

How to defend yourself in case the artwork bought at auction does not match its pre-sale description?

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While collecting art works is becoming an increasingly popular & sexy hobby for affluent individuals, the financial & legal risks involved in such activities are very high, especially when such art pieces are bought at auction. Indeed, it is in the interest of auction houses to depict a rosy & partial portrait of any artwork on sale, which often does not reflect the exact provenance and/or condition of such work of art. How can a collector prevent such partial disclosures and inaccurate embellishments relating to the condition or provenance of a coveted artwork on sale, at auction?

1. A real risk

Our [art law firm Crefovi](https://crefovi.com) currently advises several individuals – all art collectors – who have fallen into the following trap: they all based themselves on the (proven, later, to be incorrect) information provided by the auction house responsible for the sale of an artwork, to enthusiastically and successfully bid at auction for such work of art. When, or shortly after, they went to collect the artwork, deception ensued, as they found out that they had been the subject of deceit, as far as the condition and/or provenance of the artwork were concerned. Therefore, the artwork you bought at auction does not match its pre-sale description.

For example, one of our clients is a keen collector of Chinese antics who resides in the United Kingdom, on his Chinese passport and work visa. In an auction sale organised by the French auction house Tajan, he mostly relied on the condition report provided by such auctioneer, which set out that the Chinese vase was in “*good aged-related condition (and had) normal age-related traces of wear*“, to successfully bid for that lot. When he came to Tajan’s offices in Paris to view this Chinese vase for which he was now the successful bidder, further to obtaining a travel visa to France, he was floored to discover that this vase was not as described in the condition report. The state of the vase is, indeed, poor, since it is damaged by several marks and traces of wear and tear, in many places; there is a large crack at the base of such vase, which means that no water stays in the vase because it escapes from that crack; several enamel parts are missing; certain parts, such as the panels on the inferior part of the vase and the enamels on the neck of the vase, seem to have been added after the manufacturing stage of the vase, etc.

Another example is the successful bid made by another client of our firm, for a painting “*attributed to*

Alighiero e Boetti” as per the catalogue and website of the auction house Bellmans. While our client took the time to view and inspect the painting prior to its auction at Bellmans’ Sussex Room, he was in great turmoil when he was turned down by the Archivio Alighiero Boetti (a cultural association based in Rome, founded by the heirs of the artist Alighiero Boetti, in order to authenticate works of art which are alleged to have been made by Alighiero Boetti) to which he had asked for a certificate of authenticity for that art work. Indeed, when he spoke to Matteo Boetti, son of Alighiero Boetti and president of Archivio Alighiero Boetti, he was told that this painting had already been unsuccessfully submitted to the authentication committee three times before, in order to obtain a certificate of authenticity! Archivio Alighiero Boetti declined to provide such certificate of authenticity to the previous owners of the artwork because, according to Matteo Boetti, it was a fake, a forgery, a counterfeit, and therefore not of the hand of Alighiero Boetti.

This risk of falling prey to the deceit of auction houses (and of their anonymous sellers of such flawed artworks) is definitely not mitigated by the terms and conditions of sale of such auction houses. Indeed, these T&Cs are riddled with liability waivers, such as this one extracted from Bellmans’ T&Cs: *“Please note that Lots (in particular second-hand Lots) are unlikely to be in perfect condition. Lots are sold “as is” (i.e. as you see them at the time of the auction). Neither we nor the Seller accept any liability for the condition of second-hand Lots or for any condition issues affecting a Lot if such issues are included in the description of a Lot in the auction catalogue (or in any saleroom notice) and/ or which the inspection of a Lot by the Buyer ought to have revealed”* or these gems set out in Tajan’s T&Cs: *“If no information on restoration, an accident, retouching or any other incident is provided in the catalogue, the condition reports or labels or during a verbal announcement, this does not mean that the item is void of defects. The condition of the frames is not guaranteed”* and *“Buyers may obtain a condition report on items included in the catalogue that are estimated at more than €1 000 upon request. Information contained in such reports is provided free of charge and solely to serve as an indication. It shall by no means incur the liability of Tajan”*. Of course it is very likely that such liability waivers, which remove any liability from the shoulders of a deceitful auctioneer, are unlawful. But it will take a protracted, expensive and painful lawsuit to demonstrate that such liability waivers are in severe breach of English or French contractual law. Which art collector has the time or appetite for that?

2. To pay or not to pay the hammer price?

In the two above-mentioned examples, our clients faced several scenarios: our fervent Chinese art collector refused to pay for the price of the Chinese vase, immediately rescinding his successful bid by way of a formal email to Tajan, sent on the same day that he discovered that the Chinese vase was not as per the description made of it in the condition report and Tajan’s catalogue. However, our Italian modern art enthusiast client dutifully paid the price of GBP25,912 by credit card to Bellmans, on the day of his successful bid for the painting *“attributed to Alighiero e Boetti”* (sic).

While not settling the price and not collecting the deceitful lot was the right move to make, for the Chinese art collector who immediately spotted the fraud upon close inspection of the Chinese vase post-auction, it opened the way to court litigation since Tajan and its anonymous seller contested, of course, that their condition report and catalogue had hidden the truth about the poor condition of such lot. Indeed,

further to an unsuccessful attempt to mediate this dispute with the (rather useless) “commissaire du gouvernement près le Conseil des ventes volontaires de meubles aux enchères” (i.e. the statutory body which role is to regulate French auction houses), Tajan lodged a lawsuit against our client with the Paris Tribunal de grande instance in early 2017 which is still ongoing, to this day.

