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Sommaire

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Arbiters of Value: The Complexity and Dealers' Liability in Pricing Art

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INTRODUCTION

Prices for works of art have risen relentlessly over the last ten years, frequently reaching double-digit million amounts today. The price trend is more due to the buyer's growing wealth than to a greater demand[1]. As art has proven itself to be an interesting investment, it attracts the greater liquidity of those investors that are discouraged by traditional assets, such as stocks and real estate. Naturally, where prices are changing, appraisers must also adapt.

Whether a gallery owner seeks to establish an artist's market value, a dealer advises a collector on the value of a painting in the market, or an auction house assesses an estimate price for a potential consignment – all share the concern of effectively evaluating art objects. Determining the market value of an artwork is a challenging endeavour. It is essential that the appraiser understands the functioning of the international art market, and how prices are made and must be interpreted. The proper determination of the art object's market value is important to appraisers as they may incur liability for erroneous valuations.

In its first part, this chapter aims to shed light on the pricing practices of the art market, and on the market's understanding of an art object's value[2]. It further endeavours to explain why some artists are priced higher than others, or more specifically, how preference is created.

In its second part, this chapter examines the appraiser's liability for over- or underpricing art objects in the different evaluation contexts. Finally, it analyses whether these practices of the art market are appropriate in view of the applicable legal setting.

I. Complexity of Art Prices

Because the art market functions by its own unwritten rules and operates by opacity, pricing art is a complex undertaking. Oral understandings, secret arrangements, personal favours, and manipulation of prices and taste occur frequently[3]. When determining the price of an artwork, different interests come into play, such as positioning the artist on the market, inducing bidding, or making a profitable sale. Moreover, art prices reflect numerous, non-financial intangible factors, such as the pleasure of owning a prestige symbol and the desire to signal wealth[4].

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1 See Piroschka Dossi, *Hype! Kunst und Geld*, 5th ed. (Munich: Deutscher Taschenbuch Verlag, 2011), 53; Iain Robertson, "Price Before Value," in *The Art Business*, ed. Iain Robertson and Derrick Chong, 29-54 (New York: Routledge 2008), 30.

2 This chapter focuses exclusively on the market value of artworks, which generally differs from its art historical, fiscal, or insurance value.

3 Cf. Isabelle Graw, *Der große Preis – Kunst zwischen Markt und Celebrity Kultur* (Freiburg: Dumont, 2008), 66.

4 See Adam Davidson, "How the Art Market Thrives on Inequality," *The New York Times*, May 30, 2012, accessed December 26, 2013, http://www.nytimes.com/2012/06/03/magazine/how-the-art-market-thrives-on-inequality.html?ref=magazine&_r=0.

To understand the pricing system of the art market, conventional understandings of the market for commodities must be surpassed. When evaluating art, appraisers reconcile the capitalistic and quantitative logic with the logic of quality and perception[5]. The qualitative logic is tied to taste and preferences, to what the artwork expresses, and to how it appeals to its viewer.

In understanding the quantitative logic, material effects on prices have been identified: criteria such as technique, size, and whether the work has been made by the "artist's hand" or in edition can impact price[6]. For example, demand is likely to be higher for larger artworks and for paintings than for smaller-sized artworks and lithographs[7].

However, various authors have excluded the cost of producing art as a price determinant[8]. According to David Ricardo, the value of rare art is "wholly independent of the quantity of labour originally necessary to produce them"[9]. The selling price of limited goods like art does not account for its production, which instead varies according to the "wealth and inclinations of those who are desirous to possess them"[10]. Consequently, differences in price for the material features of artworks are not related to production costs and time considerations, but instead to the market's preference for these material characteristics. In other words, if prices are higher for larger-sized paintings than for smaller-sized prints, reasons are attributable mainly to the market's preference for big artworks and the technique of paint, and not because such works are more cost and time consuming to produce.

To some extent, there is a significant degree of discretion in pricing art and an exact value cannot be determined[11]. Appraisers often operate considering the sale prices of comparable works, accessible thanks to art data platforms. While some market actors rely on pre-established values, others are very much engaged in establishing the values themselves. Pricing in the art world follows a chain of actors, led by certain cultural lobbyists who decide what is of cultural significance and what is not.

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5 Cf. Olav Velthuis, *Talking Prices – Symbolic Meaning of Prices on the Market for Contemporary Art* (Princeton et al.: Princeton University Press, 2006), 25.

6 *Idem*, 103-104.

7 *Ibid*.

8 For an overview, *idem*, 97-98.

9 David Ricardo, *Principles of Political Economy and Taxation* [1817] (G. Bell and Sons: London, 1925): 6.

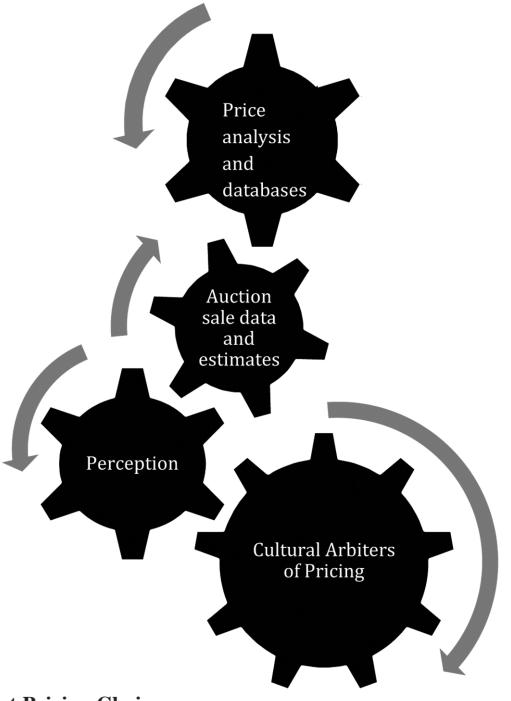
10 *Idem*, 6; see also Neil De Marchi and Hans J. Van Miegroet, "Art, Value, and Market Practices in the Netherlands in the Seventeenth Century," *Art Bulletin* 76, no. 3 (1994): 451-64 (on Adam Smith's analysis).

11 See Heinrich Honsell, "Gutachterhaftung in der Schweiz," Conference paper, Kunst & Recht Conference, *Haftung von Gutachtern im Kunstrecht*, Europainstitut, University of Zurich, November 27, 2012, 4.

A. Art Pricing Chain

The market price of an artist and his work is commonly established by means of **art market databases** such as artnet and artprice. Much of the databases' analysis and research is based on sales data openly provided by public auctions, in particular **hammer prices and estimate values**.

The private dealers' sale information, on the other hand, is generally not included in the statistics and analysis, given that the sale results transparency and are difficult to access[12]. At auction, price formation is subject to the bidders' perception of the art object, and to their financial means[13]. So then, what does ultimately trigger the buyers' interest for specific artists and their work? A closer look at the following art pricing "gears" enables us to trace the pricing chain to a group of highly influential dealers.



Art Pricing Chain

12 See The European Fine Art Foundation, *The International Art Market in 2011 – Observations on the Art Trade Over 25 Years*, prepared by Clare Mc Andrew (Helvoirt: The European Fine Art Foundation [TEFAF], 2012), 25.

13 See Jean-Pierre Jornod, "Le prix d'une œuvre d'art, " in *L'art et le droit – Points forts pour les collectionneurs d'art*, Cahier d'AXA Art Assurance SA, 57-63 (Zurich: AXA Art Versicherung AG, 2009), 63.

1. Auction House Data as a Barometer of Value

For works that have not been sufficiently and recently traded on the market – which is characteristic of the primary art market[14] – auctions may seem the preferable sale method. Instead of determining an artist's market value himself, the dealer may be inclined to leave price determination to interested bidders at an auction sale. However, when it comes to the primary market, dealers prefer to sell art by means of fixed prices for the following reasons: (1) to "gain control over the diachronic price development of an artist"; (2) because of the "parasitic" position of auction houses, generating inflated and chancy sale results; and (3) to control the "future biography of artworks", including considerations of limiting resale and speculation such as whether it is sold to a museum or a speculating dealer[15].

Art market researchers look closely at auction sale results. Also, dealers have recognized auction sale data – notwithstanding its parasitic features – as a barometer of value when establishing prices on the secondary market[16]. As revealed by a major art market research institute, the European Fine Art Foundation, "[t]he transparency of prices and the public nature of sales data in this sector of the market has meant that it continues to be the basis for much of the analysis and research in the art market, unlike the data on dealer's sales, which relies heavily on polling and qualitative research"[17]. Sale prices obtained at auction are thus taken as an indicator of an artist's or a collectible's market value despite the contingency of auctions and factors challenging truthful pricing[18].

It often occurs that an artwork after passing through a gallery will be priced much higher once it appears at auction. Price differences between the primary and secondary market fall in favour of the auction houses due to their public character and accessibility, their ability to reach a greater audience, including investors, and to the exciting momentum created at auction by means of the bidding system[19]. A further reason is the reserve and guarantee system provided at auction, which offers security to consignors and additional financial means to investors and buyers[20]. Galleries, on the other hand, are free to select to whom they desire to sell the art, and may not want to deal with buyers who acquire it with the sole purpose of making a quick profit. In addition, some galleries claim to honestly value their artists, seeking to promote their careers and to "safeguard the long-stability of prices"[21].

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14 On the primary art market, new art objects are offered for sale for the first time, unlike on the secondary or resale market.

15 See Velthuis (note 5), 82-84. On the disapproval of certain dealers to sell art to investors, see also Richard Polsky, *I sold Andy Warhol (too soon)* (New York: Other Press New York, 2009).

16 See Velthuis (note 5), 83.

17 The European Fine Art Foundation (note 12), 25.

18 See below, 39.

19 Interested buyers have very limited time to make their decisions to purchase the lot by placing bids that are outperforming the highest bid.

20 On guarantees at auction, see Sylvain Marchand, chapter 2 of this book.

21 Velthuis (note 5), 80.

Despite the fierce competition between the major auction houses, it has been argued 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"[22]. In support of this contention, there is authority suggesting that pricing of art at auction is, to some extent, subject to the supply-demand model, resulting in the establishment of the artwork's equilibrium price[23]. The auction market is said to be demand-driven, where "sellers offer items for auction, and potential buyers find what they want to purchase proactively"[24]. Potential buyers enter the auction sale with a firm position on what they want to buy[25]. Given that the supply in art typically remains unchanged, fluctuations in demand inevitably lead to changes in price[26]. On the other hand, and unlike any other commodity on the market for rare and precious objects including art, supply may prompt demand, or at least induce interest[27]. Ultimately, it essentially comes down to how demand is created, or more specifically, how an artwork is perceived.

2. Perception

Each artwork embodies a particular attribution to a certain creator or place of origin, provenance[28], and date or period. The appreciation of an artwork is very much linked to its attribution. In fact, certain artists are deemed to be more valuable than others. The inclusion of an artwork in a royal collection adds to it a certain historical aura. Dating also has an impact on perception, as price differences exist for works by the same artist according to their date of creation, or for furniture and collectibles depending on the period of manufacture. Accordingly, artworks are enjoyed within their context[29]. Attributes provide that context: they influence the art object's aura and, thereby, the viewer's perception.

At auction, where buyers can place bids of any amount, hammer prices have sometimes by far exceeded the set estimate values[30]. Perception may induce a buyer to pay whatever it

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22 Anne Laure Bandle, "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," *Journal of International Cultural Property* 18 (2011): 449-451, 449 (quoting Cyril Koller, director of the major Swiss auction house Koller Auktionen).

23 See Dossi (note 1), 139; Velthuis (note 5), 80; Jornod (note 13), 58.

24 Mike Brandly, "Auctions: Does the offering cause a desire to own?" *Mike Brandly: Auctioneer Blog*, accessed December 26, 2013, http://mikebrandlyauctioneer.wordpress.com/2012/07/02/auctions-does-the-offering-cause-a-desire-to-own/.

25 *Ibid*.

26 See Velthuis (note 5), 97 referring to David Ricardo's analysis.

27 See Jornod (note 13), 58.

28 Provenance is the history of ownership of an artwork.

29 See Raul Jáuregui, "Rembrandt Portraits: Economic Negligence in Art Attribution," *U.C.L.A. Law Review* 44 (1997): 1947-2030, 1950, fn. 3.

30 Clare McAndrew, "Determining Art Prices: Objective and Subjective Valuations," in *Fine Art and High Finance: Expert Advice on the Economics of Ownership*, ed. Clare McAndrew, 50-62 (New York: Bloomberg Press, 2010) 60.

takes to acquire an artwork. Far from any investment concerns, such acquisitions are made purely out of an emotional attachment to a work. In fact, "it is very unlikely, if the work is brought to market again in the short or medium term, that the seller would find another buyer with both the same emotional attachment to the work and the same financial means to buy it"[31] despite receiving the greatest attention from the media.

Perception reflects an interest in specific artworks that may be rooted in aesthetic pleasure, trends, or prestige[32]. Wealthy collectors' demand for art is also explained by their desire to acquire a status symbol of their fortune and power[33]. The "Veblen effect", named after Thorstein Veblen and his theory of conspicuous consumption, can explain why demand for a good grows simply because of its higher price[34]. According to Veblen, "wealthy individuals often consume highly conspicuous goods and services in order to advertise their wealth, thereby achieving greater social status"[35]. The purchase of such so-called "prestige" or "status" goods enables a public display of discretionary economic power and the maintenance or attainment of a given social status[36]. Such goods also include art objects[37]. Connoisseurs, on the other hand, are more likely to be influenced by the belief in the potential increase in value and importance of the artwork, especially in its posthumous importance[38].

So then, what inevitably explains our greater esteem for works by artists such as Jackson Pollock (1912-1956), Robert Motherwell (1915-1991), Mark Rothko (1903-1970), Willem de Kooning (1904-1997), and Arshile Gorky (1904-1948), to name only a few American Abstract Expressionists? Why does society seem to agree on its preference for certain artists, periods, or movements? Interest in a work is influenced by external incitement. In brief, specific individuals have pre-selected these artists and the works they consider to be valuable, and the art world follows suit.

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31 *Idem*, 60; see also Davidson (note 4), quoting Sergey Skaterschikov, who publishes an influential art-investment report, for saying that no painting bought for US$30 million or more has ever been resold at a profit.

32 On art acquired for prestige reasons, see Bernard Schulz, "The New Status Symbol," *The German Times*, August 2008, accessed December 26, 2013, http://www.german-times.com/index.php?option=com_content&task=view&id=7691&Itemid=103; Hans-Peter Katz, "Sachmängel beim Kauf von Kunstgegenständen und Antiquitäten," PhD diss., (University of Zurich, 1973), 14.

