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Bandle, Anne Laure

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“Legal Questions of Art Auctions” (Rechtsfragen der Kunstauktion): Seminar held by the Europe Institute, University of Zurich and the Center of Art and Law, Zurich, 13 April 2011

Anne Laure Bandle*

Directed by Professor Dr. Kurt Siehr, Professor Dr. Wolfgang Ernst, and Dr. Andrea F. G. Raschèr, the seminar exposed the legal fundamentals of art auctions and provided an overview of some underlying problems currently faced by practitioners and legal scholars. The seminar was followed by a panel discussion called the “Boon and Bane of Auction Houses for the Art Market,” gathering directors of auction houses as well as art market and art law experts.

As an introduction Kurt Siehr subtly pointed out several legal consequences deriving from what he qualified as a “nightmare for legal scholars”: the threefold legal relationship involving consignor, auctioneer, and buyer. This may even turn into a quadrifold relationship, should a fourth party lay claim to property for instance.

Cyril Koller reported on some of the key facts and figures of the art auction market from an auctioneer’s perspective. The role of its main players has slightly shifted during the last years. For example, auction houses increasingly conduct private sales or offer lots acquired directly by the artist. Old Master dealers occasionally share the acquisition costs at auction of paintings they then resell to private collectors.

Thanks to the disclosure of auction sale results, Cyril Koller alleged that auctioneers are the only reliable and transparent art market indicator. These results are analyzed by online databases, which provide a useful tool to all stakeholders of the art market. The Internet has been particularly helpful also to small auction houses to scale up outreach.

Given the fierce competition between major auction houses, Cyril Koller named a few indicators on which the seller often relies when choosing a particular auction house. He believes that the same major artwork is likely to be sold at an equal price, however, regardless of which well-established auction house offers it for sale.

*Art Law Center, University of Geneva, Email: AnneLaure.Bandle@unige.ch

Wolfgang Ernst presented the legal fundamentals and contractual relationships of auction sales. Each relationship has to undergo a separate examination in terms of contractual qualification, international and domestic jurisdiction, and applicable law, including the relevant Swiss norms and validity requirements for conditions of business.

Practical complications may arise when the auction house acts as agent for account of the undisclosed principal. Unlike various foreign legislations, Swiss law only exceptionally permits the representation of an unidentified principal (cf. art. 32 Federal Act on the Amendment of the Swiss Civil Code, CO), which generally falls under the same legal scheme as representation without authority (art. 39 CO). Therefore, despite any statement to act as agent in the name and account of the undisclosed principal, the auction house may be held liable.

Wolfgang Ernst ultimately mentioned the “apparent antagonism of interests” between auctioneer and purchaser, in particular with regard to liability and hammer price. In fact, while the purchaser strives for the lowest price and greatest liability guarantee offered by the auctioneer, the auction house pursues the opposite interest along with the consignor’s.

Florian Schmidt-Gabain advanced several theses on the due diligence requirements imposed on art dealers and auction houses under article 16, sections 1 and 2, of the Federal Act on the International Transfer of Cultural Property should an art dealer buy a cultural good at auction. These requirements include identity and provenance verifications of consignor and consigned good (section 2).

Departing from the assumption that the buyer concludes the sale agreement with the consignor rather than with the auction house, the art dealer auctioning the good would have to comply with due diligence and examine the rightful ownership of the consignor. This would require the disclosure of the consignor’s identity by the auction house, however, which may be circumvented in reducing the scope of section 2 on teleological grounds, hence excluding its application to art dealers buying at auction. Florian Schmidt-Gabain also revisited section 1 on the general circumstances whereupon art dealers may assume that the auctioned lot is neither stolen, nor sold against the will of its owner, illicitly excavated, or illegally imported. Given dual due diligence requirements for auction houses and art dealers, the latter may rely on information provided by the auction catalogue and solely have to proceed to further verifications where information is incomplete.

Professor Andreas Heinemann focused his presentation on antitrust issues of the auction market in Europe and in the United States departing from the price-fixing scandal between Sotheby’s and Christie’s. Christie’s benefited from a punishment exemption under the U.S. Cartel Leniency Policy, whereas both auction houses were targeted by class actions filed by deceived sellers, buyers, and shareholders. The risks for participants of a cartel are generally more far reaching in the United States than in Europe, because according to U.S. antitrust law they can be sanctioned by fines and imprisonment.

Several potential cartel scenarios exist on the bidder's side, such as dealers pooling and shill bidding. Qualifying such behavior as anticompetitive rather than as unfair business practice may be problematic, given that demand cartels typically decrease and not increase prices. Vertical exclusivity arrangements between an auction house and several consignors bear the risk of customer foreclosure. Another growing practical and legal concern exists in the dominant position by unassailable attribution experts (e.g., authentication boards and authors of *catalogues raisonnés*). Such a natural market leader position is abusive should the expert refuse to examine the artwork but not where examination results are unfavorable. Based on antitrust law, every owner is entitled to an authentication and attribution examination *de lege artis*.

Dr. Mark A. Reutter gave an overview of many legitimate and illegitimate manipulations in auction trade transactions, which may occur by bidders, consignors, or auctioneers.

On the side of the purchasers, bid rigging and bidding communities such as the Medici Conspiracy may distort the price formation of a lot at auction, as much as telephone bids and bids placed directly by the auction house—all lacking of transparency. According to the Swiss Federal Tribunal, consignors are authorized to influence price formation by placing bids on their own goods, as long as it is mentioned in the auction catalogue (BGE 109 II 123; 112 II 337). Auction houses, however, provide buyers with financing opportunities and sellers with guarantees on auction proceeds, all of which have also met with great criticism. Mark A. Reutter concluded by remembering that many manipulations remain undisclosed and that the art auction market is only “a part of the puzzle.”

Professor Claire Huguenin examined the issue of the buyer's warranty rights and their exclusion and limitation in art auctions by means of three Swiss court cases (BGE 126 III 59; 123 III 165; 114 II 132).

Generally, in view of the broad exemptions stipulated in their conditions of business, auction houses can only be held accountable for fraudulent deceit. However, the buyer may also turn against the auction house for gross negligent behavior as to deficiency in title and defect regarding the quality of the artwork. Pursuant to the Swiss Federal Tribunal, an agreement on general terms of the conditions of business by the weaker or less experienced party does not cover unusual clauses, of which he was not made specifically aware (BGE 119 II 443).

Huguenin criticized the “market-maker” status imposed on auction houses by referring to *Tony Shafrazi Gallery v. Christie's*, Index No. 112192/2007 (Sup.N.Y. Co.2008), fearing an imbalance in pooling risks between auctioneer and purchaser. Purchasers already benefit from authenticity guarantees by major auction houses despite the various opportunities to gather information about the lot prior to the sale.

Andrea Raschèr closed the seminar with an emphasis on how the threefold contractual relationship of auction sales can raise many complications as well as scores of interesting conclusions.