

Федоренко Светлана Валерьевна,
магистр юриспруденции
Московский государственный юридический университет имени О.Е.
Кутафина (МГЮА)
Россия, г. Москва

**ОТВЕТСТВЕННОСТЬ ЗА ПРОДАЖУ ПОДДЕЛЬНЫХ
ПРОИЗВЕДЕНИЙ ИСКУССТВА: РАСПРЕДЕЛЕНИЕ РИСКА МЕЖДУ
ПРОДАВЦОМ, ПОКУПАТЕЛЕМ И ЭКСПЕРТОМ В ПРАВЕ
ЕВРОПЕЙСКИХ ГОСУДАРСТВ**

Аннотация: *настоящая статья посвящена исследованию правовых механизмов распределения убытков, возникающих в результате продажи фальсифицированных произведений искусства, между участниками сделки (продавец, покупатель, эксперты) в рамках правовых систем европейских государств. В качестве эмпирической базы используются английское дело Sotheby's v Mark Weiss Ltd (2020), общие принципы французского договорного права и практика Верховного суда ФРГ (BGH) по интерпретации понятия "недостаток вещи" (Sachmangel) применительно к поддельным предметам искусства. В статье показывается, что, несмотря на разные юридические конструкции (гарантии в Англии, порок согласия в континентальном праве, Sachmangel в Германии), все три правовые системы в конечном итоге возлагают финансовые риски, связанные с подделкой, на сторону, допустившую ошибку, и обеспечивают максимальную защиту добросовестному покупателю.*

Ключевые слова: *подделка произведений искусства, аукционный дом, гарантия подлинности, заблуждение, гражданская ответственность, art law, Европа.*

*Fedorenko Svetlana Valerievna,
Master of Laws
Kutafin Moscow State Law University (MSAL)
Moscow, Russia*

LEGAL LIABILITY FOR FORGED ARTWORKS: ALLOCATION OF RISK BETWEEN SELLER, BUYER, AND EXPERT IN EUROPEAN LAW

Abstract: *this article is devoted to the study of the legal mechanisms for the distribution of losses resulting from the sale of falsified works of art between the parties to the transaction (seller, buyer, experts) within the legal systems of European states. The English case Sotheby's v Mark Weiss Ltd (2020), the general principles of French contract law and the practice of the German Federal Court of Justice (BGH) on the interpretation of the concept of material defect (Sachmangel) in relation to counterfeit art objects are used as an empirical basis. The article shows that, despite different legal constructions (guarantees in England, the vice du consentement in continental law, Sachmangel in Germany), all three legal systems ultimately impose the financial risks associated with forgery on the party who made the mistake and provide maximum protection to a bona fide buyer.*

Key words: *art forgery, auction house, authenticity guarantee, mistake, civil liability, art law, Europe.*

Introduction

The sale of a forged work of art initiates a multilateral chain of potential lawsuits that go beyond a simple bilateral dispute. A typical scenario involves the original buyer contacting the selling organization (often an auction house) for a refund, which then makes recourse claims against the sender or seller who provided the work. Depending on the circumstances of the purchase, this seller may, in turn, seek compensation from a previous dealer or an expert who initially confirmed the authenticity of the work. This article explores the methods used by European legal systems to distribute economic losses according to this sequence, focusing on two

complementary legal mechanisms: the direct contractual guarantee of authenticity inherent in the practice of English auction houses, and the continental doctrine of error regarding the essential qualities of the object being sold, which applies independently of the explicit guarantee.

The analysis continues by considering, firstly, the functioning of contractual guarantees of authenticity, which was demonstrated by the example of a recent court case in England; secondly, the approaches of the continental legal doctrine regarding errors regarding the characteristics of the goods sold, in relation to counterfeit works of art; and, thirdly, the comparative status of the expert who confirmed the authenticity of the work. whose responsibility, discussed in the broader context of authorship disputes, interacts with the two main mechanisms considered in this study.