33 See Jean-Jacques Rousseau, *Œuvres complètes, 1964[e], vol. III*, ed. B. Gagnebin and M. Raymond (Paris: NRF-Gallimard, 2007), 523; Jimena Hurtado, "Jean-Jacques Rousseau: Economie Politique, Philosophie Economique et Justice," *Revue de philosophie économique* 11 (2010/2): 69-101, 77; Giso Deussen, "Kunst Sammeln und Repräsentieren – Von der Leidenschaft des Sammelns und dem Jahrmarkt der Eitelkeiten," in *Repräsentation in Politik, Medien und Gesellschaft*, ed. Lutz Huth et al. (Würzburg: Königshausen & Neumann, 2007), 169.

34 See Thorstein Veblen, *The Theory of the Leisure Class: An Economic Study of Institutions (1899)* (London: Macmillan & Co. Ltd, new edition printed 1912), 68-101; Dossi (note 1), 206.

35 See Laurie Simon Bagwell and B. Douglas Bernheim, "Veblen Effects and the Theory of Conspicuous Consumption," *The American Economic Review Vol. 86, N. 3* (June 1996), 349.

36 *Ibid*.

37 See Dossi (note 1), 206.

38 See Graw (note 3), 30-31.

3. Cultural Arbiters of Pricing

Historically, the pricing power belonged to collectors. In the early 1950s, there were too few buyers on the art market, which explains why collectors pulled the strings[39]. When selling art, collectors also could impose desired prices, regardless of whether they were viable on the market or not[40]. At that time, the collectors supported the galleries and artists, enabling them to continue their work[41]. The collector and art critic Sidney Janis followed a simple business model in seeking to promote Abstract Expressionists such as Pollock, De Kooning, and Rothko: he enticed away key talents from rival galleries, lowered the prices of their works since they were not selling, and gradually raised them again once they caught on in the market[42]. Despite his success, many quality paintings would fail to find a buyer[43]. With the rise of the Pop art generation in the 1960s, the power shifted to artists, who had started to drive harder bargains and were allowed to sell out of their studios[44].

Art dealers took over the pricing reins by the early 1980s: buyers were placed on waiting lists and offered works by lesser-known artists before being able to acquire the best pieces[45]. At that time, galleries and auction houses followed distinct purposes: it was the galleries' role to discover and promote artists, while their work was sold at auction once "the consensus of the art world deemed them worthy"[46]. To the greatest dismay of the galleries, auction houses gradually began to sell artworks that had just been created[47].

The incessant acceleration of the market's pace has obscured the time necessary for the art world to reach a consensus regarding the quality of an artist new to the market. Instead, cultural arbiters manipulate that consensus by actively magnifying the artistic aura and quality of the oeuvre. Today, art dealers still bear the role of selecting the artists they want to promote. The most important dealers have become as renowned as their artists, sometimes even exceeding their reputation, especially prior to the artists' establishment on the market.

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39 See Polsky (note 15), 22; Betty Parsons in Laura De Coppet and Alan Jones, *The Art Dealers*: *The Powers Behind the Scene Tell How the Art World Really Works* (New York: Clarkson N. Potter, Inc., 1984), 25.

40 See Leo Castelli in De Coppet and Jones (note 39), 87.

41 See for instance the evidence given by Betty Parsons in De Coppet and Jones (note 39), 22, 23, and 25.

42 Polsky (note 15), 23; see Sidney Janis in De Coppet and Jones (note 39), 39.

43 *Ibid*.

44 Polsky (note 15), 23.

45 *Idem*, 24.

46 *Idem*, 25.

47 *Ibid*.

The manipulative process departs from a circle of dealers which have achieved a reputation amounting to "spiritual leaders"[48]. In running their galleries, these much-acclaimed dealers have portrayed themselves as "visionaries of the artistic field"[49]. Art dealer Irving Blum, for instance, was reputed for always being ahead of his time. Considering that he had been the first dealer to exhibit works by Andy Warhol (1928-1987), collectors and dealers from then on took note of Blum's business moves[50].

By means of their manifold relations to the cultural field, and necessary for the promotion of the artists they represent, these leading dealers are the "central nodes […] of the art world"[51]. Basically, dealers position their artists in a way that directly impacts art critics, who report about the artists in the media and to museum curators, who, in turn, consider an exhibition of their works. This chain altogether leads to an increase in scholarly attention devoted to these artists[52].

Museums and critics are key actors to promote understanding and appreciation of the selected artists, artistic movements, and techniques. For example, a museum exhibition adds great visibility to works of art and enhances their value by contributing to their provenance[53]. Art critics review the shows and explain the artistic and innovative merits of the selected works, thereby generating more scholarly consideration[54]. These indirect cultural arbiters translate the dealer's preferences to their audience, thus influencing its perception. The audience sustains the credibility of the dealers' choices and enhances the significance of the selected artists and works, all of which ultimately legitimizes their market value[55].

Charles Saatchi is well-known for having mastered the art of media manipulation in promoting his own collection: "Saatchi commissioned a set of four books on his collection, with profuse illustrations, and essays by the most respected critics. The art world was shocked by both the immense quantity and quality of what he was able to amass. With his marketing ploy in place, he shrewdly began selling off his own collection, reaping huge profits. […] Besides publishing catalogs, he opened his own museum in London,

48 Velthuis (note 5), 16. A hierarchy amongst dealers has already existed earlier: "Art dealers were ranked according to the importance of the art they handled. If you weren't a dealer in the top five percent, you paid homage to your superiors in order to get what you wanted. You had to find ways to integrate yourself," Polsky (note 15), 25.

49 Velthuis (note 5), 17; see Graw (note 3), 80 on Larry Gagosian.

50 See Polsky (note 15), 69 and 84 on how much money Blum made on Warhol paintings.

51 Velthuis (note 5), 24.

52 *Ibid*.

53 Provenance includes references to museum exhibitions, which greatly supports the artwork's quality and authenticity and therefore impacts on its expressive and monetary value. See Noah Horowitz, *Art of the Deal – Contemporary Art in a Global Financial Market* (Princeton: Princeton University Press, 2011), XVI.

54 Cf. Clare McAndrew (note 30), 52; Velthuis (note 5), 24.

55 Graw (note 3), 45.

the Saatchi Gallery. Once his artists were critically established, he repeated the process of selling off paintings and reaping embarrassing profits"[56]. Thus, Saatchi was involved in all stages of the taste-making process. Not only did he work on art critics to obtain their approval, but his museum further facilitated sustaining the publicity, uniqueness, and desirability of the works that he selected.

Auction houses endorse the cultural arbiters' selection of artists by providing the artworks with an internationally visible and accessible sale platform. Through their catalogues, auction houses can insist on the quality and uniqueness of the works by elaborately describing the techniques used, the background of the artist, and the history of previous owners. Furthermore, they validate the prices established by the galleries, which are often surpassed given the enhanced liquidity[57].

By their actions, cultural arbiters generate preferences in the art market that ultimately reach the collectors, who shape the demand at sales through their desire to purchase and own the art object. Insiders of the art world also do not remain unaffected by successful artists on the market and, despite their connoisseurship, consider them to be of artistic relevance as well[58]. In fact, persuasive efforts of the charismatic dealers are as much directed towards experts as they are at collectors[59].

Given their standing, leading dealers ultimately select those artists and works which deserve the market's acclamation, hence acting as gatekeepers to the group of those deemed aesthetically and economically important. They may decide that an artist has reached sufficient maturity to deserve their representation and that representation justifies a price raise. Artists are therefore eager to have their works shown by these reputable galleries[60]. By providing valuable promotional material, raising the artist's prices, and receiving a great deal of attention from the media, they endorse the artist's oeuvre and thus produce a treasured context[61].

Moreover, cultural arbiters coordinate their efforts amongst each other, thereby shaping the market that is alleged to be "based on manipulation"[62]. The success of the oeuvre of Jean-Michel Basquiat (1960-1988) illustrates well how such manipulations may be effective: dealers convincingly established that Basquiat was a Warhol proxy at a lower price[63].

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56 Polsky (note 15), 65.

57 *Idem*, 25 and 28.

58 Graw (note 3), 45.

59 Velthuis (note 5), 41.

60 See Betty Parsons in De Coppet and Jones (note 39), 25.

61 See the example of the artist Robert Bechtle, whose standing on the market raised by moving from the gallery O.K. Harris Works of Art to Gladstone, in Polsky (note 15), 32.

62 Dan Kedmey, "Is a Basquiat Painting Really Worth $16 Million?" *The New York Times: The 6th Floor blog*, June 1, 2012, accessed December 26, 2013, http://6thfloor.blogs.nytimes.com/2012/06/01/is-a-basquiat-painting-really-worth-16-million/, quoting Sergey Skaterschikov.

63 *Ibid*.

Auctions supported that representation of a Warhol peer and, eventually, the buyers followed suit.

The well-respected art dealer Larry Gagosian juxtaposed the work of Francis Bacon (1909-1992) with Damien Hirst's (1965-). In an exhibition of both artists' works, he "was making a profound if obvious statement about the young artist's place in [England's] new pecking order"[64]. All actors in the art market invest a lot of effort and money to sustain the created perception since they possess a shared interest "to keep the story going"[65]. After all, cultural arbiters aim to persuade as many market actors as possible to think along the same defined lines. By achieving this goal, important price movements are caused[66].

Primarily, the art market is peculiar because it is very much based on perception, especially with regard to contemporary art. Technique and material costs play a minor role. Instead, the artworks' aura, as created and intensified by the work of direct and indirect cultural arbiters, is key to its appreciation. In the art market, perception becomes reality[67]. That, in turn, encourages market manipulation.

B. Factors Challenging Truthful Pricing

Particularly for high-end art, the art market is a far cry from the ideal where demand and supply freely meet and reach fair prices[68]. Instead, many factors challenge truthful pricing.

Both auction houses and galleries generally draw a profit based upon the artwork's sale price. Thus, they pursue personal commercial interests when pricing art.

An auction house's estimate price range is used as a marketing tool. Ideally, it is assigned "low enough to encourage bidding, but high enough to treat the painting with respect"[69]. On the other hand, auction houses have offered consignors unrealistic estimates for their artworks only to obtain the consignment[70]. Moreover, each lot is generally subject to a reserve price, i.e. "the confidential minimum price below which a lot will not be sold"[71] as agreed with the consignor. Finally, the ultimate paid amount may depart from the officially announced price, as major auction houses offer discounts on the seller's and buyer's

64 Polsky (note 15), 93.
65 Kedmey (note 62), quoting Sergey Skaterschikov.
66 See Dossi (note 1), 42.
67 See Polsky (note 15), 255; *ibid*.
68 See Graw (note 3), 51.
69 Polsky (note 15), 89.
70 *Idem*, 228.
71 Ralph E. Lerner and Judith Bresler, *Art Law: The Guide for Collectors, Investors, Dealers & Artists*, 4th ed. (New York: Practising Law Institute, 2012), 338.

premiums[72], and in view of guaranteed prices for top lots that are paid to the consignor regardless of the actual hammer price reached at auction[73]. Despite the fact that such arrangements have slackened during the crisis[74], the influence on price formation remains problematical considering that auction sale results are taken as a reference for an artworks' market value.

The primary market involves mutual gifts and favours by artists and dealers, such as when artists are subsidized by dealers and donate some of their works in return, and by collectors who buy works or otherwise sponsor the activities of the given artist or gallery[75].

As mentioned, dealers may maintain an interest in securing an artist's value in the long term. In that event, they are likely to set prices honestly and may refuse to sell to buyers who only seek an investment opportunity[76]. Dealers have also bought back a work offered at auction, which failed to obtain the assigned price, with the purpose of sustaining the artist's value[77]. Prices may also be distorted if dealers sell artworks on a regular basis to personal connections rather than to buyers willing to pay a higher price. Not only may these personal connections profit from a discount, but such favours also affect the optimal allocation of scarce resources[78].

On the buyer side, art auctions are exposed to the risk of collusive ring bidding aimed at depressing the lot's price[79]. Furthermore, collectors have stimulated prices at auction by means of rigged bids in order to maintain or raise the value of their own collection. A famous example is the Mugrabi family, which holds one of the biggest collections of works by Andy Warhol. The family has frequently bid at auction when a work by Warhol was on sale, in an attempt to aid the lot's attainment of a certain amount. Sometimes, they may well be the highest bidder. Moreover, the Mugrabis have sold their Warhols privately when they could realize a high price[80].

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72 Such backroom arrangements have been disclosed in *Accidia Foundation v Simon C. Dickinson* [2010] EWHC 3058 (Ch), [2010] All ER (D) 290 (Nov), Chancery Division, November 26, 2010; see also Orley Ashenfelter and Kathryn Graddy, "Art Auctions," *CEPS Working Paper* No. 203, Princeton University, March 2010, accessed December 26, 2013, http://www.princeton.edu/ceps/workingpapers/203ashenfelter.pdf, at 8.

73 Guarantees are either warranted by the auction house itself, or more frequently, by third parties, see S[arah] T[hornton], "Financial machinations at auction," *The Economist*, November 18, 2011, accessed December 26, 2013, http://www.economist.com/blogs/prospero/2011/11/art-market.

74 See Polsky (note 15), 257.

75 See Velthuis (note 5), 74.

76 *Idem*, 89-90.

77 See Betty Parsons in De Coppet and Jones (note 39), 30. The alleged success of Damien Hirst's "Beautiful Inside my Head" auction at Sotheby's London in September 2008 has been said to have been supported by bids or purchased made by Hirst and Sotheby's. Hirst's Diamond Skull for instance was bought by an investor consortium which included Hirst himself; see Horowitz (note 53), XIV-XV.

78 See Velthuis (note 5), 59 and 74; Polsky (note 15), 66.

79 See Ashenfelter and Graddy (note 72), 5.

80 See Polsky (note 15), 66.

Does their behaviour imply that the value of Warhol's works is artificially inflated? It certainly puts into perspective the assumption that auctions are a barometer of value.

C. Impact on the Work of Art

The growing speed of the art market has induced contemporary artists to produce more works in lesser time, which has negatively impacted quality and led to industrialised production. Artists have also become much more aware of market tendencies by creating works that respond to the interest of potential buyers instead of pursuing their creative impulses. The trade of art as a commodity has alienated artists from their work and their labour[81]. Instead, the price-setting mechanism replaces artistic values by commensurable aspects.

II. Dealers' Liability in Pricing Art

In an attempt to regulate market practices and to protect individuals seeking expertise, art pricing and authentication has found its way into law.

New York City has a "truth-in-pricing" law that requires items for sale, including art, to have a price tag conspicuously displayed[82]. Although the law is aimed at the protection of consumers of commodities, it also has been enforced against galleries in an effort to increase transparency in the art market. Some galleries have, however, refused to comply with the labelling rule, believing that posting prices on valuable works would generate security concerns and disrupt the exhibitions' aesthetics "by transforming artworks into commodities"[83].

Similarly, Switzerland has enacted a regulation on price disclosure that applies to certain art sales, with the exclusion of auctions, and specifies whether prices must be displayed on the good itself or in close proximity[84]. For antiques, art objects, furs, jewellery, and other items made of precious metals that cost above CHF5,000, prices, instead, may be printed in catalogues and price lists that are easily accessible and readable[85]. Nonetheless, Swiss galleries commonly conceal prices in their showrooms and at art fairs. Instead, these are revealed upon request.

