

ART AUTHENTICATION: PROTECTION OF ART EXPERTS FROM A SWISS PERSPECTIVE

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Art authentication is the attribution of an artwork to a specific artist.¹ With estimates that up to a third of artworks circulating on the market are forgeries,² authentication has become more important than ever. Auction houses, galleries and art dealers are likely to accept valuable twentieth-century artworks only if they are listed in a catalogue raisonné or have been issued with a certificate of authenticity by a recognised art expert.³ With prices for twentieth-century artworks reaching new highs, the pressure on art experts has increased dramatically. Owing to the fear of authenticity-related litigation, which has arisen in recent years, art experts are increasingly reluctant to opine publicly on issues of authenticity. This at a time when their opinion is needed the most.

First, this article will examine the recent market developments contributing to the heightened pressure on art experts. Secondly, the two main types of authentication authorities are briefly introduced. Thirdly, this article will cast light on the protection of art experts under Swiss law: (i) how does the authentication contract meet the requirements of Swiss law, (ii) what duties arise for the art authenticator and (iii) how can liability be limited. Finally, this article will explore insurance solutions where protection by the law is insufficient.

I. RECENT MARKET DEVELOPMENTS

1. Rising Demand for Twentieth-Century Art Attracts Forgers

Throughout the recent economic crisis, the art market has been remarkably resilient. This has led to art being increasingly viewed as a diversification tool for high net worth individuals and the rapid growth of specialised art investment funds.⁴

With the rising demand for art, in particular twentieth-century art, prices are reaching new highs. In November 2013, Christie's Post-War and Contemporary Art Evening Auction

1 Naïma Jornod, 'Le catalogue raisonné', in: Marc-André Renold, Pierre Gabus and Jacques de Werra (eds), *L'expertise et l'authentification des œuvres d'art*, Études en Droit de L'Art 19, (2007), pp. 19, 26.

2 Hanno Rauterberg, 'Das Lehrstück - Warum ist der Fall Beltracchi so wichtig', *Die Zeit*, 16 Jan. 2014 <<http://www.zeit.de/2014/04/fall-beltracchi-bedeutung-fuer-kunstszene>>.

3 Friederike von Brühl, *Marktmacht von Kunstexperten als Rechtsproblem: der Anspruch auf Erteilung einer Expertise und auf Aufnahme in ein Werkverzeichnis*, (2008), pp. 53-54.

4 In 2012, the global art investment fund market increased by 69 % to US\$1.62 billion in 2012, see Deloitte/ArtTactic, *Art and Finance Report 2013*, pp. 10-14 <http://www.deloittelux-library.com/artandfinance/2013/lu_en_wp_artandfinancereport_15032013.pdf>.

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achieved US\$691 million in sales, the highest auction total in history. This auction featured Francis Bacon's triptych *Three Studies of Lucian Freud*, at US\$142.4 million, setting a new record for a single painting.⁵

These buoyant prices combined with the level of detailed information available today on artists and their oeuvres⁶ and the fact that twentieth-century art is generally easier to forge than old master paintings⁷ has attracted its fair share of forgers.

2. Recent High-profile Forgery Scandals Increase Pressure on Art Experts

Recent high-profile scandals have provided evidence of the huge number of forgeries circulating in the art market.

In 2011, Wolfgang Beltracchi deceived the art market with a completely fabricated art collection, the 'Werner Jäger Collection'. It contained expressionist and surrealist works attributed to Max Pechstein, Heinrich Campendonk and others. Beltracchi forged works that had gone missing during the Second World War and created new fictitious works in the style of these artists. Over a period of fifteen years, he cunningly legitimised his forgeries by furnishing them with authentication certificates of renowned art experts.⁸ As a result, his forgeries were traded by auction houses, galleries, art dealers, museums and private collectors. In October 2011, Beltracchi and his three accomplices were charged with forgery and corruption relating to fourteen works sold for US\$45 million collectively. With approximately one hundred of Beltracchi's forgeries in circulation, this was probably only the tip of the iceberg.⁹

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- 5 The sale results are published on Christie's website: <<http://www.christies.com/sales/post-war-and-contemporary-evening-sale-new-york-november-2013/>>; see further Carol Vogel, 'At \$ 142.4, Triptych is the Most Expensive Artwork Ever Sold at an Auction', *The New York Times*, 12 Nov. 2013 <http://www.nytimes.com/2013/11/13/arts/design/bacons-study-of-freud-sells-for-more-than-142-million.html?ref=francisbacon&_r=0>.
- 6 Barbara Nägeli, 'Das Auge ist der Richter? Der Kennerblick in der Kritik', in: Ulf Bischof (ed.), *KUR (Kunst und Recht), Journal für Kunstrecht, Urheberrecht und Kulturpolitik*, 5/2012, pp. 92, 93.
- 7 Georgina Adam, 'The Art of Deception: How Forgers Get Away with it', *BBC*, 8 July 2013, <<http://www.bbc.com/culture/story/20130709-the-art-of-deception>>.
- 8 In May 2013, renowned art historian Werner Spies was held liable by the Tribunal de Grande Instance of Nanterre in France for the incorrect authentication of the Max Ernst's *Tremblement de terre*, a painting forged by Beltracchi, see Harry Bellet, 'L'historien d'art Werner Spies condamné pour avoir mal authentifié une toile de Max Ernst', *Le Monde*, 27 May 2013 <http://www.lemonde.fr/culture/article/2013/05/27/l-historien-d-art-werner-spies-condamne_3418072_3246.html>; Peter Dietmar, 'Werner Spies und sein schwerstes Urteil', *Die Welt*, 30 May 2013 <<http://www.welt.de/kultur/kunst-und-architektur/article116638951/Werner-Spies-und-sein-schwerstes-Urteil.html>>.
- 9 Duncan Chappell/Saskia Hufnagel, 'The Beltracchi Affair: A Comment on the "Most Spectacular" German Art Forgery Case n Recent Times', in Noah Charney (ed.), *The Journal of Art Crime*, Spring/Summer 2012, p. 38, pp. 39-40; Julia Michalska, 'Full List of German Forgeries - Police Reveal a Much Longer List of 53 Fakes by Master Forger Wolfgang Beltracchi and his Gang', *Art Newspaper*, 28 Nov. 2011 <<http://www.theartnewspaper.com/articles/Full-list-of-German-forgeries/25133>>; Julia Michalska, Charlotte Burns and Ermanno Rivetti, 'True Scale of Alleged German Forgeries Revealed', *Art Newspaper*, 5 Dec. 2011 <<http://www.theartnewspaper.com/articles/True-scale-of-alleged-German-forgeries-revealed/25235>>.