1. Contractual Authenticity Guarantees: the English Approach

For several decades, English auction houses have successfully minimized the risks associated with the sale of fakes, relying primarily on direct contractual guarantees, and not only on legislative measures to protect consumer rights. The case of *Sotheby's v. Mark Weiss Ltd and others* [2020] EWCA Civ 1570 is a prime example of how these guarantees work and what legal consequences they can have [1]. As part of this case, the painting, allegedly by Frans Hals, was sold by dealer Mark Weiss and the investment company Fairlight Art Ventures LLP to the buyer of Sotheby's for an impressive sum of 10.75 million US dollars. The sale was carried out under two parallel agreements: a consignment agreement between the sellers and Sotheby's, and a purchase agreement between Sotheby's and the buyer [2]. Both agreements included guarantees of the authenticity of the work. When subsequent scientific tests revealed the presence of pigments that did not correspond to the 17th century, Sotheby's fulfilled its obligations to the buyer, fully reimbursing him for the purchase price. Then the auction house appealed to the sellers with a demand to compensate for the losses incurred, based on the terms of the consignment agreement [2; 3].

The decisions of the Commercial and Appeal Courts confirmed Sotheby's right to recover funds from sellers. The courts concluded that the consignment agreement clearly instructed the sellers to cancel the transaction and refund the amount paid if Sotheby's, acting within its authority and in accordance with the terms of the contract, determines that the work is a forgery [3; 4]. It is noteworthy that the courts deliberately avoided making a decision on the authenticity of Frans Hals' painting, recognizing it as legally insignificant [4; 5]. Their position was that since the termination mechanism provided for in the contract had been activated correctly, no further investigation of authenticity was required. This highlights the key advantage of the contractual model for the buyer: the possibility of receiving compensation does not depend on the establishment of any party's guilt, but solely on the occurrence of a pre-agreed event – in this case, the honest conclusion of the auction house on the inauthenticity of the work made in accordance with the established procedure. Thus, the economic burden and the risk that the initial assessment of the product may later be refuted fall on the seller.

The principle of "caveat emptor" (let the buyer be vigilant) significantly complicates the distribution of risks in English legislation relating to transactions with works of art. This principle, which the courts still apply when assessing the buyer's actions outside the scope of the direct guarantee, forces them to take into account the experience of the parties, the degree of trust the buyer has in the specialists and the measures taken by him to verify authenticity [6]. In practice, this means that in England, it is the existence and precise wording of the authenticity guarantee, rather than the general laws on fraud or negligence, that usually determine who will suffer losses if a fake is discovered

2. The Continental Approach: Mistake as to the Substance of the Object

In jurisdictions based on civil law, for example, in France, the approach to such situations is based on the doctrine of mistake (*erreur*) as a *vice du consentement* (defect of will), which may lead to the invalidity of the contract. If a buyer purchases a work, being sure of its authorship by a particular artist, and this confidence turns

out to be false, French legal doctrine and judicial practice have long considered authorship as a substantial quality (*qualité substantielle*) of the subject of the transaction. Consequently, the buyer's mistaken idea of authorship could serve as a basis for declaring the purchase agreement invalid and refunding the price paid, regardless of whether any of the parties was responsible for the error [7]. This approach relieves the buyer of the need to prove the seller's negligence or bad faith; it is sufficient to establish that his consent was due to an error regarding the quality that both parties considered essential to the transaction at the time of the conclusion of the contract.

French law allows for a parallel chain of responsibility in situations where the seller in the transaction is an auction house or dealer who has engaged an expert for evaluation. This means that, in addition to the buyer's right to cancel the transaction with the seller in the event of a fault in valuation (without having to prove guilt), the auction house or the expert may be held accountable for any errors made in the valuation process. Such responsibility comes under the condition of non-compliance with the obligation-of-means standard and the lack of constitutional protection of a bona fide expert opinion. The combined effect of these mechanisms - restitution for the buyer and liability based on guilt for the expert / auction house - allows French law to protect the interests of the buyer without requiring proof of guilt, and at the same time provides a separate analysis of the behavior of the expert or auction house for further distribution of losses.