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81 See Velthuis (note 5), 3.

82 New York City Administrative Code, Title 20, Ch. 5, Subch. 2: "Truth-in-pricing law," Section 20-708.

83 Robin Pogrebin and Kevin Flynn, "As Art Values Rise, So Do Concerns About Market's Oversight," *The Art Newspaper*, January 27, 2013, accessed December 26, 2013, http://www.nytimes.com/2013/01/28/arts/design/as-art-market-rise-so-do-questions-of-oversight.html?pagewanted=all; Velthuis (note 5), 32.

84 Articles 3 (3) and 7 (1) of the Regulation on Price Disclosure of December 11, 1978 (Ordonnance sur l'indication des prix, OIP, RS 942.211).

85 Articles 7 and 11 (1) OIP.

From a Swiss legal viewpoint, the gallery's unwillingness to quote the artworks for sale may be explained by the fact that the price indication next to the displayed work is legally binding and consists in the dealer's offer to enter into a contract to these conditions[86]. Printed prices in sale catalogues constitute a non-binding offer[87]. Conversely, in England and the United States, goods displayed on shelves[88] or in shop windows[89] constitute an invitation to treat (or to bargain, under United States law) and not an invitation to offer, showing the seller's readiness to negotiate a contract. The same may be said with regard to auction catalogues[90] and price lists[91].

Transparency in pricing is difficult to achieve in the art market, especially under laws that interfere with these industry practices[92]. The market's opacity further complicates the difficult assessment of whether an expert's appraisal may be erroneous[93].

A. Liability towards the Contracting Party

Dealers are asked to appraise works of art in view of a prospective sale or purchase. Together with the consignor, auction houses set the estimate and the reserve prices for the consigned property. In both cases, the client may suffer damage by heeding the wrong advice, or by making unfavourable dispositions in reliance upon an erroneous opinion. Generally, the inflicted loss is of a pecuniary nature[94].

Thus, a buyer may attempt to seek damages from the dealer for selling the object at a price far too high, or a consignor may sue the auction house for offering the work at a far too low amount. The following section enquires whether an artist or client may hold the dealer or adviser liable for a failure to determine an artwork's correct market value.

1. Binding Contract

Primary difficulties in establishing liability reside in the fact that many transactions in the art world are still conducted in absence of any written statement[95]. The artist and the dealer

86 Article 7 (3) Code of Obligations.

87 Article 7 (2) Code of Obligations.

88 *Pharmaceutical Society of G.B. v Boots Cash Chemists (Southern) Ltd* [1952] 2 Q.B. 795; see also H. G. Beale (ed.), *Chitty on Contracts* (London: Sweet and Maxwell, 2004).

89 *Fisher v Bell* [1961] 1 Q.B. 394.

90 Section 57 (2) Sale of Goods Act 1979.

91 *Partridge v Crittenden (*1968) 2 All ER 421.

92 Consumer authorities have allegedly temporarily desisted from enforcing the law against art galleries; see Pogrebin and Flynn (note 83).

93 See Henry Peter and Paul-Benoît Duvoisin, chapter 7 of this book.

94 See Honsell (note 11), 3.

95 See Polsky (note 15), 81 acting as an expert in a lawsuit explaining that "large deals were done on a traditional handshake basis"; John Henry Merryman, Albert E. Elsen and Stephen K. Urice, *Law, Ethics, and the Visual Arts*, 5th ed. (Alphen aan den Rijn: Kluwer Law International, 2007), 973.

often informally agree on the consignment of a series of works and on the organisation of an exhibition. A dealer counselling a collector on an acquisition or a sale is unlikely to send a written statement to confirm the commission and disclaim any liability. Auction houses may provide estimate prices over the phone without having seen the actual work of art.

Informality is due to the fact that "[l]egally binding contracts hardly provide a solution to these fragile commitments"[96]. Many elements of the agreement may not be formulated as a contractual term, such as the artist's dedication to continue producing quality works of art in the future[97]. Furthermore, it is difficult to monitor each party to ensure the contract has been followed, and enforcement in court may be expensive, inefficient, and may imperil both parties' reputation[98]. Instead, the art market is characterised by transactions based on trust[99].

From a comparative law perspective, the question as to whether an artworks' valuation is subject to contract has been determined differently in Switzerland than in England and the United States.

The Swiss Federal Tribunal ruled that the provider of a free appraisal service cannot automatically assume an exemption from legal responsibility[100]. In the given case, the Zurich branch of an international auction house was asked to evaluate a lamp by Emile Gallé (1846-1904) in view of a private purchase offer of CHF15,000 made to its owners. The auction house employee wished to consult with his colleague in London and sent him a picture of the lamp. Due to time pressure, the employee could not await the arrival of the photograph in London and therefore had to describe the lamp to the colleague over the phone. The colleague valued the lamp between CHF8,000-12,000. Upon reception of the picture, he revoked his appraisal, realising that the lamp was not a serial model, but custom made, and therefore much more valuable (CHF40,000). However, the lamp had then already been sold to a private person for CHF16,500. The sellers brought an action for damages against the auction house.

The Court primarily had to determine whether the auction house was bound by a contract to the requestors of the appraisal. Expert opinions are generally considered a contractual performance, except in very limited cases where the absence of requisite intent to enter such a contract (*animus contrahendi*) may be established through the circumstances by which the opinion was given[101]. An auction house that offers an appraisal (for promotional purposes)

96 Velthuis (note 5), 62.

97 *Ibid*.

98 Considering, for instance. the low income of most artists, who are neither able to pay for expensive litigation, nor for eventual damages ordered by the court, see *ibid*.

99 See Merryman et al. (note 95), 974; Polsky (note 15), 81.

100 Federal Court Ruling 112 II 347 ("Gallé lamp").

101 For instance, if the authentication was given incidentally and gratuitously as a gesture, Federal Court Ruling 112 II 347; Luc Thévenoz, "La responsabilité de l'expert en objets d'art selon le droit suisse," in *L'expertise dans la vente d'objets d'art: Aspects juridiques et pratiques, Studies in Art Law* Vol. 1, ed. Quentin Byrne-Sutton and Marc-André Renold, 37-65 (Geneva et al.: Schulthess, 1992), 54.

against a commission, or in view of a potential sale transaction from which it may benefit, enters into a contractual relationship[102]. The same reasoning may apply to dealers who gratuitously appraise artworks and the requestors subsequently ask the dealers to sell them. As a result, judges are often inclined to interpret expressions of opinions as contractual[103].

In the Gallé lamp case, the court held that the parties had implicitly agreed to an appraisal in the moment the auction house informed the owners of the London specialist's valuation[104]. The auction house in Zurich was therefore liable for its performance under the agency agreement. Even so, it could have avoided a contractual obligation by specifying that the valuation would be provided without prejudice and obligation[105].

In England and the United States, there is much reliance on the idea that an expert's statement of value is an expression of opinion. Judges generally do not attach any contractual force to statements of opinions, unless the circumstances or the qualifications in the statement allow for such[106].

Under the UK Sale of Goods Act 1979, statements made in the course of a sale may be legally binding if the sale qualifies as a sale by description (Section 13). This type of sale creates an implied contractual term that the goods will correspond with the description.

In *Harlingdon and Leinster Enterprises v Christopher Hull Fine Art*, two dealers agreed on the sale of a painting attributed to Gabriele Münter (1877-1962) in the transaction's invoice, which was later qualified as a forgery[107]. The purchaser filed suit under Section 13 of the Sale of Goods Act, claiming that the painting was not as described. The High Court of Justice considered the painting's description as not influential to the sale, so as to constitute a contractual condition. Instead, the seller had clearly disclaimed any connoisseurship on the given artist, and the buyer, who was much more of an expert in German expressionist art than the seller, had relied on his own examination of the painting's authenticity rather than on its description[108]. Therefore, the transaction did not constitute a sale by description.

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102 Federal Court Rulings 112 II 347, 352; 4A_45/2010 of March 25, 2010; Bruno Glaus, "Die Haftung des Auktionators für Sachmängel gegenüber dem Ersteigerer," *Jusletter* (June 14, 2004, www.weblaw.ch). In fact, an economic or legal interest of the appraiser to provide the opinion speaks for an *animus contrahendi*, see Federal Court Ruling 116 II 695, 698.

103 See Honsell (note 11), 5.

104 Federal Court Ruling 112 II 347, 351; cf. Article 351 Code of Obligations of March 30, 1911, RS 220.

105 See Glaus (note 102).

106 See Norman Palmer, "The Civil Liability of the Professional Appraiser," in *L'expertise dans la vente d'objets d'art: Aspects juridiques et pratiques, Studies in Art Law* Vol. 1, ed. Quentin Byrne-Sutton and Marc-André Renold, 19-36 (Geneva et al.: Schulthess, 1992), 23; Ronald D. Spencer, "The Risk of Legal Liability for Attributions of Visual Art," in *The Expert versus the Object – Judging Fakes and False Attributions in the Visual Arts*, ed. Ronald D. Spencer, 143-187 (New York: Oxford University Press, 2004), 181.

107 [1991] 1 Q.B. 564; [1990] 3 W.L.R. 13, CA.

108 [1990] 1 All ER 737. The claimant art dealer had purchased a painting described in an auction catalogue as being by Gabriele Münter. The seller made it plain to the buyer that he lacked expertise in Münter's work and could therefore not tell whether the work at sale was authentic. The buyer examined the picture himself and decided to buy it. The seller's invoice referred to the picture as a Münter.

In *Drake v Thos Agnew & Sons Ltd*., the High Court also decided that an expression of opinion regarding a painting's attribution to Sir Antony van Dyck (1599-1641) failed to constitute a term of the contract[109]. The defendant's employee, Mr Agnew, sold the painting through an intermediary, dishonest dealer to the claimant, Mr Drake. Agnew was sufficiently satisfied through his own research to declare in the sale catalogue that the painting had been executed by the Master artist himself and not by one of his pupils or followers. Even so, the sale catalogue clearly included differing opinions of other experts on the work, and Agnew informed the intermediary dealer by letter that the attribution was contested. The dealer intentionally declined to pass on that information to his principal, Mr Drake, and he concealed the corresponding note in the catalogue. Drake sought recovery of the price paid from Agnew's employer when he learned the work was not by van Dyck.

Again, the High Court ruled in favour of the seller, considering that the opinion on authenticity did not form part of the contract, either by an express statement, or by imputing to the parties the necessary common intention on an objective assessment of all the circumstances[110]. In fact, Agnew had made known the doubts about the attribution; thus, the Court construed his opinion as a mere expression of belief, and not as a sale by description. It also reasoned that reliance on Agnew's attribution had been limited[111].

Furthermore, opinions are contractual under both common law jurisdictions if there is an implied or express warranty as to their accuracy[112]. The existence of a warranty depends on a case's circumstances. For example, if an expert has been instructed to advise on the purchase of an artwork against a fee paid by the client, a contract will almost invariably exist[113]. Moreover, the major auction houses offer purchasers a limited authenticity guarantee.

In the United States, the Uniform Commercial Code (U.C.C.) applies to most issues arising from the sale of artworks, including authenticity and value assurance. Pursuant to Section 2-313 (1) U.C.C., descriptions and affirmations of fact or promises including a seller's affirmation of value are part of the basis of the bargain and create an express warranty. However, "an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty" (Section 2-313 (2) U.C.C.). Accordingly, the essential question is "[w|hat statements of the seller have in the circumstances and in objective judgment become part of the basis of the bargain?"[114] Affirmations of facts "made by the seller about the goods during a bargain

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109 *Drake v Thos Agnew & Sons Ltd* [2002] EWHC 294 (QB).

110 *Idem*, at 26.

111 *Idem*, at 32.

112 See Pierre Valentin in "Panel 2: The Rights and Responsibilities of Authenticating Art," *Columbia Journal of Law & the Arts* Vol. 35 Iss. 3 (2012): 393, 409.

113 See Luke Harris, "The Liability of Experts for the Misattribution of Works of Art," Conference paper, Kunst & Recht Conference, *Haftung von Gutachtern im Kunstrecht*, Europainstitut, University of Zurich, November 27, 2012, 11.

114 Official Comment to the U.C.C. Section 2-313, para. 8.

are regarded as part of the description of those goods, hence no particular reliance on such statements need to be shown in order to weave them into the fabric of the agreement"[115].

Nonetheless, a statement's qualification as either an affirmation of fact or a simple opinion is dependent upon the expertise in art of the person making the statement. It has been held that where the party making the representations maintains superior knowledge regarding the subject matter of those representations, and the other party's level of expertise is such that he may reasonably rely on the supposed superior knowledge, the representations may be considered as fact and not opinion[116]. Thus, art merchants and experts are more likely to bear legal responsibility for rendering such statements[117].

Under New York law, the question of the reliance requirement is unsettled, i.e. "whether the 'basis of the bargain' requirement implies that the buyer must rely on the seller's statements to recover and what the nature of that reliance requirement is"[118]. In *Rogath v Siebenmann*, the Court of Appeals for the Second Circuit affirmed that a buyer waives the breach of warranty claim if, when signing the contract, he is in full knowledge and acceptance of the facts disclosed by the seller that would constitute a breach of warranty under the terms of the contract[119]. Therefore, "what the buyer knew and, most importantly, whether he got that knowledge from the seller are the critical questions"[120] to establish an enforceable warranty.

Moreover, New York's Arts and Cultural Affairs Law differs from U.C.C. Section 2-313 by foreseeing that the furnishing of a certificate of authenticity by an art-merchant to a non-art merchant creates an express warranty[121]. Ultimately, even where no contract is concluded, the expert may still be held liable under negligent misrepresentation, which requires reliance upon the statement by the party receiving the appraisal or authentication[122].

2. Cooperation Contract between Artists and Galleries

Correct pricing is essential for the launch and promotion of an artist. Ideally, "prices have to be fixed according to the general state of the art market, should reflect the seller's estimation of the quality and should provide a certain security for the buyer's investment"[123].

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115 *Idem*, para. 3.

116 *Toole v Richardson-Merrell Inc*., 251 Cal. App. 2d 689, 706; *Haserot v Keller*, 67 Cal. App. 659, 670, 228 Pac. 383 (1924); *Grinnel v Charles Pfizer & Co*., 274 Cal. App. 2d 424, 79.

117 See Lerner and Bresler (note 71), 82.

118 *Rogath v Siebenmann*, 129 F.3d 261, 263; 1997 U.S. App. LEXIS 32142, 5.

119 129 F.3d 261, 264; 1997 U.S. App. LEXIS 32142, 8.

120 129 F.3d 261, 265; 1997 U.S. App. LEXIS 32142, 9-10.

121 Section 13.01 N.Y. ACA Law; see also *Christie's Inc. v SWCA, Inc*., 22 Misc.3d 380, 387 (2008), 867 N.Y.S.2d 650, 655-656.