A further spectacular case of forgery involved one of New York's oldest and most renowned art galleries. The Knoedler & Co. Gallery, which closed its doors in November 2011, was allegedly involved in the sale of 40 counterfeits of major abstract-expressionist painters such as Jackson Pollock and Mark Rothko for an estimated value US\$63 million. Again, these paintings had been authenticated by various established art experts prior to sale.¹⁰

These two examples clearly illustrate that the process of art authentication is error-prone and that even the most renowned art experts can be deceived. As more and more forgeries furnished with authenticity certificates by recognised art experts come to the surface, confidence in the authentication procedure has been undermined. The financial and emotional stakes are higher than ever and, given the litigiousness of today's society, many collectors will resort to suing art experts in order to protect the authenticity of their possession or seek retribution for erroneously issued authenticity certificates.¹¹

3. Authentication Boards Disband Owing to the Fear of Authenticity-related Litigation

The fear of being dragged into authenticity-related litigation has led several prominent art authentication boards to cease their activities. In 2011, the Andy Warhol Foundation for the Visual Arts disbanded its Authentication Board after sixteen years having reviewed approximately 6,600 works.¹² The Authentication Board was involved in several authentication lawsuits, the most important of which concerned the rejection of the *Red Self-Portrait* for the catalogue raisonné. This lawsuit, which was ultimately dismissed with prejudice, dragged on for three years and incurred legal fees of nearly US\$7 million.¹³ In 2012, the Jean-Michel Basquiat Authentication Committee also ceased its activities after eighteen years having reviewed over 2,000 works.¹⁴ It, too, was involved in a famous authentication lawsuit. The Committee was sued in the New York County Court after it had declined to authenticate the painting *Fuego Flores*. The owner, who had purchased the painting at a Sotheby's auction for

- 10 Richard A. Altman, 'A Knoedler Aftershock: Freedman Sues for Defamation', *Centre for Art Law*, 16 Sept. 2013 <<http://itsartlaw.com/2013/09/16/a-knoedler-aftershock-freedman-sues-for-defamation/>>; Laura Gilbert, 'More victims of Abstract Expressionist Fakes Scandal Revealed', *Art Newspaper*, 21 Nov 2013 <<http://www.theartnewspaper.com/articles/More-victims-of-Abstract-Expressionist-fakes-scandal-revealed/31061>>; Daniel Gran, 'Reading the Tea Leaves in the Knoedler Mess', *artnet*, <<http://www.artnet.com/magazine/features/grant/the-knoedler-mess-4-2-12.asp>>; James Panero, 'I Am the Central Victim: Art Dealer Ann Freedman on Selling \$63 Million in Fake Paintings', *New York Magazine*, 27 Aug. 2013 <<http://nymag.com/daily/intelligencer/2013/08/exclusive-interview-with-ann-freedman.html>>; Helen Stoilas, 'AbEx Fakes Scandal Silences the Experts', *Art Newspaper*, 11 Oct. 2013 <<http://www.theartnewspaper.com/articles/AbEx-fakes-scandal-silences-the-experts/30609>>.
- 11 Eileen Kinsella, 'A Matter of Opinion', *ARTnews*, 28 Feb. 2012 <<http://www.artnews.com/2012/02/28/a-matter-of-opinion/>>; Christine J. Vincent, 'Artist-Endowed Foundations and Art Authentication', *IFAR Journal*, Vol. 13, No. 3, 2012, pp. 29, 32.
- 12 See the 'Authentication Procedure - Statement from the Board of Directors' published on the website of *The Andy Warhol Foundation for the Visual Arts* <http://www.warholfoundation.org/legacy/authentication_procedure.html>.
- 13 Charlotte Burns, 'Warhol Foundation Shuts its Authentication Board', *Art Newspaper*, 20 Oct. 2012 <<http://www.theartnewspaper.com/articles/Warhol+foundation+shuts+its+authentication+board/24869>>; Linda Sandler, 'Warhol Foundation's \$7 Million Defense Beats Collector's 'Fakes' Lawsuit', *Bloomberg*, 16 Nov. 2010 <<http://www.bloomberg.com/news/2010-11-16/warhol-foundation-for-the-visual-arts-wins-lawsuit-with-7-million-defense.html>>.
- 14 See the 'Notification from Authentication Committee' published on the website of *The Estate of Jean-Michel Basquiat* on 2 Jan. 2012 <<http://basquiat.com/events.htm?pg=news>>.

£960,000, was seeking damages of up to US\$5 million. The case was eventually settled, after the Authentication Committee declared the work genuine.¹⁵ Similarly, the Roy Lichtenstein Foundation ceased authenticating works of art in 2011. Although the Roy Lichtenstein Foundation had not been the target of any authenticity-related litigation, its board of directors “came to the opinion that the risks involved in authenticating Lichtenstein’s works outweighed any possible reward or lasting effect”.¹⁶

However, the disbanding of authentication committees does not protect foundations from authenticity-related litigation. A recent example is the Keith Haring Foundation, which disbanded its Authentication Committee in 2012.¹⁷ In February 2014, a group of collectors filed a claim in the Federal Court of Manhattan against the Keith Haring Foundation and its Directors for the rejection in 2007 of around 90 paintings by the Authentication Committee. The claimants are seeking US\$40 million in damages for the allegedly wrongful labelling of their artworks as fakes and the Authentication Committee’s refusal to take into account additional evidence.¹⁸

4. Growing Reluctance to Opine on Authenticity Has Far-reaching Consequences

The disbanding of various authentication boards shows the growing tendency that many qualified art experts are no longer willing to publicly voice their opinion on issues of authenticity for fear of litigation.¹⁹ In particular, art experts with a modest income cannot afford to be involved in lengthy and expensive legal proceedings – even if they should eventually prevail in court.²⁰

15 ‘Authentication committee refused to give an opinion on my Basquiat, says collector’, *Art Newspaper*, 1 June 2008, <http://www.theartnewspaper.com/articles/Authentication-committee-refused-to-give-an-opinion-on-my-Basquiat-says-collector/8613>>; Colin Gleadell, ‘Fontana Works Star At Sotheby’s Season Opener’, *ARTnews*, 3 Nov. 2009. <<http://www.artnews.com/2009/11/03/fontana-works-star-at-sothebys-season-opener/>>; Irina Tarsis, ‘Authentication Committees Disband: Warhol 2011, Basquiat 2012, Who’s Next?’ *Center for Art Law*, 25 Jan. 2012 <<http://itsartlaw.com/2012/01/25/authentication-committees-disband-warhol-2011-basquiat-2012-whos-next/>>.

16 Jack Cowart, ‘The Roy Lichtenstein Foundation’, in: *IFAR Journal*, Vol. 13, No. 3, 2012, pp. 39, 40.

17 See ‘Keith Haring Foundation Disbands Authentication Committee and Ceases Accepting Applications for Review of Haring Works’ published on the website of the Keith Haring Foundation <http://www.haring.com/kh_foundation/authentication>.