3. The Position of the Expert and the Limits of Recovery

Regardless of whether English or continental law applies, the expert whose opinion confirmed the authenticity of the counterfeit item occupies a unique position relative to the seller and the auction house. French law, as a rule, defines the responsibility of an expert through the prism of guilt and the obligation to make every effort, whereas English law is based either on a direct guarantee given by the expert himself or on general principles of negligence [8; 9]. In situations where the auction house, like the Sotheby's case against Mark Weiss, provides the buyer with

its own contractual guarantee of authenticity, the individual responsibility of the expert who conducted the evaluation loses its primary importance. In this case, the buyer relies on the auction house's guarantee, and not on the expert opinion that formed its basis. Collecting damages from an expert or making claims against him becomes the task of the auction house or seller to compensate for their own losses, rather than a direct protection tool for the original buyer.

Lawsuits over forged artworks in leading auction houses, as the example of Sotheby's against Mark Weiss shows, are due to their structural nature. They focus on interpreting the terms of transfer and purchase agreements, rather than on expert assessments of authenticity. This is due to the fact that the contractual allocation of risks after the provision of a guarantee becomes a central issue. Consequently, determining who initially made a mistake by identifying a fake loses its legal significance compared to the issue of contractual liability for damages to the injured party [4; 5].

4. The German Model: Sachmangel and the Limits of Contractual Exclusion

The German legal system offers a unique approach to the regulation of defects in goods, which can be described as the "third way". It is conceptually closer to the French doctrine of mistake than to the English model of contractual guarantees, while its roots lie in the customary law of sale. According to Section 434 of the German Civil Code (BGB), the absence of material defects (Sachmängel) in a thing sold is determined by its compliance with the agreed quality at the time the risk passes to the buyer [10]. In the absence of specific quality agreements, the item must be suitable for the usual use expected from goods of the same kind. In the field of art transactions, German courts have repeatedly confirmed that the claimed authorship and authenticity of the work are essential qualities for the purposes of § 434. Thus, the sale of a forgery as a genuine work qualifies as a violation providing the buyer with legitimate remedies, including termination of the contract, reduction

of the price or compensation for damages, according to §§ 437, 440, 323 and 346 BGB [11; 12].

A striking example is the precedent decision of the German Federal Court of Justice (BGH) of October 9, 2013 (case no. VIII, ZR 224/12). In this case, the sculpture, presented in the catalog of a German auction house as an authentic Chinese Buddha figure of the VI-VII century of the Sui Dynasty and sold for 20,295 euros, turned out to be a modern forgery [13]. Despite the existence of a clause in the standard conditions of the auction house on the exclusion of liability for material defects, the BGH ruled that the sale of a forgery under the guise of an original is a quality defect within the meaning of § 434 BGB, since such an item does not have the properties that the buyer has the right to expect [13; 14]. Moreover, the Court invalidated the auction house's complete exclusion of liability for material defects in accordance with § 309 No. 7(a) of the BGB. This was due to the fact that this provision, in its broad formulation, also covered the exclusion of liability for harm to life, health or bodily injury, which is unacceptable under German law under standard conditions [13; 14].

The German model of distribution of authority in matters of authenticity of goods demonstrates two distinctive features that are absent in the previously discussed French and English models. First, German law treats the question of whether authenticity is part of the "agreed quality" of an object as a matter of contractual interpretation, decided on a case-by-case basis based on catalog descriptions, oral statements and expert opinions mentioned in the contract, rather than as a general legal presumption. In cases where the product is sold with an explicit reference to an expert assessment, the content of this assessment may itself become part of the quality agreed upon in the contract, expanding the practical significance of the initial expert opinion beyond its direct responsibility [15]. Secondly, German consumer protection legislation imposes structural restrictions on the ability of auction houses to waive liability for forgeries on standard terms. As the 2013 BGH decision shows, the exclusion clause, formulated too broadly, will be completely repealed, leading to full statutory liability of the auction house. This is

precisely because the auction house tried to exclude more than German law allows. The result is to provide German buyers with a practical level of protection against counterfeiting, regardless of whether the buyer has agreed on a direct guarantee of authenticity. This distinguishes the German position from the English model discussed in section 1, and at the same time approaches, using a different legislative path, a result comparable to the French doctrine of mistake discussed in section 2.