122 See below, 50-51.

123 Mark A. Reutter, "Artists, Galleries and the Market: Historical, Economic and Legal Aspects of Artist-Dealer Relationships," *Villanova Sports and Entertainment Law Journal* 8 (2001): 99.

The arrangement of the cooperation between an artist and a gallery may be manifold. The parties may cooperate in view of selling the artist's works through the gallery, in which case the gallery commonly sells works in its own name but under the artist's account. Title to the works generally remains with the artist until the gallery effects the sale. Or, they may decide that the gallery will buy the works from the artist outright for their resale. Outright sales are common in Europe, but rare in the United States[124].

Swiss law qualifies the first regime as a (sale) commission relationship, which is a type of agency contract[125]. The gallery must follow the artist's instructions with regard to price fixing and formation[126]. Therefore, the parties may agree to a minimum price, below which the works must not be sold. However, should the dealer sell a work below the minimum price instructed and pay the artist the proportional difference at his own expense, the contract has been validly performed[127]. Moreover, where the dealer sells at a higher price than as instructed by the artist, he is not permitted to retain the profit but must credit it to the artist[128]. The relativisation of the artist's instructions does not give the gallery complete freedom in price determination. Instead, the dealer may only diverge from the agreed price if it is in the artist's interest, such as when it maintains a balanced market for her works[129].

If the artist has given no instructions as to the price of her works, the dealer's duty of care and loyalty requires a sale at the best possible price in view of the diachronic price development of the artist and her market position[130].

Likewise, in both England and the United States, the contractual relationship between artists and galleries is essentially one of agency[131]. The law attaches a fiduciary duty to the agency relationship, which ensures that the agent acts only for the benefit of the principal also with regard to the valuation of her works[132]. In particular, the agent must "disgorge any benefit which he receives as a result of his position unless he has the principal's fully

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124 See Lerner and Bresler (note 71), 4.

125 Pursuant to Article 425 Code of Obligations. The commission agreement may be part of, or completed by, other innominate obligations and contracts (e.g. not specifically regulated by the law); see Florian Schmidt-Gabain, "Künstler und Galerie: Eine rechtliche Beurteilung ihrer Zusammenarbeit," *AJP/PJA* (2009): 609.

126 Articles 425 (2) and 397 Code of Obligations.

127 Article 428 (1) Code of Obligations; see also Mark A. Reutter, *Exklusivverträge zwischen Künstler und Händler – Darstellung der Rechtslage in den Vereinigten Staates von Amerika und der Schweiz*, *Studies in Art Law* Vol. 2 (Zurich: Schulthess, 1993): 158.

128 Article 428 (3) Code of Obligations.

129 See Reutter (note 127), 158; see also above, 33.

130 See Schmidt-Gabain (note 125), 621-622; Reutter (note 127), 158.

131 See Adrian Barr-Smith, Antony Mair and Susan Lucas, "United Kingdom: National Report on Topic 2. Rights of Artists and the Circulation of Works of Art," in *International Art Trade and Law/Le commerce international de l'art et le droit*, Vol. IV, ed. Martine Briat and Judith A. Freedberg, 275-296 (Paris: Kluwer, 1993); see generally Restatement (third) of Agency § 1.01 (2006); Section 12.01 (a)(i) N.Y. ACA Law; Section 1738.6 California Civil Code.

132 See *In the Matter of the Estate of Mark Rothko*, 401 N.Y.S.2d 449 (1977); *Kremer v Janet Fleisher Gallery, Inc*., 320 Pa.Super. 384, 467 A.2d 377 (1983).

informed consent to him retaining the benefit"[133]. For example, the gallery maintains a fiduciary duty to reveal to the artist the sale price agreed upon with the purchaser and may not simply retain the amount of the price increase[134].

Several American States have adopted consignment of art statutes in an attempt to reduce the artist's vulnerability in the event of gallery abuses and bankruptcy[135]. Although they offer essential protections for artists, only very few cases have arisen under these statutes[136]. Some dictate that the parties must reach an agreement on a minimum sale price, below which the works must not be sold[137]. The parties may also arrange for a maximum sale price, which can be of particular interest to the artist if the dealer pays her a pre-fixed amount for sold works instead of a portion of the sale price[138].

Under the laws of Switzerland, England, and the United States, the artist bound by an outright sale contract with the dealer may not interfere with the resale of the works, unless the contract stipulates otherwise[139]. In absence of a permanent contract, the artist may not obstruct the sale with her instructions, and the dealer has no obligation to account for the performance of the sale and his pricing policy[140]. Conversely, where the artist has an exclusive agreement with the gallery to sell her works only with that gallery[141], the pricing and sale strategy is subject to several obligations arising from the dealer's duty of care and obligation to promote the artist[142]. The dealer must use his best efforts to promote the sale and place the artist on a long-term basis. In turn, the artist must use her best efforts to supply the works she agreed to consign[143]. Furthermore, the gallery must disclose all the circumstances relating to the purchase, such as whether it is intended to be resold and, if so, at what price[144].

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133 Elizabeth Weaver, "Dealer or Agent? And Why it Matters," *Art Antiquity & Law*, Vol. 16, Iss. 4 (2011): 298.

134 See also below, 65.

135 For a full list see Lisa Moore and Liz Wheeler, "The Protection of Visual Artists Through Consignment of Art Statutes," *Journal of Intellectual Property Law* 18 (2011): 551, 554.

136 *Idem*, 558.

137 See for instance Florida Statutes § 686.503 (3).

138 See Reutter (note 127), 158.

139 The contract may for instance specify the artist's right to collect royalties on any subsequent sale, *ibid*.; see also Lerner and Bresler (note 71), 5.

140 See Reutter (note 127), 108.

141 See Schmidt-Gabain (note 125), 623.

142 See Reutter (note 127), 159. For a dissenting opinion, see *ibid*.

143 Section 2-306 (2) U.C.C.; Reutter (note 127), 159.

144 See for instance Section 12.01 N.Y. ACA Law; Section 1738.7 California Civil Code; see also *Bernard Perlin v Chair and the Maiden Gallery et al*., Index No. 652392/2011, August 30, 2011, New York Sup. Ct, County of N.Y. The artist Bernard Perlin agreed to sell one of his paintings to the principals of the Chair and the Maiden Gallery for US$15,000 – the value appraised by them. According to Perlin, the principals told him the painting was being purchased for their individual and collection. After the sale, the principals allegedly began to market the painting in an attempt to enhance its value so that it could be resold at a profit, and arranged for its exhibition at a museum with an insurance value of US$350'000. The action was discontinued on August 5, 2013 in the course of alternative dispute resolution.

The parties often mutually decide on the sale prices for the art objects, whereby the more influential the gallery and the less established the artists, the more likely it is that prices will be determined by the dealer. In any event, when the artist aims to realize a fair commission, she should consider how aggressively the gallery will promote her work[145].

3. Valuation Contract

An expert valuation of a work of art may be subject of a valuation contract.

Under Swiss law, legal scholars are divided regarding the characterisation of the experts' performance, as it may either be an agency contract or a contract for work and services. Under an agency agreement, the expert must answer to the principal for the diligent and faithful performance of the business entrusted to him (*obligation de moyen*[146]), whereas the expert acting under a contract for work and services incurs strict liability for the attained result (*obligation de résultat*[147]). Under the second contractual scheme, an incorrect valuation is considered to be defective no matter how diligent and careful the expert was during its determination.

According to the Federal Court, if no objective criterion may verify the correctness of the expert's performance, it must be qualified as an obligation *de moyen*[148]. The valuation of an object is a matter of discretion[149]. Given the lack of objectively verifiable indicators, the expert's established market value for the art object may not be qualified as wrong or right[150]. Therefore, the Federal Court held that the artwork valuation conducted by experts in the exercise of their business is subject to agency law[151]. The expert's duty of diligent performance is defined according to what the parties have agreed upon and what may be expected from a competent professional acting under the same circumstances[152].

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145 See Lerner and Bresler (note 71), 27.

146 Article 398 (2) Code of Obligations.

147 Article 367 et seqq. Code of Obligations.

148 Federal Court Ruling 127 III 328, 330-331.

149 *Idem*, 331.

150 There is authority suggesting that an expert statement as to an art object's authenticity, unlike as to its value, may only be wrong or correct. Pursuant to that reasoning, art authentications would qualify as obligation *de résultat*. However, it does not take into account the difficulties to clearly establish an attribution contested between expert and that attributions are very subjective. Courts are therefore often led to decide on the expert's liability by assessing *the likelihood* of the provided authentication being wrong or right. See for instance the Ruling of the Supreme Court of the Canton of Zurich, June 18, 2012, no. HG060451 (*A. Inc. v B. and Gallery C.*).

151 Federal Court Ruling 112 II 347, 350-351; see also Christine Chappuis, "L'authentification d'œuvres d'art: responsabilité de l'expert et qualification du contrat en droit suisse," in *L'expertise et l'authentification des œuvres d'art*, Studies in Art Law Vol. 19, ed. Marc-André Renold, Pierre Gabus and Jacques de Werra, 47-74 (Geneva et al.: Schulthess, 2007), 52.

152 Federal Court Ruling 115 II 62, 64; Thévenoz (note 101), 43.

Under English law, the contract whereby an appraiser agrees to value an artwork is characterised as a contract for the supply of services pursuant to Section 12 of the UK Supply of Goods and Services Act 1982. Similar to the Swiss legal regime, the expert owes the principal express contractual duties to perform the agreed services and an implied contractual duty to do so with all reasonable care and skill[153]. In the United States, appraisal contracts are, unlike sale transactions, without specific regulation[154].

Under all three jurisdictions, a wrong valuation does not necessarily imply that the expert has acted in breach of his duty of care. Instead, the judge may only hold negligence against the expert if he failed to act with care and in compliance with the instructions of the principal, the extent of which is assessed according to the terms of the contract, and if he failed to act under the diligent performance that the principal can expect from a professional expert acting under the same circumstances[155]. Thus, an expert's valuation or advice is deemed protected if found in accordance with the prevailing scholarly opinion at the time it was given. The more detailed the expert's explanation of the considerations that affect and establish the art object's value, the less he risks inviting a claim[156].

In order to determine what the principal may reasonably expect, professional standards, such as the rules or directives of art appraisers and dealers, provide further guidance. The expert may not justify a departure from the proficiency standard that results in an erroneous valuation by relying on a lack of ability or resources[157].

Moreover, the expert has a duty to inform the principal of any doubts regarding the valuation and attribution of the work[158]. The extent of this duty depends mainly on the degree of specialization and knowledge of the parties and on their access to information[159]. According to English case law, in the event of a duty to provide information enabling another person to make a decision, the adviser acting in breach of that duty is responsible for all reasonably

153 Section 13 of the Supply of Goods and Services Act 1982; see also Harris (note 113), 11.

154 See Debra B. Homer, "Fine Art Appraisers: The Art, the Craft, and the Legal Design Proposed Model Fine Art Appraiser Act," *Columbia-VLA Journal of Law & the Arts*, Vol. 8, Iss. 4 (1983-1984), 457-512, 478, fn. 65.

155 Notwithstanding that the expert's fault is assessed by means of an objective criteria, it takes into account the specificities of the case, including the task's difficulty, the time available, the expert's special skills, and the importance of the mandate; Thévenoz (note 101), 43-44; Chappuis (note 151), 53-55; Palmer (note 106), 28; see also Lerner and Bresler (note 71), 517; Steven Mark Levy, "Liability of the Art Expert for Professional Malpractice," *Wisconsin Law Review* (1991): 595-651, 605.

156 See Peter H. Karlen, "Appraiser's Responsibility For Determining Fair Market Value: A Question Of Economics, Aesthetics, And Ethics," *Columbia-VLA Journal of Law & the Arts* 13 (1989): 185-218, at 216-217.

157 In *Travis v Sotheby Parke Bernet Inc*., the judge ruled that Sotheby's expert went beyond the required standard of care by consulting with the authority for the alleged artist of the painting presented to the auction house for evaluation purposes, Index No. 4290179 (N.Y. Sup. Ct. Nov. 11, 1982).

158 See Chappuis (note 151), 55.

159 See Carolyn Olsburgh, *Authenticity in the Art Market – A Comparative Study of Swiss, French and English Contract Law* (Leicester: Institute of Art and Law, 2005), 7.

foreseeable consequences of the misinformation[160]. For example, if the adviser was asked by the purchaser to valuate an artwork prior to its purchase, and the assessment turns out to be overvalued, the adviser is liable for any resulting loss which he could have reasonably anticipated at the time the valuation was made and which falls under the scope of his duty of care[161]. By providing information in the nature of advice, professional appraisers assume a responsibility giving rise to a duty of care, which, however, does not extend to what may be regarded as "obvious" or to "risks which are fanciful"[162]. Determining what may qualify as such "depends on the characteristics and experience of the person receiving the information"[163].

Finally, differentiation must also be made according to the context of the auction valuation. Where auction houses provide a gratuitous appraisal service as a first, rough estimation of the artwork's market value, to require the same diligence standard as expected from a mandated specialist or an expert appraising consigned property would impose an unreasonably excessive burden on auctioneers[164]. In the Swiss Gallé lamp case, the court reduced the amount of damages, given that the auction house had performed the valuation gratuitously and under time pressure[165]. In England and the United States, auctioneers also must comply with a duty of care for gratuitous valuations if the auctioneer possesses a special skill and the enquirer trusts in the exercise of that special skill, unless the enquiry made is "so casual as to negate any inference of reliance by the enquirer on the person possessed of the special skill"[166]. Nonetheless, a claim for negligent misrepresentation requires a special relationship between the auctioneer and the enquirer[167].

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160 *South Australia Asset Management Corp v York Montague Ltd*., [1997] AC 191 at 23. In this case, the plaintiffs asked the defendant valuers to value properties on the security of which the plaintiffs were considering advancing money on mortgage. The defendants overvalued the properties considerably. The plaintiffs then made advances to borrowers secured by the properties, which they would not have made had they known about the actual value of the properties. When the borrowers defaulted, the plaintiffs' financial loss was substantially increased by the overvaluation. They therefore brought actions against the defendants for negligence and breach of contract, seeking the reimbursement of all damages they had suffered by entering into the transactions.

161 *Idem*, at 35 et seqq.; see also Harris (note 113), 12.

162 *Thomson v Christie Manson & Woods Ltd and others* [2005] EWCA Civ 555, § 95 referring to *Tomlinson v Congleton Borough Council* [2004] 1 AC 46.

163 *Ibid*.

164 *Luxmoore-May and another v Messenger-May Baverstock*, Court of Appeal, Civil Division [1990] I All ER (1067), at 1081b.

165 See above, 43. The auction house in Zurich was held responsible for the conduct of the specialist in London the performance of the valuation was delegated to pursuant to the liability for associates (Article 101 Code of Obligations). Damages were assessed according to the estimate sale price as established by the auction house, since the claimants asserted that they would have sold the lamp with the auction house had they known that it was worth CHF40,000.