18 *Bilinski et al v. The Keith Haring Foundation Inc et al*, US District Court for Southern New York, No. 14-cv-1085. New York; see further ‘Keith Haring Foundation Sued For \$40 Million By Collectors Over ‘Fakes’’, *artlyst*, 23 Feb. 2014 <<http://www.artlyst.com/articles/keith-haring-foundation-sued-for-40-million-by-collectors-over-fakes>>; Benjamin Weiser, ‘Collectors of Keith Haring Works File Lawsuit’, *New York Times*, 21 Feb. 2014 <http://www.nytimes.com/2014/02/22/arts/design/collectors-of-keith-haring-works-file-lawsuit.html?_r=0>.

19 Georgina Adam and Riah Pryor, ‘The Law vs Scholarship’, *Art Newspaper*, 8 Dec. 2011 <<http://www.theartnewspaper.com/articles/The+law+vs+scholarship/25155>>; Sharon Flescher, ‘The International Foundation for Art Research’, in: Ronald D. Spencer (ed.), *The Expert versus the Object, Judging Fakes and False Attributions in the Visual Art*, (2004), pp. 95, 101; Meaghan Wilson-Anastasios, ‘Expertise Goes Down the Drain’, *Sydney Morning Herald*, 29 Dec. 2012 <<http://www.smh.com.au/entertainment/art-and-design/expertise-goes-down-the-drain-20121228-2bz8y.html>>; ‘Collectors, Artists and Lawyers - Fear of Litigation is Hobbling the Art Market’, *Economist*, 24 Nov. 2012 <<http://www.economist.com/news/business/21567074-fear-litigation-hobbling-art-market-collectors-artists-and-lawyers>>.

20 Adam and Pryor, above, note 19.

This reluctance could have far-reaching consequences for the art market. In the long-term, art experts are likely to protect themselves by agreeing to authenticate only those works which are clearly genuine. However, for works where an opinion on authenticity is most needed – objects recently discovered or with an unclear provenance – it will be difficult to find an expert who is willing to take the risk. This is likely to have an impact on price development: While prices for verifiably genuine works will increase even more, the prices for the majority of artworks will drop. Furthermore, if art experts no longer dare to declare forgeries as such this will lead to the art market becoming more contaminated and will eventually distort art history. Therefore, it is in the interest of all art market participants that experts who honestly and diligently conduct authentication are sufficiently protected.²¹

II. TWO TYPES OF AUTHENTICATION AUTHORITIES

A crucial question for art market participants is whom they should turn to for authentication if their artwork is not listed in a catalogue raisonné. ‘Art expert’ is not a legally regulated profession; unlike doctors and solicitors, anyone can call himself an art expert.²² As a result, an authentication certificate is worthless unless it is issued by a person or institution recognised by the art market as an authority for a certain artist or epoch.²³

There are two types of authentication authorities: Firstly, private individuals, so-called ‘*mandarins de la peinture*’.²⁴ These include a diverse range of people, such as art historians (often involved in the publication of a catalogue raisonné), art dealers (often the artist’s principal dealer) and family members (or other parties designated by the artist to own the ‘*droit moral*’ under French law²⁵).²⁶

Secondly, groups of experts who collectively render a judgment on authenticity.²⁷ These

- 21 If particular legal systems move towards jurisprudence where the expression of an honest academic or scientific opinion is not defamatory, even if untrue, then the normal reluctance to pronounce on authenticity might begin to vanish. England, following the Defamation Act 2013, may well become such a legal system.
- 22 Only for publicly appointed art experts there will be a test with regards to capabilities and credentials, see Bruno Glaus, *Haftung von Experten und Werkverzeichner nach Schweizer Recht*, <http://www.glaus.com/bilderpdf/0mehrfach_gefuehrt/haftung_experten2.html>; see further Andrew Jobson, ‘Is Professional Indemnity Insurance Appropriate for Art and Antique Dealers?’, *Journal of Insurance Research and Practice*, Vol. 16, pt 1, pp. 61 and 65.
- 23 Serge Lemoine, ‘Le rôle de l’expert dans la pratique’, in Quentin Byrne-Sutton and Marc-André Renold (eds), *L’expertise dans la vente d’objets d’art - aspects juridiques et pratiques*, *Études en Droit de L’Art* 1, 1992, pp. 67, p. 71.
- 24 Friederike Ringe, ‘Le pouvoir de l’expert face au droit de la concurrence’, in Renold, Gabus and de Werra above, note 1, at 135, at pp. 136-137.
- 25 Under French law, an artist’s descendants or other parties designated by the artist are presumed to have an innate understanding of the art created by their progenitor, and are thus entitled to issue certificates of authenticity, Georg Stolz, ‘Authenticating Picasso’, *ARTnews*, 2 Jan. 2013 <<http://www.artnews.com/2013/01/02/authenticating-picasso/>>; see further Melanie Gerlis, ‘When is an Utrillo not an Utrillo?’, *Art Newspaper*, 5 June 2013 <<http://www.theartnewspaper.com/articles/When-is-an-Utrillo-not-an-Utrillo/29720>>.
- 26 Von Brühl, above, note 3, pp. 24-25; Lemoine, above, note 23, pp. 68-69; Van Reeves, ‘The Rights and Risks of Experts in French and American Courts’, in: *IFAR Journal*, Vo. 12, No. 4, 2011, pp. 18, p. 18; see further an overview over the different types of art experts in Jean-Pierre Jornod, ‘L’expert et son rôle’, in Renold, Gabus and de Werra above, note 1, at pp. 13-14.
- 27 Ringe, above, note 24, p. 136-137; Vincent, above, note 11, p. 31.

include artist-endowed foundations that authenticate artworks of a specific artist either several times a year (e.g. Robert Mapplethorpe Foundation) or while in the process of producing a catalogue raisonné (e.g. Nikki de Saint Phalle Charitable Art Foundation, The Estate of Francis Bacon)^{28, 29} Some artist-endowed foundations have set up separately incorporated entities with the sole purpose of conducting authentication, so-called authentication boards or authentication committees (e.g. The Henry Moore Authentication Committee, Alexander Calder Authentication Committee).