German legal experts drew attention to the fact that in Germany, clients usually file complaints with sellers or auction houses, bypassing direct appraisers, which contrasts with French realities. However, after a high-profile court precedent in France, where an art expert had to pay large compensation, German doctrine began to predict an increase in the number of direct lawsuits against experts. This trend is especially likely when the seller's fault is excluded, and the expert opinion becomes an integral part of the catalogue description [16].

5. Comparative Assessment

A comparison of the English contractual model with continental jurisdictions reveals three different trajectories leading to a comparable practical outcome for the buyer. In England, the primary protection of the buyer is rooted in an explicit, freely agreed contractual guarantee, the scope and wording of which determine damages. In France, the main protection of the buyer stems from the general doctrine of contract law, applicable even in the absence of specific guarantees, but available only if it is proved that the authenticity was a significant quality of the object in the common understanding of the parties at the time of sale. In Germany, however, the main protection of the buyer is provided by the customary statutory law of sale, according to which, in most transactions with works of art, authenticity is considered as part of the quality of the object that complies with the terms of the contract. An additional structural advantage, illustrated by the 2013 BGH Buddha decision, is that German consumer protection regulations often negate attempts by auction houses to completely eliminate this liability through widely developed standard conditions.

Different legal systems have different approaches to protecting the buyer in the absence of a guarantee of authenticity. The English model provides a high degree of confidence when there is a guarantee, but leaves a buyer who makes a purchase without it (for example, privately) significantly more vulnerable than his French or German counterpart. The French system offers broader protection, independent of the availability of a guarantee, but requires the buyer to prove that authenticity was an essential condition of the transaction, which may be the subject of a dispute. The German model occupies an intermediate position: it, like the French one, does not require an outright guarantee, since protection is already provided for by the general legislation on purchase and sale. However, as practice shows, German law imposes additional, mostly procedural, restrictions on this protection, carefully monitoring the validity of any standard exceptions that an auction house might rely on to reject a buyer's claim.

Conclusion

European legal systems, despite the specifics of the English contractual model, the French doctrine of mistake and the German legislation on material defects, share a common fundamental policy. This policy is that the economic damage caused by a forged work of art is borne by the party that assumed the risk of incorrect attribution of the object. This risk may arise from a direct contractual obligation, the general law of contractual consent, or a legislative definition of the appropriate quality. At the same time, a bona fide end customer in all these systems is in a relatively secure position. The fundamental practical difference is manifested in the degree of protection available to the buyer, who has not received a direct guarantee of authenticity. The French doctrine of mistake and German legislation on the sale of goods provide residual protection, which is absent in an equivalent form in English law. The German model further enhances this protection by severely limiting the ability of auction houses to opt out of it based on standard contractual terms. For art market participants and their legal advisors working in these jurisdictions, this comparative analysis highlights the importance of two

complementary strategies: agreeing on direct, well-defined guarantees of authenticity for any cross-border sales, and realizing that France and Germany already have a significant level of buyer protection that cannot be completely eliminated by the seller's standard terms and conditions.

References:

1. Sotheby's v Mark Weiss Ltd & Ors [2020] EWCA Civ 1570 (23 November 2020) [Electronic resource]. – URL: <https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2020/1570.html> (date of access: 27.06.2026).

2. Center for Art Law. On Duty of Auction Houses to Authenticate [Electronic resource]. – URL: <https://itsartlaw.org/art-law/on-duty-of-auction-houses-to-authenticate/> (date of access: 29.06.2026).