Meanwhile, our UK-based collector also did the right thing, by settling the hammer price and buyer’s premium including VAT, and by collecting the painting “*attributed to Alighiero e Boetti*” since he was still convinced that this was a genuine painting made by the hand of Alighiero Boetti; until he was proved otherwise by the authentication committee of Archivio Alighiero Boetti, a few weeks later.

To conclude on this point, the logical rule is that, as soon as you discover the deceit or forgery, you should let the auction house know that you rescind the successful bid by way of a formal communication with them; be it before you have paid the hammer price and buyer’s premium, or after. Ideally, you want to make such formal disclosure of the deceit or counterfeit to the auction house as soon as possible, since most auctioneers set out, in their T&Cs, that they will not consider claims of forgery by the successful bidder, if these claims are made after a short period following the successful bid. Here is, for example, Bellmans’ liability waiver on this topic: “*You may return any Lot which is found to be a Deliberate Forgery to us within 21 days of the auction provided that you return the Lot to us in the same condition as when it was released to you, accompanied by a written statement identifying the Lot from the relevant catalogue description and a written statement of defects*”.

3. Preemptive measures to avoid being the unhappy successful bidder of a deceitful lot

Buyers of art works have no mandatory obligations to conduct any due diligence, under French or English law or case law.

However, the principle of *caveat emptor* (i.e. “buyer beware”, in Latin) applies, by which the onus is on the buyer to investigate the property or object he is acquiring. Since such burden of due diligence rests with buyers, they typically search the stolen art database of the Art Loss Register and conduct enquiries on ownership, authenticity, condition, provenance and lawful export of art. Due diligence depends on the type of asset, its value, and the information volunteered by the seller.

As a rule of thumb, any buyer should, at the minimum, conduct the following searches:

- attend the auction’s location in person and inspect the coveted art work before taking part into a bid for it;
- research the coveted art work on price databases, such as ArtNet, in order to find some historical data about past sales of such art work;
- research lost or stolen art databases, such as the [Art Loss Register](#) and [Interpol](#), since such databases include data about art works which authenticity is challenged, and therefore report authenticity issues. The database of the Art Loss Register is not publicly available but it can be searched on request. Some data on the Interpol database can be searched by members of the public

and,

- if in existence, read the “catalogue raisonné” of the artist who the artwork is attributed to, in order to assess whether such artwork has been indeed recognised by the field as being of the hand of such artist.

If you, buyer, conduct such above-mentioned searches and due diligence steps, and provided that you are a consumer (and not acting as a professional, such as an art dealer or trader), the courts would probably find that you have complied with the principle of *caveat emptor* (buyer beware).

4. What are your options, after the successful bid and unhappy discovery that the artwork is unlike its description set out in the auctioneer’s documents?

As set out above in paragraph 2. above, you should send an official letter to the auction house, denouncing the forgery and/or poor condition (or any other undisclosed defect) of the art work, very soon after you have discovered it, rescinding the successful bid and requesting to return the disputed lot to the auctioneer, against the full refund of the hammer price, the buyer’s premium including VAT, any other costs associated with the bid (such as transport costs) and the costs relating to the authentication and/or inspection of the artwork.

While it is unlikely that the auction house, recipient of such formal letter of complaint, will accept to cover the authentication and/or inspection costs, any auctioneer who wants to keep his reputation intact would accept to take back the litigious lot and refund the rests of the requested costs; especially if you sent your official communication as close as possible to the date of the successful bid, and if you have gathered much strong evidence that the artwork is indisputably a forgery or not at all like it was described in the condition report and/or the catalogue.

If the French auction house and you, unhappy bidder, cannot see eye to eye, you can lodge a formal complaint and request for mediation with the “commissaire du gouvernement près le Conseil des ventes volontaires de meubles aux enchères” (i.e. the statutory body which role is to regulate French auction houses), bearing in mind, though, that the ‘Conseil des ventes volontaires de meubles aux enchères’ may come across as biased, since it is not in its best interest to annoy its members, the French auction houses.

In the UK, there is no regulatory body in charge of watching and regulating UK auction houses. However, most UK auction houses belong to trade federations, such as the [Society of Fine Art Auctioneers and Valuers](#), which have issued some guidance notes for good practice and often have complaint handling schemes in place, and even mediation services, when one of their members is the subject of a dispute with one of its buyers. Indeed, the strategy of “naming and shaming” is particularly effective in the UK, much less so in France where French auction houses act as if they were in contempt of any regulations or complaints handling schemes that may limit their ability to waive their liability vis-a-vis their buyers.

If the dispute between the auction house and the buyer escalates into a fully-fledged lawsuit, your defense, as a buyer, should be based around proving that the work of art was deceitfully sold at auction,

because of gross misrepresentation and negligence committed by the auctioneer and, accessorially, the seller. As much evidence of the forgery, counterfeit and/or poor condition, as possible, should be provided to the court, even by way of requesting an expertise of the deceitful artwork, executed by an art expert, under supervision of the court.

Meanwhile, you, as a buyer and defendant in the lawsuit, [should request and attempt mediation all the way](#), during the lawsuit, in order to demonstrate that you are ready to compromise and find a constructive, time-efficient and cost-effective resolution to this dispute. The other side, however, may not agree to such alternative dispute resolution, out of sheer stupidity or because their legal fees may not be covered by their legal insurance policy, should a mediation or any other alternative dispute resolution process be put in place between the parties.

To conclude, you really want to avoid finding yourself in the situation of an unhappy successful bidder who discovers, post-auction, that he has overpaid for an artwork which is not at all what it seemed, or was presented to be, by the auctioneer and its anonymous seller. Our guidelines, above, should save you from that headache and situation. However, if that is not the case, don't worry and call us, since we are here, at [Crefovi](#), to service you to find a solution to your bad auction experience and deceitful transaction, in the most cost-efficient and time-efficient way.

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