Her legal advice is quick and pragmatic. Additionally, she is an international artist manager and has a profound knowledge of and great passion for the art world. She speaks Italian, German, English and French.

At the end of a police forgery trial in Switzerland, what legal options are available for victims who:

a) Gave a statement to police and the judge has directly ruled that their painting is a fake?

Victims suffering harm may bring civil claims based on the offence as a private claimant in the criminal proceedings. They are entitled either to void the contract, because the error relates to specific facts which the party acting in error considered in good faith to be a necessary basis for the contract, or to file a suit on a warranty or guarantee.

However, the longer the period between the point in time the artwork was purchased and the point in time it was discovered that the artwork is a forgery, the more difficult it can become to get the money back. For example, the Swiss Federal Supreme Court ruled in a case, where a buyer bought an artwork of Picasso on October 4th 1974, but he found out that the artwork was not painted by Picasso only on November 6th 1985, that the buyer could not claim any compensation voiding the contract because a claim for restitution for unjust enrichment becomes time-barred ten years after the date on which the claim first arose, i.e. October 1984.

If victims bought the artwork at an auction house on the basis of the information provided in the action catalogue, they may not be compensated for their damage, because the auction house applies terms of business according to which it does not accept any liability for the details provided in the catalogue. However, the victim might be able to claim the money back if the action conditions foresee this. For example, the action conditions may be worded along the following lines:

„1. The auction house shall reverse the purchase and shall reimburse the purchase price and the surcharge (incl. VAT) to the Purchaser if the item proves to be a forgery.
2. The guarantee given to the Purchaser in accordance with the above provision shall not be applicable at the discretion of the auction house if:

- (i) the description of the item in the auction catalogue was supported by the view of a specialist or by the prevailing view of specialists, or if the description in the auction catalogue suggested that differences of opinion exist in this respect;
- (ii) the forgery was not identifiable as such at the time of the successful bid in accordance with the current state of research and with the generally acknowledged and usual methods, or only with disproportionate effort;

- (iii) the forgery (in the auction house's careful view) was produced before year xxxx; or
- (iv) the purchase item is a painting, watercolour, a drawing or sculpture which according to the details set out in the auction catalogue should have been created prior to year xxxx.“

Nevertheless, since 1st July 2012, these kinds of conditions might probably be considered as void according to the Swiss Federal Act Against Unfair Practises, because this Act was aligned with European Law (The Council directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts) In fact, a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. The consequence would be that the auction house would have to reverse the purchase.

b) Gave a statement, but their painting was not included in the court trial and no direct decision was made about its authenticity?

If the public prosecutor orders the complete abandonment of the proceedings, the victims are entitled to file objection due to an incomplete or incorrect assessment of the circumstances of the case. If the authority upholds an objection to a ruling abandoning proceedings, it may issue instructions to the public prosecutor or the authority responsible for prosecuting contraventions on the continuation of the proceedings.

If the complete abandonment of the proceedings is confirmed and no settlement with the seller can be reached, victims should consider a civil suit. This can be very expensive because they must pre-finance an expertise about the authenticity of the artwork.

c) Victims whose painting was not involved in the original police investigation, but after the trial, believe the criminals may have made their painting?

Victims should report an offence in order to cause the prosecutor to have the authenticity of the artwork examined. The advantage is that victims do not have to pay the costs of the expertise.

d) What happens to forgeries in Switzerland, once a trial is complete?

There are three possibilities:

1. The victim receives the artwork back with a sign, which indicates that the work is a forgery;
2. The authorities destroy the artwork;
3. The artwork can be exhibited in a (criminal) museum.



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