In addition to artist-endowed foundations there are multiple-artist institutions. For example, the Swiss Institute for Art Research (SIK-ISEA), founded in 1951 as a public-interest trust, is dedicated to the research and documentation of Swiss artists. It is involved in the publication of various catalogues raisonnés, including Ferdinand Hodler and Cuno Amiet.³⁰ The SIK-ISEA draws on the vast expertise of its own scholars and conservators. In the event that the SIK-ISEA regards outside experts as the foremost authority on a given artist, it will refer clients directly to those. A comparable institution is the International Foundation for Art Research (IFAR), a non-profit educational organisation based in the United States offering opinions as to authorship on a wide range of artists.³¹

III. PROTECTION OF THE ART AUTHENTICATOR UNDER SWISS LAW

1. Qualification of the Authentication Contract

Under Swiss law, there are no special rules governing the authentication of artworks. Instead, general civil law applies, under which authentication is qualified by the Swiss Federal Court of Justice and the prevailing doctrine as an agency contract (*'Auftrag'*) according to article 394 *et seq.* Swiss Code of Obligations ('Swiss CO').³² "*An agency contract is a contract whereby the agent undertakes to [...] provide certain services in accordance with the terms of the contract*" (article 394(1) Swiss CO).³³ This means that the agent does not undertake to

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- 28 The Nikki de Saint Phalle Charitable Art Foundation is currently preparing an online-catalogue raisonné of the 'Nanas' <http://www.nikidesaintphalle.org/sites/default/files/pdf/Nana_Research_Form_2013.pdf>. A catalogue raisonné is currently being prepared by The Estate of Francis Bacon <<http://www.francis-bacon.com/news/?c=Catalogue-Raisonne>>.
- 29 Ronald D. Spencer, 'Authentication in Court, in: Ronald D. Spencer (ed.), *The Expert versus the Object – Judging Fakes and False Attributions in the Visual Arts*, (2004), 189, at pp. 192-193.
- 30 A list of catalogues raisonnés published by the SIK-ISEA is available at: <http://www.sik-isea.ch/Portals/0/docs/Publikationsverzeichnis_August_2013.pdf>.
- 31 <<http://www.ifar.org/>>; a comprehensive overview of the IFAR is made by Sharon Flescher, above, note 19.
- 32 Judgment of the Swiss Federal Court of Justice of 3 June 1986, BGE 112 II 347, pp. 350-352, paras 1a-1b; see further Alexander Jolles, Isabelle Roesle, Gestaltung des Gutachtervertrags im Schweizer Recht, in Ulf Bischof (ed.), *KUR (Kunst und Recht), Journal für Kunstrecht, Urheberrecht und Kulturpolitik*, 2/2013, 35, at p. 39; Marc-André Renold, '8. Kapitel: Vertragsverhältnisse in der Welt der bildenden Kunst und der Museen, § 5 Das Gutachten', in Peter Mosimann, Marc-André Renold and Andrea Raschèr (eds), *Kultur, Kunst, Recht - Schweizerisches und Internationales Recht*, 2009, 554, at p. 555; Luc Thévenoz, 'La responsabilité de l'expert en objets d'art selon le droit suisse', in: Quentin Byrne-Sutton and Marc-André Renold (eds), *L'expertise dans la vente d'objets d'art - aspects juridiques et pratiques*, Études en Droit de L'Art 1, 1992, 37, at pp. 39-42.
- 33 Remuneration is not a necessary element in an agency contract, art. 394(3) Swiss CO ("*Remuneration is payable where agreed or customary.*").

achieve a successful outcome or result, but has a duty to act with reasonable care and skill in the interest of the client.³⁴

This qualification is based on the fact that for art authentication absolute certainty in the result is *de facto* unachievable as it relies heavily on the subjective connoisseurship of the assessor.³⁵ Similarly, as technical methods used to falsify authentication are constantly evolving, an authentication is only a best estimate at a given point in time and might be overturned in the future.³⁶ To put it in layman's terms just as the doctor cannot warrant that he will cure the patient or the solicitor that he will win the case, the art expert cannot guarantee the complete accuracy of his authentication.³⁷

2. Duties of the Art Authenticator under the Swiss Agency Contract

First and foremost, the art expert can protect himself from litigation by conducting the authentication in accordance with the law. Under the Swiss agency contract there are three main duties he needs to abide by: the duty to diligently perform the authentication (article 398(2) Swiss CO), the duty to act in the best interest of the client (article 398(2) Swiss CO) and the duty to give information on the authentication procedure (article 400 Swiss CO).

2.1 Duty to Diligently Perform the Authentication

According to article 398(2) Swiss CO, the art expert is obligated to carry out the authentication with reasonable care and skill. The standard of diligence is an objective one, taking into account the specific circumstances of the case (e.g. enhanced standards for recognised authorities and for authentication against remuneration).³⁸ The overriding principle for the courts is the question how a reasonably competent art expert would have carried out the authentication under the given circumstances.³⁹ The standard of diligence is not further substantiated by the law. "*The art world has no formalized system for authenticating art*

34 The authentication cannot be qualified as a contract for work and services ('*Werkvertrag*') according to arts. 363 *et seq.* Swiss CO as a contractor owes a successful outcome/result, which can be objectively qualified as such; see Judgment of the Swiss Federal Court of Justice of 11 May 2001, 4C.28/2001, para. 2c.

35 Von Brühl, above, note 3, at p. 17; see also the English case of the Court of Appeal *Harlington and Leinster Enterprises Ltd v. Christopher Hull Fine Art Ltd*, [1991] 1 Q.B. 564, at 577-578 stating that there is "*potential arguability of almost any attribution*".

36 Gareth S. Lacy, 'Standardizing Warhol: Antitrust Liability for Denying the Authenticity of Artwork', *Washington Journal of Law, Technology & Arts*, Vol. 6, Issue 3, 2011, 185, at p. 189 <<https://digital.lib.washington.edu/dspace-law/handle/1773.1/560>>; Nancy Mowll Mathews, 'Procedures and Process Panel - Introduction', *IFAR Journal*, Vol. 8, Nos 3 & 4, 2006, 9, at p. 10.

37 See also the *dicta* of Lord Denning M.R. in *Greaves & Co (Contractors) Ltd v. Baynham Meikle & Partners* [1975] 3 All E.R. 99, at 103-104: "Apply this to the employment of a professional man. The law does not usually imply a warranty that he will achieve the desired result, but only a term that he will use reasonable care and skill. The surgeon does not warrant that he will cure the patient. Nor does the solicitor warrant that he will win the case."

38 Jolles and Roesle, above, note 32, at p. 37, with reference to Rolf H. Weber, in Heinrich Honsell, Nedim Peter Vogt and Wolfgang Wiegand (eds), *Basler Kommentar, Obligationenrecht I, Art. 1-529 OR*, 2010, art. 398 paras 27-28; Renold, above, note 32, at pp. 556-557; Thévenoz, above, note 32, at pp. 43-44; Franz Werro, in Luc Thévenoz and Franz Werro (eds), *Commentaire Romand, Code des Obligations I - Art. 1-529 CO*, 2012, art. 398, para. 14.