166 Brian W. Harvey and Franklin Meisel, *Auctions Law and Practice*, 3rd ed. (Oxford: Oxford University Press, 2006), para. 5.57; *Hedley Byrne v Heller* [1964] AC 465, at 486, 502 and 514; *Struna v Wolf*, 126 Misc. 2d (1031), 484 N.Y.S.2d 392 (Sup. Ct. 1985).

167 Negated in *Ravenna v Christie's, Inc*., Index No 121367-00 (N.Y. Sup. Ct., 2001, unpublished) aff'd, 289 A.D.2d 15, 734 N.Y.S.2d 21, 2001 N.Y. Slip Op. 09730 (1st Dept. 2001).

4. Sale Contract

The main difference in liability between the expert-vendor and the expert-adviser is that the seller is strictly liable when offending the statutory standards, whereas the adviser is liable only for failing to show reasonable care and skill[168]. The buyers' claims for overpricing artworks are mainly linked to questions of authenticity and the misattribution of the art object. Far less often, the seller may have over- or underpriced an art object despite its accurate attribution.

a. On the Basis of Misattribution

A wrong attribution or description usually forms the basis for claims involving mispriced art objects. Under Swiss law, mistakes on attribution as to the art object's creator, date of origin, or provenance, and the misidentification of the art object's condition may constitute the subject of a claim for fundamental mistake and/or warranty of quality and for any defects[169]. Under the laws of England and of the United States, the three main types of claims that might suggest themselves to buyers are mistake, breach of contract, and misrepresentation. Mistake and misrepresentation are mainly relevant where statements on the artwork's authenticity have not been guaranteed contractually[170].

i. Mistake

Under Swiss law, erroneous facts giving rise to a mistake claim may relate to the art objects' attribution or other qualities such as its condition, as long as they are both objectively and subjectively "a necessary basis for the contract"[171] for the party acting in error. The description of the object at sale, which becomes part of the contract, differs from what the object actually is – a typical example is the sale of a forgery[172]. However, should the mistaking party have known about the art object's actual attribution or condition, the court will likely reject the claim for fundamental mistake based on the principle of fairness in

168 See Palmer (note 106), 29; Honsell (note 11), 3.

169 On the contested alternativity between these two claims, see Federal Court Ruling 114 II 132, 134 ("Picasso Case") confirming Federal Court Rulings 109 II 322 and 108 II 104. The cause of action for fraud is not addressed in this article. It requires that the seller fraudulently made a false representation of fact; see Federal Court Ruling 123 III 165 (Swatch watch); Bruno Glaus, "Haftung für die unrichtige Schätzung von Kunstobjekten," in *Kunst & Recht: Schwerpunktthemen für den Kunstsammler, Schriftenreihe der AXA Art Versicherung AG* (AXA Art Versicherung AG: Zürich, 2007), 66; *Thomson v Christie Manson & Woods Ltd and others* (note 162), para. 161; Spencer (note 106), 167.

170 See Olsburgh (note 159), 43.

171 Article 24 (4) Code of Obligations; Federal Court Rulings 5A_337/2013 of October 23, 2013, para. 5.2.2; 118 II 58, 62 (para. 3b); 123 III 200, 202 (para. 2); 132 II 161, 165 et seqq. (para. 4.1).

172 Federal Court Rulings 82 II 411, 424; 114 II 131, 139-140 ("Picasso Case"); 5A_337/2013 of October 23, 2013, para. 5.2.2.

commercial transactions[173]. A successful mistake claim results in the contract's rescission. The mistaking party must act within one year running from the time the error was discovered, or the agreement will be ratified[174].

Unlike under the Swiss regime, the English mistake claim is of little interest to buyers of misattributed art as it applies only to errors on the essence or identity of the subject matter[175]. Another difference is that both parties must have been mistaken on the same material fact. In *Leaf v International Galleries*, a dispute arose when the plaintiff bought a picture that he and the seller believed to be by John Constable (1776-1837), which later turned out to be a forgery[176]. Both parties erred regarding the quality of the contract's subject-matter – the painting's authenticity – but not the subject matter itself. In fact, they had reached agreement on the same terms of that same, specific picture. Their mistake did not void the contract[177].

For actions based on mistake, the limitation period begins to run from the moment the purchaser discovered or could have discovered with reasonable diligence the mistake[178].

Likewise, under United States law, the seller may obtain rescission of the sale agreement for mutual mistake if both the seller and the buyer were mistaken about material facts existing at the time of contracting[179]. However, a disparity must exist between the belief of the disputing parties and the expert consensus on the sale date.

In *Firestone & Parson v Union League of Philadelphia*, both the buyer and the seller believed to contract around a painting by Albert Bierstadt (1830-1902)[180]. However, art experts had increasingly questioned its attribution until eventually, after the sale, these doubts became the generally-accepted opinion amongst art practitioners[181]. The District Court for the Eastern District of Philadelphia contended: "[p]ost-sale fluctuations in generally accepted attributions do not necessarily establish that there was a mutual mistake of fact at the time of sale. If both parties correctly believed at that time

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173 Federal Court Ruling 110 II 293, 302 regarding a mistake claim by an incorporated company which errored on the value of a share. The Court held that it could have reasonably determined that value and thus negated the claim for fundamental mistake.

174 Article 31 (1) and (2) Code of Obligations.

175 In order to succeed, the seller has to prove that he erroneously understood the terms of the offer, raising issues of conformity between offer and acceptance to the sale agreement. The court only analyzes the formal requirements for the conclusion of a contract, but it may not consider the substantial merits of the claim; see *Bell v Lever Bros*. (1932) A.C. 161; see also Philip Davis and Graham Ludlam, "Sleepers: whose side is the law on?" *The Art Newspaper*, Iss. 195 (October 2008), 35.

176 *Leaf v International Galleries* (1950) 2 K.B. 86.

177 *Idem,* at 89. See also Lord Atkin's observation in *Bell v Lever Bros* (note 175).

178 Section 32 Limitation Act 1980.

179 See Ronald D. Spencer, "Buyer's Rescission for High Value Art Purchases – Spreading the Risk," *Spencer's Art Law Journal*, Vol. 1, No. 3 (Winter 2011).

180 *Firestone & Parson, Inc. v Union League of Philadelphia*, 672 F.Supp. 819 (E.D.P.A. 1987).

181 See Spencer (note 106), 144.

that the painting was generally believed to be a Bierstadt, and in fact it was then generally regarded as a Bierstadt, it seems unlikely that plaintiff could show that there was a mutual mistake of fact"[182].

A successful mutual mistake-of-fact claim arose in *Feigen v Weil*[183], where both the buyer and the seller believed to conclude a sale agreement on a drawing by Henri Matisse (1869-1954) when it was, in fact, a forgery. The trial court determined that experts, conversely, would have recognized its forged nature if they had been consulted on the day of the sale, which thus permitted the contract's rescission[184].

ii. Breach of Contract or Warranty

Pursuant to Swiss law, the seller is liable to the buyer for any breach of warranty of quality and for any defects that materially or legally negate or substantially reduce the value of the object or its fitness for the designated purpose[185]. Again, the price as such is not the criterion for a breach of warranty claim. Instead, a breach requires a default or the absence of a warranted quality of the art object. The Federal Court has held that authenticity is a necessary basis of the contract, as creatorship impacts the art object's value[186]. Hence, the repercussion of authenticity on the art object's market value is part of the Court's reasoning when allowing a claim for breach of contract.

The buyer may "sue either to rescind the contract of sale for breach of warranty or to have the sale price reduced by way of compensation for the decrease in the object's value"[187]. Actions for breach of a warranty of quality and fitness become time-barred one year after the buyer discovers the defect, but in any event, 30 years after the sale contract is concluded[188].

Under English law, the buyer may bring action either for breach of a contractual term or for breach of warranty. The statement becomes a contractual condition if the parties regard

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182 *Firestone & Parson, Inc. v Union League of Philadelphia* (note 180), at 823.

183 *Richard L. Feigen & Co. v Weil*, no. 13935/90 (N.Y. Sup. 1992), aff'd, 595 N.Y.S.2d 68.

184 See Spencer (note 179).

185 Article 197 (1) Code of Obligations. Under Swiss law, the parties to the auction sale agreement are generally the buyer and the auction house, see Joelle Becker, *La vente aux enchères d'objets d'art en droit privé suisse : représentation, relations contractuelles et responsabilités*, Studies in Art Law Vol. 21 (Geneva et al.: Schulthess, 2011).

186 Federal Court Ruling 114 II 131, 139.

187 Article 205 (1) Code of Obligations.

188 The limitation period has been extended from 10 years to 30 years for the sale of cultural property within the meaning of Article 2 paragraph 1 of the Cultural Property Transfer Act (CPTA) of 20 June 2003, RS 444.1. On the issue whether forgeries fall under the scope of the CPTA and thus under the longer time limitation period, see Peter Mosimann, Marc-André Renold and Andrea Raschér (eds.), *Kultur Kunst Recht – Schweizerisches und Internationales Recht* (Basel: Helbing & Lichtenhahn, 2009): 536; negating: Pierre Gabus and Marc-André Renold, *Commentaire LTBC – Loi fédérale sur le transfert international des biens culturels* (Geneva et al.: Schulthess, 2006): Art. 32 n. 46.

the term as fundamental, whereas it constitutes a warranty, if the parties regard the term as subsidiary or collateral to the main purpose of the contract[189]. The parties' intent is generally established by examining the parties' conduct, i.e. to their words and behaviour, and not through their thoughts[190].

A breach of contract claim permits the purchaser to discharge contractual obligations when the false statement forms a part of the contract as intended by the parties or as implied by the law[191]. Under a successful claim for breach of warranty, the purchaser may only obtain the payment of damages[192]. The time limitation period for breach of contract claims is six years from the date of the delivery of the forgery[193]. Unlike in Switzerland, English courts have repeatedly denied considering authenticity statements as contractual terms[194]. Whether the seller is liable for descriptions made regarding the art object very much depends on the buyer's reliance on such descriptions and on the seller's qualifications as to their accuracy.

The United States has also developed a law of warranty; the creation of an express warranty is provided in U.C.C. Section 2-313 and mainly focuses on whether the seller's representations qualify as a statement of fact, constitute part of the sale negotiations when the bargain was struck, and could have been relied upon by a reasonable person[195]. The buyer must bring an action for breach of warranty within four years upon delivery and acceptance of the sold goods, which can be reduced by contract to one year[196]. Thereby, the buyer may reject the goods and recover the price paid or damages from the seller[197].

As regards to contracts of **sale concluded at auction**, the legal situation is unclear in all three legislations[198]. The auctioneer generally acts as agent to the consignor to

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189 *Leaf v International Galleries* (note 176), at 89-90, and 93; Section 61 (1) "warranty" Sale of Goods Act 1979. In *Leaf*, one of the judges held that "[t]here was a term in the contract as to the quality of the subject-matter; namely as to the person by whom the picture was painted – that it was by Constable". The majority, however, concluded that the statement was a warranty.

190 *Oscar Chess Ltd. v Williams* [1957] 1 W.L.R. 370, 1 All E.R. 325.

191 Sections 13-15 of the Sales of Goods Act 1979 imply four main conditions into sale contracts: that goods (a.) correspond with the description by which they were sold; (b.) are fit for purpose; (c.) are of merchantable quality; and (d.) correspond with any sample previously given by the seller.

192 Sections 11 (3), 52, and 61 (1) "warranty" Sales of Goods Act 1979. See, however, Sections 48A, 48C, and 48F Sale of Goods Act 1979.

193 Section 5 Limitation Act 1980.

194 See above, 44-45. *A contrario*: In *Nicholson and Venn v Smith Marriott* (1947) 177 L.T. 189, the court qualified as a contractual term the catalogue description dating a piece of furniture as "Charles I" although it was more recent.

195 See above, 45-46.

196 Section 2-725 U.C.C.; see *Nacht v Sotheby's Holdings*, N.Y. Sup. Ct., N.Y. County, Index no. 100938-98 (1999); *Doss Inc. & Yoon Young Im, v Christie's Inc.*, 2009 WL 3053713 (S.D.N.Y.), 70 U.C.C. Rep.Serv.2d 884.

197 Sections 2-601, 2-711, and 2-716 U.C.C.

198 For an extensive study of the Swiss contractual situation at auction, see Becker (note 185); for English law, see Harvey and Meisel (note 166), para. 5.122.

arrange a sale. Aware of the agency relationship, the purchaser concludes the sale agreement with an unnamed consignor. The question then arises as to whether the auction house may be liable for the sale of defective goods, given that it is not party to the contract of sale. So far, no general rule has been established to hold the auction house liable to the contract it has arranged for the consignor[199]. Under the Swiss indirect representation scheme, the purchaser enters the sale contract with the auctioneer, and thus may assume that the auctioneer will make himself personally liable for the performance of the sale.

Conversely, under English law, the sale contract is concluded between the purchaser and the seller. English case law tends to impose a duty of delivery on the auctioneer, as a counterpart for the auctioneer's right to receive the price[200]. Despite the auctioneers' discretion in authenticating, attributing, and evaluating consigned property, their liability is unlikely to go beyond any liability for non-delivery, which is consequently borne by the consignor-seller[201]. In order to furnish buyers with a remedy to this asymmetric situation, auction houses provide an authenticity warranty within their business conditions, thereby allowing the buyer to rescind the sale contract within a limited amount of time[202]. Consequently, the auctioneer has a contractual liability to the purchaser, independent of the sale contract, to buy back a forgery[203].

iii. Misrepresentation

Pursuant to English law, the buyer may assert that he has been induced to enter the sale agreement after the auctioneer has made a misrepresentation to him, and as a result of which he has suffered loss[204]. To illustrate, the seller makes a false statement to the buyer on the art object's authenticity or provenance[205]. If he acts "within reasonable time"[206], the buyer may either obtain the sale contract's rescission and reclaim the purchase price or retain the art object and sue instead for damages. If the seller makes the false statement negligently, damages may be awarded to the buyer either under the Misrepresentation

199 See Guenter Treitel, *Law of Contract,* 11th ed. (London: Sweet & Maxwell, 2003), 734.

200 *Benton v Campbell Parker & Co* [1925] K.B. 410, 416.

201 See Sebastian Harter-Bachmann, *Truth in Art and Law: Allocating the Risks Associated with Attribution in the Art Auction House* (Master of Jurisprudence Thesis: University of Durham, 2007), 52.

202 *Ibid*.

203 The contract between the auction house and the buyer is a result of the representations made by the auctioneer; See *De Balkany v Christie, Manson & Woods, Ltd.,* (1997) 16 Tr. L.R. 163, p. 17; Harvey and Meisel (note 166), paras. 5.126 and 5.131.

204 Section 2(1) Misrepresentation Act 1967.

205 See Palmer (note 106), 21.

206 In *Leaf*, the court concluded that the buyer's claim was time-barred considering that five years were much "more than reasonable time"; *Leaf v International Galleries* (note 176), at 91. On the controversy of what may be regarded as a reasonable time lapse, see Olsburgh (note 159), 48-49.