3. The Art Newspaper. 'The law has to fall on someone': Seller of allegedly fake Frans Hals must pay Sotheby's \$5.4m for cancelled sale, judge insists [Electronic resource]. – URL: <https://www.theartnewspaper.com/2020/11/24/the-law-has-to-fall-on-someone-seller-of-allegedly-fake-frans-hals-must-pay-sothebys-dollar53m-for-cancelled-sale-judge-insists> (date of access: 29.06.2026).

4. Essex Court Chambers. Court of Appeal Decision on Fine Art Dispute [Electronic resource]. – URL: <https://essexcourt.com/court-of-appeal-decision-on-fine-art-auction-dispute/> (date of access: 29.06.2026).

5. ARTnews. British Court: Consignor of Disputed \$10.8 M. Frans Hals Painting Owes Sotheby's Repayment [Electronic resource]. – URL: <https://www.artnews.com/art-news/news/sothebys-frans-hals-lawsuit-decision-1202671669/> (date of access: 01.07.2026).

6. King & Spalding. Beyond the Palette: Issues in art disputes in the English Courts [Electronic resource]. – URL: <https://www.kslaw.com/news-and-insights/beyond-the-palette-issues-in-art-disputes-in-the-english-courts> (date of access: 01.07.2026).

7. Village Justice (Poidevin B., Vancostenoble C.). Droit de l'art : authenticité d'une œuvre d'art, preuve et responsabilité [Electronic resource]. – URL: <https://www.village-justice.com/articles/Droit-art-authenticite-une-oeuvre,16519.html> (date of access: 01.07.2026).

8. GjvD Avocats. The Liability of Experts on the Art Market: Conditions, Recognized Faults, and Obligation of Result in Public Sales [Electronic resource]. – URL: <https://gjvdavocats.com/en/art-market-law/the-liability-of-the-expert-on-the-art-market/> (date of access: 01.07.2026).

9. Art Law Blog (Center for Art Law). French Court Supports Freedom of Authentication: A Win for Art Experts [Electronic resource]. – URL: <https://www.artlawgallery.com/2014/04/articles/international-issues/french-court-supports-freedom-of-authentication-a-win-for-art-experts/> (date of access: 27.06.2026).

10. Bürgerliches Gesetzbuch (BGB), § 434 (Sachmangel) [Electronic resource]. – URL: <https://www.beckmannundnorda.de/bgbkauf.html> (date of access: 01.07.2026).

11. SLB Lawyers, Munich (Rönsberg L.). Art auction: What rights does the buyer have when purchasing a forgery at an auction in Germany? [Electronic resource]. – URL: <https://www.slb-law.de/en/art-auction-law-in-germany-purchasing-forgery/> (date of access: 02.07.2026).

12. Jura Online. LG Düsseldorf zur Rückabwicklung beim Kauf gefälschter Kunstwerke [Electronic resource]. – URL: <https://jura-online.de/blog/2020/11/20/lg-dusseldorf-zur-ruckabwicklung-beim-kauf-gefalschter-kunstwerke/> (date of access: 02.07.2026).

13. Bundesgerichtshof (BGH), Urteil vom 09.10.2013, Az. VIII ZR 224/12 (commentary) [Electronic resource]. – URL: <https://www.damm-legal.de/bgh-kunstfaelschung-bei-einer-auktion-sachmangel> (date of access: 02.07.2026).

14. Legal Tribune Online (LTO). BGH: Rücktritt bei Fälschung nicht ausgeschlossen [Electronic resource]. – URL:

<https://www.lto.de/recht/nachrichten/n/bgh-urteil-zr-224-12-versteigerung-faelschung-ruecktrittsrecht> (date of access: 02.07.2026).

15. CMS Blog. Und wieder ein Fälschungsskandal [Electronic resource]. – URL: <https://www.cmshs-bloggt.de/gewerblicher-rechtsschutz/urheberrecht/und-wieder-ein-faelschungsskandal/> (date of access: 02.07.2026).