39 *Ibid.*

that is perceived and acknowledged by all its denizens as rigorous, accountable, systematic, comprehensive and comprehensible.”⁴⁰ In general, art experts can rely on three approaches in order to determine the authenticity of an artwork: stylistic connoisseurship, art-historical documentation and technical/scientific analysis.⁴¹

Stylistic connoisseurship is the interpretation of the stylistic features of an artwork taking into account other works by the same artist or epoch.⁴² To do so, the art expert draws on his “sensitivity of visual perception, historical training, technical awareness, and empirical experience”.⁴³ Ultimately, his judgment is driven by his tacit knowledge and gut feeling.⁴⁴

Art-historical documentation is the reconstruction of an artwork’s history back to its creation. To this end, the art expert consults all available data ranging from selling documentations and catalogues raisonnés to exhibition prospectuses and various archives.⁴⁵

Technical/scientific analysis is the laboratory examination of an artwork by specialists in the fields of technical art history and art technology science. The date and location of creation of an artwork can be determined by characterisation of pigments and identification of binding materials. Dendrochronology determines the date of wooden objects, carbon-14 dating

40 Francis V. O’Connor, ‘Authenticating the Attribution of Art – Connoisseurship and the Law in the Judging of Forgeries, Copies, and False Attributions’, in Ronald D. Spencer (ed.), *The Expert versus the Object – Judging Fakes and False Attributions in the Visual Arts*, (2004), 3, at pp. 20-21; see the *CRSA Guidelines for Issuing Scholarly Opinions about Authenticity* adopted by Catalogue Raisonné Scholars Association in 2010 (‘CRSA Guidelines’) <<http://www.catalogueraisonne.org/CRSAGuidelines.pdf>> as well as the *College Art Association Standards and Guidelines on Authentications and Attributions* adopted by the in 2009 (‘CAA Guidelines’) <<http://www.collegeart.org/guidelines/authentications>>. While not legally binding, these guidelines provide useful guidance on the process of authentication.

41 See *Avrora Fine Arts Investment Ltd v. Christie Manson & Woods Ltd*, [2012] EWHC 2198 (Ch), at para. 36: “The evidence relating to authenticity can be considered under three headings: i) Connoisseurship; ii) Historical issues; iii) Technical matters.”. The *Avrora* case is noted by Katharine Mason in (2013) XVIII *Art Antiquity and Law* 411 and discussed by Jordan Holland, ‘The Approach of the English Court to Connoisseurship, Provenance and Technical Analysis’ (2012) XVII *Art Antiquity and Law* 365. See further Christine Chappuis, ‘L’authentification d’oeuvres d’art: responsabilité de l’expert et qualification du contrat en droit suisse’, in Renold, Gabus and de Werra, above, note 1, at p. 47, p. 53; Lemoine, above, note 23, at pp. 70-71; O’Connor, above, note 40, at p. 6; ‘Qualifications for issuing opinions’ of the CRSA Guidelines and ‘B. Recommended Practices’ of the CAA Guidelines; John Murdoch, ‘Attribution and the Claim to Objectivity’, in: *International Journal of Cultural Property*, 1993, Volume 2, Issue 2, pp. 319.

42 Von Brühl, above, note 3, at pp. 137-139.

43 Ronald D. Spencer, ‘Introduction’, in: Ronald D. Spencer (ed.), *The Expert versus the Object – Judging Fakes and False Attributions in the Visual Arts*, 2004, pp. xi, p. xiii.

44 Jane Kallier, ‘Galerie St. Etienne’, in: *ArtBanc Intelligence*, Issue 1, Oct. 2012, 13, at p. 14 <<http://mag.digitalpc.co.uk/fvx/abi/1210/index.html>>; Nägeli, above, note 6, at pp. 96-97; the meaning of tacit knowledge was elaborated by Barbara Nägeli in her speech ‘Von der (Ohn-) Macht der Experten: Kennerschaft im Kontext von Macht und Recht’ held at the international colloquium ‘Authentizität in der bildenden Kunst der Moderne’, SIK-ISEA, Zurich, 27-28 Oct 2011. See further *Blackman v. Gant* [2010] V.S.V. 229, at para. 54, and *Drake v Thos Agnew & Sons Ltd* [2002] EWHC 294 (Q.B.), at para. 43; both cases are examined in Rosemary Listing, ‘Art and Authenticity: The Role of the Expert Witness’, in (2012) XVII *Art Antiquity and Law*, 155, in particular pp. 159-162. *Drake v. Agnew* is noted by A.H. Hudson, (2003) VIII *Art Antiquity and Law*, 201.

45 Lemoine, above, note 23, pp. 70-71; Thomas D. Bazley, *Crimes of the Artworld*, 2010, p. 185.

provides date ranges for artworks composed of organic materials and thermoluminescence provides dates for certain types of inorganic materials. In addition, technical imaging can be used to better visualise the physicality of an artwork: X-rays reveal interior structure, infrared imaging shows underdrawing and ultraviolet fluorescence reveals restorations on the surface of an object.⁴⁶

In theory, a complete provenance history is the best guarantee for an authentic artwork; however, owing to sparse documentation in the art world it is often extremely difficult to establish.⁴⁷ Therefore, stylistic connoisseurship is the primary and most pragmatic method of authentication. However, recent high-profile forgery scandals involving some of the most renowned art experts have led an increasing number of art market participants to call for more objective and transparent assessments.⁴⁸

Some art experts contend that the expectations placed in technical/scientific analysis are unrealistic. They maintain that while this method can clearly help to detect forgeries and falsify authenticity (e.g. a painting containing pigments of materials that did not yet exist at the time of the artist), it can only in exceptional cases establish or confirm authenticity by itself.^{49,50} Furthermore, more data does not necessarily translate into more information. On the one hand, the data points gathered from various technical/scientific analyses require interpretation by experienced experts, a process which in itself is subjective and thus prone to human errors.⁵¹ On the other hand, technical/scientific analysis is further complicated by the fact that it relies on comparative examination of other works by the same artist/epoch but often those relevant benchmarks are not available.⁵² Although the possibilities of technical/scientific analysis are constantly evolving, establishing authenticity to this date still requires stylistic connoisseurship of an art expert.⁵³

The most accurate result can be achieved by complementing the stylistic connoisseurship with art-historical documentation and technical/scientific analysis. Unless authenticity of a valuable artwork is clear, it should become common market practice to use a combination of these three methods.⁵⁴ In addition, such an integrated approach provides the art expert with an effective defence against potential litigation. However, clients may balk at covering the expenses for

46 This information was given by Dr Nicholas Eastaugh and Dr Jilleen Nadolny of Art Access & Research <<http://artaccessresearch.com/>>.