Act 1967[207] or in tort for the tort of negligent misstatement[208]. In order to succeed under a negligent misrepresentation claim, a special relationship between the parties must exist which gives rise to a duty of care[209]. The auctioneer is most likely to stand in a special relationship with the buyer[210].

For wholly innocent misrepresentations, the court has the discretion to award damages instead of rescission if it is equitable to do so[211]. If the buyer's exercise of the remedy (whether under misrepresentation or breach of contract) is delayed, the court may consider the claim as barred by acceptance of the art object[212]. The *Leaf* Court held that the buyer had accepted the picture, since he had waited five years after the sale to contest its authenticity, despite the fact that he had "ample opportunity for examination in the first few days after he had bought it"[213]. The mere lapse of time therefore barred the rescission of the contract for innocent misrepresentation even though the buyer had acted immediately upon discovery of the misrepresentation. By contrast, if a misrepresentation is made fraudulently, the buyer can bring action for the tort of deceit in order to rescind the contract and recover damages within six years[214]. Moreover, the time limitation begins to run from the date the buyer discovered, or could have reasonably discovered, the fraud[215].

Likewise, in the United States, expert-sellers may be liable for negligent misrepresentation if they make a false material representation to another person without a reasonable belief that the representation is true, and the other person reasonably relies on the representation and is thus induced to act to his detriment[216]. The expert's statement must be objectively false and not simply disputable[217]. Difficulties reside in determining whether the expert has acted negligently, e.g. whether the expert had the requisite knowledge and failed to apply it[218]. Negligent misrepresentation necessitates a relation of trust and confidence between the parties entitling the plaintiff to rely upon the defendant's representations[219]. Unlike

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207 Section 2 (1) Misrepresentation Act 1967.

208 See below, 73; Palmer (note 106), 22. Damages may be awarded to the buyer in parallel to rescission unless the seller proves that he had reasonable grounds to believe and did believe that the represented facts were true, for instance, by relying on an expert opinion; see Olsburgh (note 159), 47.

209 See Olsburgh (note 159), 47.

210 See Harvey and Meisel (note 166), para. 5.145 referring to *Mutual Life and Citizens' Assurance Co Ltd. v Evatt* [1971] A.C. 793, [1971] 1 All E.R. 150, PC.

211 Section 2(2) Misrepresentation Act 1967.

212 Pursuant to Section 35 Sales of Goods Act; Lord Justice Denning in *Leaf v International Galleries* (note 176), at 91.

213 Lord Justice Denning in *Leaf v International Galleries* (note 176), at 91.

214 Section 2 Limitation Act 1980; see also Palmer (note 107), 21.

215 Section 32(1)(c) Limitation Act 1980.

216 Restatement (Second) of Torts § 528.

217 See Peter H Karlen, "Fakes, Forgeries, and Expert Opinions," *Journal of Arts Management and Law* Vol. 16 Iss. 3 (1986): 5-32, 8.

218 Restatement (Second) of Torts § 299A.

219 *Foxley v Sotheby's Inc*., 893 F. Supp. 1224, 1229 (1995 U.S. Dist. Lexis 5332).

similar English cases, the existence of a special relationship between an auctioneer and a buyer was negated in several disputes[220]. The buyer generally has six years to file suit and request a court to void the contract[221].

b. On the Basis of the Wrong Price

Buyers have also claimed damages from sellers arguing that the sold object was overpriced despite its accurate attribution. This raises a question as to whether sellers may be held liable solely on the basis of an incorrect sale price.

Under Swiss law, the buyer may attempt to rescind the sale agreement based on a mistake of the art object's value. Errors of value may be qualified as mistakes during the decision-making process to conclude a contract with that content. However, such mistakes are unlikely to be qualified as objectively "fundamental", i.e. that the judged value was an essential basis of the sale contract, pursuant to the principle of fairness in commercial transactions[222].

Furthermore, the buyer may claim that the seller gained an unfair advantage. However, it is extremely difficult for the buyer to be successful in alleging such a claim. The seller must have gained an unfair advantage from a clear discrepancy between the performance and consideration, and the seller must have intentionally exploited the buyer's straitened circumstances, inexperience, or thoughtlessness to such extent that it distorted the buyer's intent to conclude the contract[223].

Does that mean that a wrong price in itself has no legal relevance at all? Legally, the price is neither a warranted quality of the artwork, nor an essential basis of the sale contract. The Swiss Federal Tribunal has ruled that in the commerce of artworks, antiques, precious stones and metals, ancient coins and stamps, the price set by the dealer implies a guarantee of authenticity of the sold object if it corresponds to the value of an authentic object[224]. The resulting implicit guarantee produces the same consequences as an explicit guarantee: the seller must answer for the art object's authenticity[225]. Again, the wrong price is linked to the issue of authenticity. However, the principle may not apply to auction sales given that the price at auction is established by the

220 *Mickle v Christie's Inc*., 207 F.Supp. 2d 237, 244 (S.D.N.Y. 2002); *Cristallina SA v Christie Manson & Woods Int'l, Inc*., 117 A.D.2d 284, 292, 502 N.Y.S.2d 165, 171 (1986) ; *Nacht v Sotheby's Holdings* (note 199); *Ravenna v Christie's Inc*, (note 167).

221 See for instance Section 213 (1) New York Civil Practice Law and Rule (CPLR).

222 See Urs Henryk Hoffmann-Nowotny and Hans Caspar von der Crone, "Wertungsparallelität und Interessenausgleich im Irrtumsrecht," *Schweizerische Juristen-Zeitung* 104 (2008): 53, 57.

223 Article 21 (1) Code of Obligations. The cause of action for unfair advantage is accepted only very restrictively by the courts as it interferes with the principle of contractual freedom.

224 Federal Court Ruling 102 II 97, 100 (*Weber v Behar*).

225 Article 197 Code of Obligations; Federal Court Ruling 102 II 97, 100.

buyer's bid, rather than by the bid calling of the auctioneer[226]. Consequently, the sale price in the context of an auction would not have the same significance as the one of a private treaty sale[227].

By contrast, the United States U.C.C. stipulates for private treaty sales that "an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty"[228] that the goods conform to that value. Thus, liability is dependent upon the same inquiry for affirmations of value as for affirmations of authenticity: whether the statement of the seller has in the given circumstances and in objective judgment become part of the basis of the bargain[229]. Along with the claim for breach of an express warranty, the purchaser may also bring action for fraud or misrepresentation.

In *Goldman v Barnett*, the District Court for the District of Massachusetts ruled that, from a strictly legal point of view, "a seller has no duty to set a fair price"[230]. Unless an affirmative misrepresentation is made about the paintings, the buyer must beware of any statements of value from the dealer. The art dealer David Barnett had received 60 paintings on consignment by a Trust and had sold them to David Goldman. The purchase price of each work was based on Barnett's appraisal. Following the sale, Goldman received information that the appraisals were "on average, roughly four times higher than the fair market value as found by at least one other expert"[231]. Accordingly, he initiated legal proceedings against Barnett and the Trust for fraud[232], misrepresentation, breach of contract, and negligence.

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226 Federal Court Ruling 123 III 165, 170.

227 *Ibid*. At auction, the buyer determines the sale price and is therefore less vulnerable with regard to unfair advantage (discrepancy between performance and consideration under a contract concluded as a result of one party's exploitation of the other's straitened circumstances, inexperience or thoughtlessness, Article 21 Code of Obligations), or contractual nullity (for impossible, unlawful or immoral terms, Article 20 Code of Obligations). The estimate prices printed in the sale catalogues are not a firm offer that may simply be accepted by the interested buyer in order to conclude the sale (such as provided in Article 7 (3) Code of Obligations); instead, the estimate price ranges constitute a call for offers pursuant to Article 7 (2) Code of Obligations; see Becker (note 185), para. 392.

228 Section 2-313 (2) U.C.C.

229 See Spencer (note 106), 156.

230 *Goldman v Barnett*, 793 F. Supp. 28 (D.C. Mass 1992).

231 *Idem*, at 31.

232 Regarding fraud, the court held that "[t]o prove the elements of his fraud claim, Goldman must demonstrate that Barnett made a false representation of a material fact with knowledge of its falsity for the purpose of inducing Goldman to act thereon, and that Goldman relied upon the representation as true and acted upon it to his damage". The Court found that there was sufficient evidence to find "that (a) Barnett appraised the paintings; (b) Barnett told Goldman that the appraised value represented the fair market value; (c) the fair market value was in fact substantially below the appraised value; and (d) Goldman relied upon Barnett's statement of fair market value to his detriment". Moreover, the Court reasoned that the dealer had an inducement to set higher sale prices given that his commission was based on these amounts; *idem*, at 31-32.

At issue was whether Barnett was acting on the trust's behalf in issuing his appraisal. The court held that any determination of value Barnett made on the seller's behalf within the scope of his authority as seller's agent could not be actionable, unless he had acted fraudulently or negligently, or broke an express warranty[233]. The Court did not deny that Barnett's appraisals created a warranty. Even though Massachusetts law has implemented the U.C.C. rule, according to which an affirmation merely on the value of the goods does not create a warranty, the Court found that Barnett went substantially beyond merely affirming value because evidence existed that Barnet had issued an expert appraisal of the paintings' fair market value.

In *Factor v Stella*, the purchasers of a work by Frank Stella (1936-), entitled "Marquis de Portago," took the artist to court when they learned that another version of the work existed[234]. The collectors had consigned their work with an auction house, which informed them of the other copy's existence and lowered the reserve price on the painting from US$35,000 to US$15,000. The piece eventually sold for US$17,000. The judge found that "an artist has a duty to a purchaser of his work to inform the purchaser of the existence of a duplicate work which would materially affect the value or marketability of the purchased work". However, the judge concluded that there was "no credible evidence that the auctioned painting would have brought a higher price at auction had not the existence of the other "Marquis de Portago" been disclosed"[235].

It is unlikely that a court would have decided otherwise in the event of a dispute regarding the Sotheby's sale in October 2012 of "Abstraktes Bild (798-3)" (1993) by Gerhard Richter (1932-) for a price of US$21,8 million. The sale catalogue failed to mention that the painting was in fact one of three identically scaled paintings which had been sold as a triptych ten years earlier for US$3.4 million[236].

In *Levin v Gallery 63 Antiques Corp*.[237], the Levins contracted an agent, Roger Harned, and vested him with the express authority to purchase antiques and fine arts on their behalf. Harned identified several sculptures of interest that were offered by a gallery. Three different experts used by the gallery for insurance purposes had appraised the paintings between US$1,110,000 and US$1,305,000. The gallery made a sale offer for US$970,000. The Levins expressed concerns on the value of the paintings and asked for a further valuation by an independent expert, who concluded that "the sculptures

233 *Idem*, at 32.

234 *Factor v Stella*, No. C 58832, Superior Court, Los Angeles County, California (unpublished, 1978); excerpts in Merryman et al. (note 95), 1000-1001.

235 Merryman et al. (note 95), 1001.

236 See Judd Tully, "The Curious Case of Eric Clapton's Vanishing Gerhard Richter Triptych," *Blouin Artinfo*, October 17, 2012, accessed December 26, 2013, http://www.blouinartinfo.com/news/story/834356/the-curious-case-of-eric-claptons-vanishing-gerhard-richter.

237 Docket No. 04-CV-1504, 2006 U.S. Dist. LEXIS 70184 (S.D.N.Y. Sept. 28, 2006).

were in pristine condition and beautiful" but "overpriced". The Levins finally accepted the gallery's offer and purchased the paintings. After the sale, other experts challenged the descriptions and appraisals of the sculptures. As a result, the Levins brought suit against the gallery under the New York Statutory Scheme. The plaintiffs contended that the invoice and appraisals had warranted that the statutes were originals and of a certain value, when in fact, experts assessed that they had been made by workshops and others on the artists' behalf, and were defective. Throughout the dispute, the gallery maintained that the sculptures were originals and challenged the allegations that they were damaged.

The defendants argued that the value attributed to each statue constituted a "non-actionable opinion of value" and filed a motion for summary judgment. The court ruled that representations of price or value in a certificate of authenticity fall under the New York Statutory Laws, which create an express warranty for the material facts stated in such a document[238]. This analysis complies with the rules of the New York U.C.C. as the Official Comments on the Law specify, "whether representations of value are enforceable depends upon the specific facts surrounding the bargain in question"[239]. The court reasoned that the appraisals were merely the seller's opinion and not material facts. However, the character of the three appraisals changed when the Levins expressed concerns on the value of the statues. The appraisals were shown to the Levins in order to assuage their concerns. Therefore, the court found that there was a genuine issue of material fact as to whether the appraisals went beyond mere affirmation of value, opinion, or commendation, and became part of the basis of the bargain to induce the Levins to complete the purchase. On that count, the court denied the gallery's motion for summary judgment[240].

In art sales, the price may imply certain facts that form a necessary basis of the sale agreement and thus engage the seller's liability. Besides, sellers may have to comply with agency duties, including the artworks' careful valuation and the duty to inform the buyer of concerns that could eventuality affect its value essentially. Overall, the disappointed buyer's main hurdle resides in establishing proof that the dealer's contested performance impacted the art object's market value. Additional challenges in asserting damage are the emotional and speculative element in art pricing, or the lack of objectively supportable price determinants.

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238 Section 13.01 (1)(b) N.Y. ACA Law. The court determined that Harned neither had nor held himself out to have knowledge or skill peculiar to the type of statues subject of the sale agreement and that nothing in the record suggested that he was an art merchant. Thus the court applied the New York Arts Law.

239 Official Comment to the New York U.C.C. Section 2-313, para. 8. as referred to in *Levin v Gallery 63 Antiques Corp*. (note 237), at 54.

240 The Court also denied the gallery's motion for summary judgment as to the claims related to the authenticity of the sculptures, but granted summary judgment as to the condition of the statues, and as to Levins' claims for misrepresentation and fraud.

5. Consignment Agreement

a. Auction Sale

Since 1971, it has become a standard auction house practice to estimate the value of lots offered for sale and to publish the price range in the catalogue[241]. Previously, interested clients had to request the estimate values, and were limited to a certain amount of enquiries per auction[242]. Currently, the consignor and the auction house sign a consignment contract, in which they agree on the estimate price range and eventually a reserve price for the lot.

According to Swiss law, the auctioneer generally acts under its own name and for the account of the consignor, with whom the auctioneer has entered an agency-like commission agreement[243]. Under the law of England and the United States, the auction house also is the consignor's agent. All three legislations impose upon the auctioneer a duty of care and a fiduciary duty. The first duty implies that the auctioneer must identify and describe the property with care and accurately to its best advantage, in order to attract the appropriate group of bidders and to reach an optimum price[244]. Pursuant to the second duty, the auctioneer must act in the interest of its principal[245]. In particular, this includes the duty to obtain the highest possible sale price, which means generating interest in the consigned property by advertisement and promotional material, as well as exciting the bidding during the auction[246].

The UK Supply of Goods and Services Act 1982 stipulates that the consignment agreement comprises "an implied term that the supplier will carry out the services with reasonable care and skill" (Section 13). A highly regarded English court decision defined the standard of skill and care as differentiating between provincial auctioneers and leading auction houses[247]. The Court established that, for provincial auctioneers, "the standard is to be judged by reference only to what may be expected of the general practitioner, not the specialist"[248]. In that case, the consignor could not have expected that the provincial auctioneer to consult additional specialists to back-up the opinion of the in-house expert.

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241 See Dirk Boll, *Kunst ist käuflich – Freie Sicht auf den Kunstmarkt* (Ostfildern: Hatje Cantz, 2011), 167.

242 *Ibid*.

243 Article 425 Code of Obligations.

244 Harvey and Meisel (note 166), para. 5.41.

245 For Swiss law: Article 398 (2) Code of Obligations; Rolf H. Weber in *Basler Kommentar, Obligationenrecht I (Art. 1-529 OR)*, ed. Heinrich Honsell, Nedim Peter Vogt and Wolfgang Wiegand, 5th ed. (Basel: Helbing Lichtenhahn Verlag, 2011), Art. 398 n. 8; Becker (note 185), para. 80; for English law: Harvey and Meisel (note 166), para. 5.66; for United States law: *Cristallina S.A. v Christie Manson and Woods, International, Inc*. (note 220).

246 Becker (note 185), para. 80; Harvey and Meisel (note 166), para. 5.68; Jorge L. Contreras, "The Art Auctioneer: Duties and Assumptions," *Hastings Communications and Entertainment Law Journal* Vol. 13, No. 4 (1991), 723.

247 *Luxmoore-May and another v Messenger-May Baverstock* (note 164).

248 *Idem*, at 1076a.

The Court declined to assess whether the auctioneer had correctly valued the consigned property in order to determine whether the auctioneer had complied with its duty of skill and care. Instead, given that "appraisal and attribution both result from an exercise of opinion and judgment which may be arguable in most cases"[249], the Court examined whether "the valuer has done his job honestly and with due diligence"[250]. In the vein of agency law, the auction house is only liable for a diligent performance that the principal could expect from a professional auctioneer acting under the same circumstances[251]. With regard to the English case, the Court concluded that the specialists maintained widely differing views at the time of the auction sale. Therefore, it could not be held that no competent valuer would have missed the indications of the misattribution[252]. In addition, when at least one "respectable body of such professionals"[253] would have reached the same conclusions as the auction house by referencing the material, the claim for breach of the duty of skill and care must fail[254].

The standard of care to be expected of an international auction house also may be difficult to establish. In *Coleridge v Sotheby's*, the international auction house Sotheby's advised the consignor of a collar, Lord Coleridge, to sell it privately to an interested buyer for £35,000[255]. Later, the collar was attributed to the more prestigious Tudor period and sold by Christie's for £260,000. Lord Coleridge sued Sotheby's claiming that it had erroneously attributed the work to the late 17th century and misadvised him on selling it at a private sale for £35,000 and not at auction.

The court conducted a detailed analysis of the evidence provided by expert witnesses, by the expert that Sotheby's had consulted, and of the available material, and held that the claimant failed to establish that Sotheby's arrived at a different conclusion than one of a reasonable valuer in a similar position would have arrived[256]. However, in her testimony, Sotheby's consulting expert asserted that if she had been asked for a private sale price, "she would advised a price of double the low end of her auction estimate – that is £50,000"[257]. The judge reasoned that if Lord Coleridge was to succeed on the primary case concerning the incorrect dating, he still had to prove "on the balance of probabilities that no reasonable appraiser

249 *Idem*, at 1076b; see also Ewan McKendrick, "Auctioneers, 'Sleepers' and Actions in Negligence", International Journal of Cultural Property, Vol. 1, No. 01 (1992), 210.

250 *Luxmoore-May v Messenger-May Baverstock* (note 164), at 1076c.

251 As affirmed in *Coleridge v Sotheby's*, High Court of Justice, Chancery Division [2012] EWHC 370 (Ch) March 1, 2012, 2012 WL 608706.

252 *Luxmoore-May v Messenger-May Baverstock* (note 164), at 1078h.

253 *Coleridge v Sotheby's* (note 251), at 24.

254 *Ibid*.

255 *Coleridge v Sotheby's* (note 251).

256 *Idem*, at 118.

257 *Idem*, at 122. According to evidence a former Christie's director provided, "he would have arrived at a private treaty sale price by taking the top end of the correct auction estimate and adding buyer's premium and VAT thereon"; *idem*, at 20.

in the position of [the consulting expert] would have appraised the Coleridge collar other than on the basis that it was, or probably was, manufactured before 1576"[258]. The Court's decision finally entitled Lord Coleridge to the difference between £50,000 and £35,000.

Likewise, under United States law, the standard of care requires auctioneers to exercise their specific qualifications and abilities[259]. Accordingly, specialists with superior skills or knowledge are required to use their special abilities when conducting valuations albeit they may be guilty of malpractice (i.e. professional negligence)[260]. The duty of care's scope must be assessed according to the given circumstances. Major auction houses may have less time than small auction houses to examine the consigned property, given the great amount of consignments they deal with every day.

Selling consigned property below market value may not constitute a valid claim for breach of duty. In *Clay v Sotheby's*, the United States District Court for the Southern District of Ohio followed the auction house's reasoning, holding that "by definition, an auction sale determines market value, and […] therefore, it cannot be claimed with any legitimacy that Sotheby's sold any of Clay's property below market value"[261]. Arguably, as long as the auctioneer has reasonably advised on the consigned property's attribution, as well as estimate and reserve prices, it is not answerable for the property being sold at a low hammer price.

In *Reale v Sotheby's,* regarding the sale of 74 rare American coins, the New York Appellate Court rejected the plaintiff's contention that Sotheby's had acted negligently by allowing a consulting expert to estimate the consigned coins without visually inspecting them prior to the sale[262]. The plaintiff failed to show that the absence of the collection's visual inspection would have resulted in lower estimates, or in any other injury.

Where the auctioneer fails to comply with his fiduciary duty, notwithstanding whether the action is based on contract or on negligence, the auctioneer is liable for the damage caused to the consignor. In *Reale,* the plaintiff alleged in vain that Sotheby's had acted in breach of its fiduciary duty by scheduling the auction on the same day as another house's coin auction[263]. Given the lack of sufficient proof for any nonspeculative damages that such a parallel sale could have caused the consignor, the court dismissed the claim. Sotheby's was not entitled to summary judgment on one count, namely regarding the plaintiff's contention that the house had unilaterally set a global reserve for the auction, to which the plaintiff allegedly did not agree.

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258 *Idem*, at 57.

259 See Karlen (note 217), 10.

260 See Raúl Jáuregui, "Rembrandt Portraits: Economic Negligence in Art Attribution," *U.C.L.A. Law Review* 44 (1997): 1993; Karlen (note 217), 11.

261 *Alta T. Clay v Sotheby's Chicago Inc*., 257 F. Supp. 2d 973, 981; 2003 U.S. Dist. LEXIS 25683, 18.

262 *Reale v Sotheby's*, 278 A.D.2d 119, 120-121 (2000), 718 N.Y.S.2d 37.

263 *Ibid*.

The auctioneer's fiduciary duty includes a duty to inform the principal of all facts that may have an essential impact on the sale's success. The art market defines property that fails to find a buyer at auction as "burned"[264], as marketability and buying interest for the property is reduced at least temporarily. Even where the disclosure of such facts is financially damaging to the auctioneer, the duty to inform prevails over any of the auctioneer's personal interests and forces it to provide the relevant information. In *Cristallina v Christie's*[265], the New York State Appeals Court held that auctioneers must disclose internal disagreements as to the auctionability of the consigned property, including an obligation to provide its consignor with truthful opinions regarding its value[266].

In summary, liability is very much based on the auctioneer's failure to comply with statutory duties and centres on the question of whether a competent professional performing under the same circumstances would have reached the same conclusions at that time. Thus, courts have differentiated their reasoning according to the size of the auction house, degree of expertise, and seriousness of the valuation.

b. Private Treaty Sale

As the terms of a private sale remain undisclosed, some dealers have attempted to charge a higher sale price without the sellers' knowledge. The duties previously developed also apply to the agent who obtains an artwork on consignment to be sold privately. Case law in England and the United States has specifically developed liability for pricing under private treaty sales.

In *Accidia Foundation v Simon C. Dickinson*, the Accidia Foundation mandated Luxembourg Art Limited (LAL) to assist with the sale of a drawing by Leonardo da Vinci (1452-1519)[267]. LAL contacted the art dealer Simon C. Dickinson asking for help to find a buyer for the drawing. Dickinson was able to find a buyer, to whom he sold the drawing by private treaty for the price of US$7 million. As agreed upon with LAL, Dickinson remitted US$6 million to the company, which, in turn, sent on US$5.5 million to the Accidia Foundation. After the sale, the purchaser raised doubts on the authenticity of the painting and asked Dickinson to refund the purchase price. In the course of this dispute, Accidia discovered the amount of Dickinson's sale price and initiated proceedings against the dealer, claiming the return of the US$1 million that he had retained.

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264 Alan Beggs and Kathryn Graddy, "Failure to Meet the Reserve Price: The Impact on Returns to Art," *Department of Economics Paper Series, University of Oxford* 272 (July 2006), 3.

265 *Cristallina S.A. v Christie Manson & Woods, International Inc.* (note 220).

266 For example, if the auction house determines that the sale of the consigned property appears to be impossible or impracticable, it must tell the consignor so; *idem*, at 294.

267 *Accidia Foundation v Simon C. Dickinson* [2010] EWHC 3058 (Ch), [2010] All ER (D) 290 (Nov), Chancery Division, 26 November 2010.

The Court accepted Accidia's argument that Dickinson had received retrospective authority to act as Accidia's agent "so that it was liable to account to Accidia"[268]. Furthermore, the Court held that Accidia had not given LAL the authority under the agency agreement to agree to a net sale price with Dickinson. Accordingly, Dickinson was obliged to return the received US$1 million qualified as "unauthorized benefit". However, even if the fiduciary acts in breach of his duty, the law protects the fiduciary's remuneration where "it would be inequitable now for the beneficiaries to step in and take the profit without paying for the skill and labour which has produced it"[269]. Consequently, the judge held that Dickinson was entitled to US$200,000 in remuneration based on the 10% (i.e. US$700,000) stipulated in the Accidia agency agreement, after deduction of LAL's commission of US$500,000, because Dickinson "could and should have done more to make sure that Accidia understood the less than usual arrangement [he] had reached with [LAL]"[270].

In *Spencer-Churchill v Faggionato Fine Arts Ltd and Others*, the owner of a painting by Jean-Michel Basquiat, Lord Edward Spencer-Churchill, decided to sell the painting and sought advice from an art dealer, Mr Faggionato, to find an adequate buyer[271]. The dealer informed Lord Edward that he had found a collector in Florida who was interested in purchasing the painting for US$6 million. Lord Edward asked Faggionato to inquire with some auction houses whether that was a good price. The dealer informed Lord Edward that auction houses had estimated the painting between US$4-6 million, and Lord Edward accepted the Floridian collector's offer. It turned out that the collector was, in fact, the previously mentioned Warhol dealer Alberto Mugrabi, who had paid Faggionato a secret commission worth US$400,000. It was also revealed that Faggionato had not consulted any auction house, and that Mugrabi had consigned the painting at Christie's with a guide price of US$9 million.

Lord Edward contacted Christie's requesting a satisfactory arrangement with regard to any sale proceeds above US$6 million. The auction house withdrew the painting from the sale, and Lord Edward commenced legal proceedings on the basis that the painting remained vested in him because the purported sale was unauthorized and therefore void. He further sought an interim injunction restraining Mugrabi from selling the painting until judgment on the claim. The court granted the injunction, preventing Mugrabi from dealing with the painting without first giving notice, considering that a seriously issue remained for trial, and that Lord Edward maintained a real prospect of success in his claim. The parties finally

268 Weaver (note 133), 301.

269 *Accidia Foundation v Simon C. Dickinson* (note 267), at 90 quoting *Phipps v Boardman* [1964] 1 WLR 993, 1018.

270 *Idem*, at 94.

271 *Spencer-Churchill v Faggionato Fine Arts Ltd and Others* [2012] EWHC 2318 (Ch). The facts of this case are summarized in Elizabeth Emerson, "The Need for Contractual Precision: Spencer-Churchill v Faggionato Fine Arts Ltd and Others," *Art Antiquity & Law* Vol. 17, Iss. 4 (2012): 359-364.

settled the dispute, agreeing that Lord Edward possessed unencumbered title to the painting and that he was "free to deal with it"[272].

As agent of the seller, the intermediary dealer must act with strict honesty. He must disclose the commission he negotiated with the purchaser and obtain the principal's consent to do so[273]. This disclosure prevails regardless of whether damage is established[274]. Although intermediary dealers have an agency duty to their principals, the practice has developed of accepting secret commissions from buyers[275]. Any delimitation between what constitutes an unauthorized benefit or an equitable remuneration for the agent's services can be very difficult. An express statement in the agency agreement, whereby the intermediary dealer is permitted to obtain a secret commission fee from the purchaser, can prevent its contestation at court and provide a clear contractual remedy in case of any breach by the dealer.

6. Disclaimer of Warranty

Where the parties have concluded a written agreement, the document is likely to contain a warranty disclaimer for the accuracy of the attribution and/or valuation. For example, auction houses generally disclaim any liability for the accuracy of lot descriptions and estimate prices stipulated in their catalogues. Such contractual disclaimers are valid to the extent that they comply with the restrictions imposed by statutory law.

Under Swiss law, the parties may not waive in advance any responsibility for unlawful intent or gross negligence[276]. In that event, the agreement is void[277]. The expert acts with gross negligence upon the existence of a serious deviation from the owned standard of care that a conscientious person would observe in a similar situation[278]. To illustrate, a grossly negligent expert misattributes an art object if he knows that the attribution is wrong, or if he fails to inform his client on serious doubts as to authenticity or provenance[279].

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272 See Blenheim Palace Press Release, "Statement Agreed by the Parties," February 6, 2013, accessed December 26, 2013, http://blenheimpalace.com/assets/files/press_releases/BP%20PR%20LSC.pdf.

273 *Rhodes v Macalister* (1923) 29 Com. Cas. 19.

274 *Ibid*.

275 See also *Spencer-Churchill v Faggionato Fine Arts Ltd and Others* (note 271).

276 Article 100 (1) Code of Obligations. In the event the obligation's performance was delegated to an associate, such as an auction house's employee, the auction house may exclude all liability except for wilful deceit (Articles 28, 101 (1), and 234 (3) Code of Obligations). Nonetheless, the obligor is responsible for the associate's selection, instruction, and supervision; see Becker (note 185), paras. 365 et seqq.

277 The consequences of voidness are disputed amongst scholars; see Alexander Jolles and Isabelle Roesle, "Gestaltung des Gutachtervertrags im Schweizerischen Recht," *KUR* 2 (2013), 35-42, 40.