47 Lemoine, above, note 23, at pp. 70-71; Bazley, above, note 45, at p. 185.

48 Nägeli, above, note 6, at p. 93; Joachim Güntner, 'Stilkritik allein reicht nicht. Der Kunstexperte Werner Spies am Pranger – Lehren aus Kölns Fälscherskandal', *Neue Zürcher Zeitung*, 18 June 2011 <http://www.nzz.ch/aktuell/feuilleton/kunst_architektur/stilkritik-allein-reicht-nicht-1.10960849>; Milko den Leeuw and Martin Kemp, 'The Past, Current Position and Future Directions', *Authentication in Art*, 11 July 2013 <<http://www.authenticationinart.org/category/press/>>.

49 Kallier, above, note 44, p. 14; Nägeli, above, note 44, speech; Van Reeves, above, note 26, at p. 19.

50 Authentication through scientific/technical testing would be possible only in the exceptional case that the artwork/oeuvre exhibits characteristics (e.g. pigments) that can be ascribed to no other artwork/oeuvre.

51 Milko den Leeuw and Jane Sharp, 'Should Paintings Stand Above the Law', *Authentication in Art*, 26 Sept. 2013 <<http://www.authenticationinart.org/category/press/>>; Nägeli, above, note 6, p. 95.

52 *Ibid.*

53 Bazley, above, note 45, at p. 185; Van Reeves, above, note 26, at p. 19; Von Brühl, above, note 3, at p. 44.

54 Nägeli, above, note 6, at p. 95.

technical/scientific analysis, in particular when the outcome has not been in their favour.⁵⁵ To prevent this, art experts are advised to either contractually agree on the tests to be run or seek their client's written approval prior to running costly tests or agree on upfront payment.

2.2 Duty to Act in the Best Interest of the Client

According to article 398(2) Swiss CO, the art expert is obliged to carry out the authentication in the best interest of his client.⁵⁶ This means that he should render his opinion on authenticity independently and objectively. Those experts who are recognised by the art market as the ultimate authority for an artist's oeuvre are very powerful as their opinion on authenticity greatly influences prices.⁵⁷ Art experts – in particular authentication boards – have recently been criticised for exploiting their oligopolistic position.⁵⁸ However, it is inevitable that knowledge is heavily concentrated on a few individuals, since becoming a recognised authority requires years of delving into the artist's oeuvre – examining many authentic works as well as forgeries.⁵⁹

The client's interests are at risk if the art expert has a stake in the outcome of the authentication. There are three examples of misalignment of interest: first, the expert's remuneration is tied to the economic outcome of the authentication and therefore the expert is more inclined to declare the work genuine.⁶⁰ Secondly, the expert himself owns or trades in the artist's works and therefore might have an incentive to keep the supply limited.⁶¹ Thirdly, the art expert has a close personal or familial relationship with the artist and therefore might be interested in excluding works of lesser quality from his oeuvre.⁶²

The client's interests are arguably best preserved at institutions such as SIK-ISEA and IFAR, since these carry out other activities such as research in art history, cover several artists and

55 *Ibid.*

56 Rolf H. Weber, in Heinrich Honsell, Nedim Peter Vogt and Wolfgang Wiegand (eds), *Basler Kommentar, Obligationenrecht I, Art. 1-529 OR*, 2010, art. 398, para. 8.

57 Von Brühl, above, note 3, at pp. 53-54; Den Leeuw and Kemp, above, note 48.

58 Darlene Fairman, 'The True Cost of Authentication Litigation', *ArtBanc Intelligence*, Issue 1, Jan. 2014, pp. 16.

59 Kallier, above, note 44, at p. 14.

60 Quentin Byrne-Sutton, Marc-André Renold, 'Introduction', in: Byrne-Sutton and Renold above, note 23, 1, at p. 15; Michael Findlay, 'The Catalogue Raisonné', in: Ronald D. Spencer (ed.), *The Expert versus the Object, Judging Fakes and False Attributions in the Visual Art*, 2004, pp. 55, p. 56; Lacy, above, note 36, at p. 216; see further CAA Guidelines stating under 'C. Ethical Issues (5)': "In rendering an opinion, it is recommended not to charge a fee, unless circumstances would not be compromised by doing so." *Hart v. Newspaper Publishing PLC* noted by Ruth Redmond-Cooper, 'Defamation and the Art World', in (1992) *I International Journal of Cultural Property*, 175.

61 *The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations*, Vol. 2, The Aspen Institute, 2010, p. 201 <http://www.aspeninstitute.org/sites/default/files/content/docs/psi/AEF_V2.pdf>; Von Brühl, above, note 3, at p. 60; Findlay, above, note 60, at p. 56; Lacy, above, note 36, at p. 216. However, see the statement of Jack Flam, president of the Dedalus Foundation in 'Defending an Artist's Legacy – The Dedalus Foundation', in: *IFAR Journal*, Vol. 13, No. 3, 2012, 34, at p. 35: "It's absurd to think that having one or two more works on the market is going to affect the value of works owned by the foundation".

62 Von Brühl, above, note 3, at p. 59.

epochs, charge a fee independent of the authentication covering only their related expenses and have no stake in the outcome of the authentication.⁶³

2.3 Duty to Give Information on the Authentication Procedure

According to article 400 Swiss CO the art expert “*is obliged at the client’s request, which may be made at any time, to give an account of his activities*”. This means that the client is entitled to comprehensive and complete information on every step and intermediate result of the authentication procedure. This information forms the basis on which the client may judge whether or not the art expert has carried out the authentication with reasonable care and skill.⁶⁴ The categorical refusal to provide information⁶⁴ is thus an infringement of the art expert’s duty under Swiss law.⁶⁵

However, the law contains no specific provisions in relation to the content of the expert’s final opinion. In particular, the parties are free to include supplemental information such as individual test results and an explanatory statement of the authenticity decision.⁶⁶ From an art expert’s perspective, the final opinion should contain merely the *essentialia* of the authentication, e.g. the results of technical and scientific analyses supporting his decision. This is in order to protect him from potential litigation and to avoid providing forgers with detailed information.⁶⁷ Some art experts even render their final opinion without outlining their rationale. This, however, is not recommended as the failure to provide any supplemental information may be inadequate for clients and the authentication is in danger of appearing somewhat arbitrary.

3. Limitation of the Art Authenticator’s Liability under Swiss Contract Law

Given the fact that authentication is more art than science and thus error-prone it is understandable that in today’s litigious society art experts have a strong desire to limit their personal liability. Many art experts require their clients to waive the right to sue in case of a negative opinion. For instance, the Francis Bacon Authentication Committee’s submission form contains the following clause:

I/We further expressly accept that neither the Committee nor any member of it shall be liable in any way to me/us as a result of any decision taken by the Committee or any opinion on the Work(s) which may be expressed by or on behalf of the Committee.⁶⁸

63 *Ibid.*, at p. 60.

64 Rolf H. Weber, in Heinrich Honsell/Nedim Peter Vogt, Wolfgang Wiegand (eds), *Basler Kommentar; Obligationenrecht I, Art. 1-529 OR*, 2010, art. 400 paras 3-4.

65 Unless otherwise agreed, this is all part of the service and not separately remunerated, see art. 394 (3) Swiss CO.

66 Jolles and Roesle, above, note 32, at p. 38.

67 Von Brühl, above, note 3, at p. 20; Flescher, above, note 19, at p. 101; Spencer, above, note 29, at pp. 192-193; see also the CRSA Guidelines, above, note 40, stating under ‘Procedure for Issuing Opinions’ that “[e]ach scholar can decide on the extent to which an opinion is explained, but attorney advise that less discussion in writing is preferable.”

68 See para. 6 (d) of the submission form for the Francis Bacon Catalogue Raisonné: <<http://www.francis-bacon.com/news/?c=Catalogue-Raisonne>>. According to para. 9 of the submission form, the agreement is governed by English law.

However, such copious limitations are not legally enforceable in Switzerland. According to article 100(1) Swiss CO, “*any agreement purporting to exclude liability for unlawful intent or gross negligence in advance is void*”.⁶⁹ It follows that only liability for minor negligence can be contractually excluded under Swiss law.⁷⁰ In practice, it is often difficult to distinguish between gross negligence (violation of the most elementary precautions and professional standards) and minor negligence (marginal carelessness and minor misconceptions).⁷¹

Should the client not agree to exclude liability for minor negligence, there are other means within the limits of article 100(1) Swiss CO available to the art expert: restricting the time limit for filing a claim and capping the maximum amount of claimable damages.⁷² In any case, art experts are advised to contractually include a limitation of their liability in tort as well as in contract.⁷³

Although the law does not require contractual limitations in written form, it is advisable from an art expert’s perspective to include these as central provisions in the main body of the contract.⁷⁴

4. Protection of the Art Authenticator from Meritless Claims under Swiss Procedural Law

Contractual limitation does not prevent clients from taking legal action against art experts. However, the Swiss Civil Procedure Code (‘Swiss CPC’) provides several features with the goal of dissuading meritless claims. First, the court may order the claimant to make an advance payment covering the expected court costs (article 98 Swiss CPC). If the claimant fails to comply, the court can declare the claim inadmissible (article 101 (3) Swiss CPC). Secondly, a person claiming damages arising from breach of contract has to prove three elements: breach of contract, damage and causation.⁷⁵ The defendant is presumed to be at fault unless he can prove otherwise.^{76,77} Evidence must be proved with utmost certainty (likelihood greater than

69 Article 100 CO is non derogable and cannot be weakened in favour of the art expert: see Rolf H. Weber, *Berner Kommentar zum Schweizerischen Obligationenrecht, Band VI, 1. Abteilung, 5. Teilband, Die Folgen der Nichterfüllung, Art. 97-109*, art. 100 para. 61.

70 Some legal experts maintain that to exclude any liability for negligence, gross or minor, is contrary to the very nature of the agency contract: see Chappuis, above, note 41, at p. 65; Ingeborg Schwenzer, ‘Beschränkung und Modifikation der vertraglichen Haftung’, in Alfred Koller (ed.), *Haftung aus Vertrag*, 1998, 99, at pp. 114-115; Thévenoz, above, note 32, at pp. 46-47; Weber, *Berner Kommentar*, above, note 69, art. 100 para. 43.

71 Weber, *Berner Kommentar*, above, note 69, art. 100 paras 95-96.

72 Chappuis, above, note 41, at p. 65; Weber, *Berner Kommentar*, above, note 69, art. 100 paras 63-71; Wolfgang Wiegand, in Heinrich Honsell, Nedim Peter Vogt, and Wolfgang Wiegand (eds), *Basler Kommentar, Obligationenrecht I, Art. 1-529 OR*, 2010, art. 100 para. 5.

73 Chappuis, above, note 41, at p. 65; Weber, *Berner Kommentar*, above, note 69, art. 100 paras 63-71; Wiegand, *Basler Kommentar*, above, note 72, art. 100 para. 5.

74 Chappuis, above, note 41, at p. 63; Thévenoz, above, note 32, at p. 46.

75 See art. 97 para. 1 Swiss CO. Hans Schmid/Flavio Lardelli, in: Heinrich Honsell, Nedim Peter Vogt and Thomas Geiser (eds), *Basler Kommentar, Zivilgesetzbuch I, Art. 1-456 ZGB*, 2010, art. 8 para. 46.

76 Wiegand, *Basler Kommentar*, above, note 72, art. 97 para. 61.

77 According to the Swiss Federal Court of Justice, an agreement to exclude contractual liability for minor negligence according to art. 100 Swiss CO leads to a reversal of the burden of proof for intent and gross negligence. This has been criticised by the leading doctrine, see Wiegand,

90 per cent)^{78, 79} Thirdly, procedural costs are allocated according to the outcome of the case (article 106 (1) and (3) Swiss CPC). These costs include court costs, reasonable attorney fees and other related expenses (article 95 (1) and (3b) Swiss CPC). Thus, Swiss procedural law strikes a fair balance between protecting art experts from meritless claims while still allowing substantiated claims.

It is worth mentioning that the Art Law Committee of the New York Bar Association is proposing similar procedural legislation to protect art authenticators. The key measures include (i) increased pleading requirements (the claim must be stated with particularity), (ii) heightened burden of proof (the evidence must be clear and convincing) and (iii) allocation of attorney fees (if the art expert prevails in court the claimant must cover his reasonable attorney fees but not vice versa).⁸⁰

IV. PROTECTION OF ART AUTHENTICATORS BY MEANS OF INSURANCE

Despite the possibility of contractually excluding liability for minor negligence and procedural protection against meritless claims, there remain two main risks for art experts under Swiss law: liability for gross negligence and any residual costs that remain with the art expert. Mitigating these two risks, Professional Indemnity ('PI') insurance indemnifies the policyholder for damages and claimants' expenses, up to the sum insured, arising out of any negligent act, error or omission.⁸¹

1. No PI Insurance for Art Authenticators in Switzerland

In Switzerland, PI insurance for art authenticators is currently not available because insurers consider the moral hazard in insuring authenticity as a PI policy to be significant. On the one hand, unlike doctors and lawyers the population of art authenticators is not large enough for the insurer to reliably calculate the probability of a claim occurring. On the other hand, with prices for art at peak levels potential claim volumes are equally high. In addition, stylistic connoisseurship as the main approach of authentication is a subjective procedure and recent high-profile scandals have proven it to be error-prone. Furthermore, art experts neither form part of a legally regulated body nor follow generally accepted industry guidelines. Thus, the insurer would have to set the insurance premium high or limit the sum insured to cover the associated risks properly. As a result, however, the insurance policy would not be economically attractive for the individual art expert.⁸²

Basler Kommentar, above, note 72, art. 100 para. 5.

78 Hans Peter Walter, in Heinz Hausheer and Hans Peter Walter (eds), *Berner Kommentar zum Schweizerischen Privatrecht, Band I, 1. Abteilung, Art. 1-9 ZGB*, 2012, art. 8 para. 136.

79 Judgment of the Swiss Federal Court of Justice of 7 Dec. 2006, BGE 133 III 153, para. 3.3. Schmid and Lardelli, above, note 75, art. 8 para. 17; Walter, above, note 78, art. 8 para. 136.

80 Fairman, above, note 58, at pp. 17-18; Julia Halperin, 'No More Silence of the Scholars', *Art Newspaper*, Vol. XIII, No. 254, Feb. 2104, pp. 1, 6; Nicholas O'Donnell, 'Proposed Legislation in New York Would Help Shield Authentication Experts from Liability', *Art Law Report*, 11 Nov. 2013 <<http://www.artlawreport.com/2013/11/11/pyork-would-help-shield-authentication-experts-from-liability/>>.

81 Jobson, above, note 22, at p. 64; see further Ellen Hoener Ross, 'Insurance for Art Scholars and Writers', *IFAR Journal*, Vol. 8, Nos. 3 & 4, 2006, 77, at p. 78.

82 Interviews conducted with David Saillen, Managing Director AXA ART Switzerland, and Kayum Guerrero, Head of Liability Insurance, AXA Winterthur, Switzerland, in Dec. 2013.

2. PI Insurance Available for Art Authenticators on the London Market

While PI insurance for art authenticators is not offered in Switzerland, it is available in London through Lloyds, “*the world’s specialist insurance market providing insurance service in over 200 countries*”.⁸³

In order to determine the capabilities and credentials of an art expert, insurance companies require *inter alia* the following information: age, qualification, number of years’ experience, area of expertise, revenue over the last three years and any membership of a recognised organisation, society or trade association. Membership of such organisations lends credibility and provides PI underwriters with some comfort with regards to the professionalism and peer recognition of the art expert.

Furthermore, insurance companies would want to know whether an art expert works under written agreements, whether any insurer has previously declined to offer or repudiated PI insurance and whether any claim has ever been brought against the art expert – successfully or not. Even if the art expert has faced authenticity-related claims in the past, he might still be able to obtain PI insurance. In their assessment, PI underwriters would take into account the circumstances of the claim and whether the art expert has taken any measures to avoid similar claims occurring in the future.

When negotiating the PI insurance policy, the art expert should pay special attention to territorial and jurisdictional limits of liability. PI insurance policies available through Lloyd’s may not cover work undertaken outside the United Kingdom or any other EU Member State (‘territorial limits’). Thus, the Swiss art expert should ensure that coverage is provided worldwide. In general, PI insurance does not cover claims that are brought in a court of law outside the United Kingdom or any other EU Member State or that are subject to the laws of any country outside these jurisdictions (‘jurisdiction limits’). It is important that the applicable law and jurisdiction are referred to the territory in which the art expert operates. In any case, as a protective measure against claims brought in foreign jurisdictions and under foreign laws, it is advisable that the terms of the business agreement between the art expert and his client state that the authentication shall be governed by and interpreted in accordance with Swiss law and shall be subject to the exclusive jurisdiction of the Swiss courts.⁸⁴

In general, PI underwriters calculate the premium as a percentage of the revenue earned from the professional services provided. The percentage depends on the above-mentioned information requested from the art expert as well as the limit of indemnity required and the deductible to be borne by the art expert.⁸⁵

CONCLUSION

With the art market booming, there is no indication that the pressure on art experts will decrease in the near future. On the contrary, it seems only a matter of time until the Swiss courts will be increasingly dealing with authenticity-related claims. Thus, it is vital that art experts take precautionary measures shielding them from harmful litigation.

83 <<http://www.lloyds.com/lloyds/about-us/what-is-lloyds>>.

84 Another possibility would be to refer to arbitration in Switzerland, which has at least the advantage of privacy, but the cost of which frequently exceeds the cost of litigation and the resources of the parties.

85 Interviews conducted with Richard Nicholson, Executive Director, Willis Fine Art, Jewellery and Specie (FAJS), and Andrew Jobson, Divisional Director, CBC UK Ltd, in Feb. 2014.

In Switzerland, this means that the art authenticator must fulfil the statutory duties arising from the agency contract. With regards to the duty to diligently perform authentication, it is key that art experts incorporate technical/scientific methods, in particular for valuable artworks. With regard to the duty to act in the best interest of the client, art experts should strictly avoid taking any inappropriate financial or personal interest in the outcome of the authentication. The appearance of venality can quickly destroy an art expert's reputation, which takes years to establish. With regards to the duty of information, the authentication procedure is often perceived as opaque and even arbitrary. It is in the best interest of art experts to counteract this perception. "*The expert's opinion must not only be honestly arrived at, but it must appear to have been honestly arrived at.*"⁸⁶ It is crucial that art experts help their clients develop an understanding of the authentication procedure and its limitations, i.e. that absolute certainty is often unachievable. Although stylistic connoisseurship is to a large extent based on tacit knowledge, art experts should nevertheless make an effort to explain *how* they arrived at their conclusion. Furthermore, it is good business practice for any art expert to set out the terms of business in writing. This agreement should include the scope of work being undertaken, the responsibilities of each party, any limitation of the art expert's liability and the applicable law and place of jurisdiction. Without such agreements, art experts are at a severe disadvantage to prove their case in court. In addition, written agreements are a key requirement for any prudent underwriter in order to accept a PI risk. Finally, every art expert should take a view as to the necessity and economic viability of closing any gaps in protection by means of PI insurance. By taking these precautionary measures, art experts can alleviate the pressure.⁸⁷

Another way for art experts to avoid litigation would be to strictly follow generally accepted guidelines. However, given the vast array of different materials and epochs, authentication guidelines could refer only to a theoretical benchmark painting and would probably not be applicable to the specific artwork at hand.

86 Ronald D. Spencer, 'Authentication in Court, Factors Considered and Standards Proposed', in Ronald D. Spencer, *The Expert vs. The Object*, 189, at p. 209.

87 In many jurisdictions as part of the precautionary exercise attention is given not only to the definition of obligations but to the agreed mode of dispute resolution should a controversy arise.