278 See Wolfgang Wiegand in *Basler Kommentar, Obligationenrecht I (Art. 1-529 OR)*, ed. Heinrich Honsell, Nedim Peter Vogt and Wolfgang Wiegand, 5th ed. (Basel: Helbing Lichtenhahn Verlag, 2011), Art. 99 n. 6.

279 See Jolles and Roesle (note 277), 40.

On the other hand, the parties may validly exclude in advance the expert's liability for minor negligence in the performance of the expertise. It is not the expert's diligence that is subject to the contractual autonomy of the parties, as the expert *per se* has a duty of care. Instead, by means of a disclaimer, the parties may confine the degree of the expert's accountability regarding the mandate's performance[280]. The parties may, for example, limit the liability to a certain amount, which may be especially critical regarding high-end art.

Moreover, the exclusion of liability clause is subject to the rules of the Swiss Federal Law on Unfair Competition (LCD)[281], which introduced new restrictions for misleading general terms and conditions concluded between dealers and **consumers**. Such clauses are deemed unfair if they are used to the detriment of consumers and lead to a significant imbalance between the contractual rights and obligations[282]. It is contested whether the requestor of an art expertise is a consumer within the meaning of the LCD[283]. In an exceptional case, the Federal Court held that, in the context of a sale at auction of a collection of stamps, the fact that the auction house and the consignor had entered both an agency agreement and a credit agreement would induce the existence of a consumer contract[284]. Also, in more recent consumer law developments, public auctions are excluded from the law's material scope of application[285].

In England, the parties to a sale contract may validly exclude liability for implied terms by express agreement or by the course of dealing or usage[286]. Excluding the seller's or appraiser's liability for negligence, disclaimers are subject to the reasonableness requirement mandated by the Unfair Contract Terms Act 1977 (UCTA)[287]. The "reasonableness test" is satisfied if the expert can show "that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made"[288]. The same requirement applies to the expert's misrepresentations[289]. For unusual clauses, the court requires far more effort from the auctioneer to bring the clauses to the buyer's notice[290].

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280 Rolf H. Weber (note 245), Art. 398 n. 34.

281 Of December 19, 1986, RS 241.

282 Article 8 LCD.

283 Wolfgang Ernst, "Das Kunstgutachten im Spannungsfeld der Justiz," Conference *Expertise – Das Kunsturteil zwischen Geschichte, Technologie, Recht und Markt*, SIK-ISEA Zurich, May 16-17, 2013.

284 Federal Court Ruling 121 III 336 (ruling is only based on the criterion of a private usage of the collection; the Court stressed the fact that this was an exceptional case).

285 Parliamentary initiative no.06.441 on consumer protection for distance sales ("*Pour une protection du consommateur contre les abus du démarchage téléphonique*") aiming to add new rules to the Code of Obligations on the consumers' right to rescind a distance sale contract.

286 Section 55 (1) Sale of Goods Act 1979.

287 Cf. Section 11(1) UCTA; see also Harvey and Meisel (note 166), para. 6.21.

288 Section 11 (1) UCTA.

289 Section 3 Misrepresentation Act 1967 referring to Section 11(1) UCTA.

290 See Harvey and Meisel (note 166), paras. 6.05 et seqq.

Again, for liability arising in contract, much depends on whether the requestor of an art expertise qualifies as a consumer. Pursuant to the UCTA, "the buyer is not in any circumstances to be regarded as dealing as a consumer if he is an individual and the goods are second hand goods sold at a public auction at which individuals have the opportunity of attending the auction in person" or "if he is not an individual and the goods are sold at auction of competitive tender"[291].

The Council of Ministers adopted the EU Directive on Unfair Terms and Consumer Contracts (93/13/EEC) by the Unfair Terms in Consumer Contracts Regulations 1999, which introduces a general concept of fairness. In fact, applying to consumers (respectively to natural persons) who enter the contract acting for purposes outside their "trade, business, or profession"[292], the Regulations stipulate that "[a]n unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer"[293]. A contractual term is qualified as unfair "if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer"[294]. An unfair term is not binding on the consumer, but does not affect the rest of the contract, in so far as the contract is capable of continuing in existence without the unfair term.

Attention should be paid to the fact that the fair term requirement only applies to standard contractual provisions, which have been drafted in advance, and the substance of which the consumer has been unable to influence[295]. According to common auction house practices, the terms of standard agreements are not negotiated by the consignor or the buyer but rather "imposed" on them[296]. Regardless, in order to fall within the Regulations, the buyer must still qualify as a consumer[297].

In June 2014, the United Kingdom will introduce the Consumer Contracts Regulations 2013, which will also apply to art sales. Before the consumer is bound by an off-premises or distance sale contract, the Regulations require traders to disclose their identity[298]. Moreover, they extend the time period within which consumers may cancel such a sale contract, i.e. the "cooling-off period"[299]. The new Consumer law will also apply to online

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291 Sections 3 (1) and 12 (2) UCTA; see also *idem*, paras. 6.15 et seqq.

292 Article 2 (b) Council Directive 93/13/EEC; Regulation 3 Unfair Terms in Consumer Contracts Regulations 1999.

293 Regulation 8 (1) Unfair Terms in Consumer Contracts Regulations 1999.

294 Regulation 5 (1).

295 Regulation 5 (2).

296 See Harvey and Meisel (note 166), para. 6.27.

297 *Ibid*. If not, the misattribution of an artwork may be prosecuted under the Trade Descriptions Act 1968; see *May v Vincent* [1990] 10 T.L.R.1, and Palmer (note 106), 26-27.

298 Regulations 10 (1) and 13 (1); Schedule 2.

299 Regulation 28.

auction sales, which currently do not fall under the law's exemption scheme for public auctions[300].

In their sale terms, auction houses generally express that attributions are statements of opinions and must not be taken as statements of facts. In *Hoos v Weber*, the buyer at Sotheby's of a Rembrandt (1606-1669) picture resisted an action for the purchase price on grounds of the picture's non-authenticity[301]. Sotheby's referred to its sale conditions, which declared that all statements on authorship and attribution were statements of opinion and not of fact. The court ruled that the clause would have been unavailable to the auction house if it had failed to comply with its duty of care. Instead, it conceded that Sotheby's had exercised proper care and skill and within the scope of the contract. Auctioneer's disclaimers for misrepresentation remain vulnerable, especially in view of the imbalance of power and knowledge between auction houses and their clients[302].

In the United States, the U.C.C. regulates the seller's liability disclaimers for both express and implied warranties[303]. For instance, an express warranty "pertaining to the 'core descriptions' or 'quality of the subject matter of the sale' cannot be limited and applies even to the seller who acts in good faith and without any knowledge of forgery or misattribution"[304]. Additionally, most U.S. States maintain consumer protection statutes applying to transactions involving the purchase of consumer goods. These statutes generally provide that the consumer's rights may not be abridged by means of a disclaimer.

In *Foxley v Sotheby's Inc*., Sotheby's exclusion of liability was upheld for the misrepresentation of a lot's provenance[305]. In that case, the auction house had replaced the name of an equivocal dealer in its catalogue with "Private Collection". The New York federal district court held that auction houses often do not disclose their consignors' identity and that the exculpatory language of Sotheby's Business terms was sufficient "to bar any action based upon a representation of provenance"[306]. The New York Art and Cultural Affairs

300 Regulations 5 "public auction" and 9 (1) and Schedule 1 (on-premises contracts), respectively Regulation 10 and Schedule 2 (off-premises contracts) allow that in the event of a public auction that is not exclusively online, the information as to the seller's identity may be replaced by the equivalent details for the auctioneer. Moreover, the right to cancel during the cooling-off period only applies to exclusively online auctions, see Regulations 5 "public auction" and 28 para. (1)(g). Before the enactment of the new Regulations, the Consumer Protection (Distance Selling) Regulations 2000/2334 apply, which foresee a right to cancel except for auctions in general. See also Pierre Valentin and Hannah Shield, "Online Trading – Art Dealers Beware," *artatlaw blog*, November 23, 2013, accessed December 26, 2013, http://www.artatlaw.com/latest-articles/online-trading-art-dealers-beware.

301 *Hoos v Weber* [1974] 232 Estates Gazettes 1379; see also Palmer (note 106), 25.

302 See Harvey and Meisel (note 166), para. 6.63; see also Harter-Bachmann (note 201), 92.

303 Section 2-316 U.C.C.

304 Patty Gerstenblith, *Art, Cultural Heritage, and the Law: Cases and Materials,* 3rd ed. (Durham, North Carolina: Carolina Academic Press, 2012): 355.

305 *Foxley v Sotheby's Inc*. (note 219).

306 As reported by Anton Pestalozzi, *Der Steigerungskauf – Kurzkommentar und Zitate zu Art. 229-236 OR* (Zurich: Schulthess, 2000), 163, para. E 1147; see also Lerner and Bresler (note 71), 632.

Law explicitly invalidates disclaimers that intend to exclude actions based on "an instrument of authentication"[307]. In practice, such instruments concern catalogue statements on creatorship, which unequivocally signifies that the art object is, in fact, by the stated creator[308].

In accordance with the duty of care and fiduciary duty, auction catalogue disclaimers are generally valid for lot descriptions that "corresponded to the generally accepted opinion of scholars and experts at the date of sale, or fairly indicated there was a conflict of opinion among scholars and experts"[309].

Also towards their consignors, auctioneers arrange in their standard agreements for full discretionary power over the consigned property's attribution, estimate price, and catalogue description. The consignor, by signing the consignment agreement, agrees to this standard of care and fiduciary duty, and may hold the auction house liable only in case of reckless disregard. In *E.S.T. v Christie's*, the situation became increasingly precarious for Christie's when the New York Supreme Court challenged its liability exclusion clause in an attempt to distinguish between "authenticity" and "attribution". Christie's contract provisions did not expressly encompass the latter[310]. Luckily for the auction house, the court ultimately did not rule on these issues. Nevertheless, it held that it could "not determine as a matter of law that misattribution of the painting is included in the matters listed"[311] by the exculpatory clause of the consignment agreement. The case was finally settled and Christie's changed the wording of its standard consignment agreement by including "attribution" in its list.

In the United States, the question of whether consignment and sale agreements constitute consumer transactions is determined under State law[312]. In *Mickle v Christie's*, the Federal District Court for the Southern District of New York held that unique, one-of-a-kind paintings are not typical consumer goods, and thus not governed by consumer statutory law[313]. In *Nataros v Fine Arts Gallery of Scottsdale*, the State Court of Arizona found that the buyer, misled by the auctioneer's misrepresentations of the artwork's value and

307 Section 13.01; see also *ibid*.

308 Section 13.01 (3) N.Y. ACA Law.

309 Ronald D. Spencer, "When Experts and Art Scholars Change Their Minds," *Spencer's Art Law Journal*, Vol. 1, No. 1 (Spring 2010); see for example *Foxley v Sotheby's Inc*. (note 219), at 1235-1236, upholding Sotheby's exculpatory clause for liability stemming from the performed appraisals.

310 *E.S.T., Inc. v Christie's, Inc*., Index No. 112793/00 (N.Y. Sup. Ct. June 22, 2001).

311 As cited by Lerner and Bresler (note 71), 634.

312 See Marc Weber, "Liability for the Acquisition of Faked or Wrongly Attributed Works of Art in US Law," in *Kulturgüterschutz – Kunstrecht – Kulturrecht, Festschrift für Kurt Siehr zum 75. Geburtstag aus dem Kreise des Doktoranden- und Habilitandenseminars "Kunst und Recht,"* ed. Kerstin Odendahl and Peter Johannes Weber, 409 – 431 (Baden-Baden: Nomos, 2010), 416.

313 *John T. Mickle v Christie's, Inc*. (note 220), at 432; see also *Christie's Inc. v Croce*, 5 F.Supp.2d 206, 207-208 (S.D.N.Y. 1998).

concealment of its provenance, could qualify as a consumer and seek damages from the auctioneer[314].

With regard to authenticating experts, the case *Lariviere v E.V. Thaw, the Pollock-Krasner Authentication Board et al*., showed that experts might effectively protect themselves through contract waivers in the event of a lawsuit. In that case, the owner of a painting purportedly by Jackson Pollock brought an action for breach of contract[315]. He had submitted his painting to the Pollock-Krasner Authentication Board, which refused to authenticate. The court upheld an exculpatory agreement concluded between the parties[316].

To summarize, experts engaged in valuation and authentication may disclaim liability for their statement's accuracy, but they must comply with the minimum standard of care imposed by statutory duties. Besides, given the increasing commoditisation of art, and the imbalance of power and knowledge between professional dealers and their clients, consumer law may progressively apply to certain art transactions in the future.

B. Liability Towards Third Party Beneficiaries

Third parties may rely on the expert's valuation when making unfavourable dispositions although they have no contractual relationship with the expert. Typical third party beneficiaries are "persons whose identity and anticipated use or benefit was expressly contemplated by the parties at the time of contract"[317]. The third party beneficiary must show that the expert had reason to know the contracting party intended prospective purchasers to benefit from the appraisal contract's performance[318].

The appraiser's liability towards third parties has led to much discussion in Switzerland[319]. As ruled by the Federal Court, a quasi-contractual liability may be derived from trust created by the appraising expert: the expert must enjoy a direct or indirect relationship with the person relying on the appraisal and must know or should have known that the person would trust his information[320]. For example, this may be the case where an expert commis-

314 *Nataros v Fine Arts Gallery of Scottsdale, Inc*., 126 Ariz. 44, 612 P.2d 500 (1980).

315 *Lariviere v Thaw et al*., 2000 WL 33965732 (N.Y. Sup.), 2000 N.Y. Slip. Op. 50000(U).

316 On the liability of authenticating experts, see Anne Laure Bandle, "Fakes, Fears, and Findings – Disputes over the Authenticity of Artworks," *Transnational Dispute Management* 2 (2014) accessed February 26, 2014, www.transnational-dispute-management.com/article.asp?key=2100.

317 Robin Paul Malloy, "Lender Liability for Negligent Real Estate Appraisals," *University of Illinois Law Review* 1984 (1984): 53-98, 70.

318 *Stotlar v Hester*, 92 N.M. 26, 32-33, 582 P.2d 403, 407 (1978).

319 See Honsell (note 11), 2.

320 Federal Court Rulings 130 III 345, 124 III 363 and 124 III 297. Liability in such cases cannot be answered conclusively to this date in view of jurisprudence and the doctrine of law; see Jolles and Roesle (note 277), 40.

sioned by the seller for appraisal knows that the purchaser will rely upon that appraisal when deciding whether to buy an art object, which later proves to be under- or overvalued. The expert owes a duty of care, the extent of which is narrower compared to an expert performing under contract[321]. In any case, the expert would be well advised to limit the disclosure of his appraisal to third parties and his legal responsibility.

Whereas the expert has no general obligation to speak truthfully, he must – should he decide to do so – answer truthfully if he has a special insight in the relevant facts by virtue of his position, and if it was recognisable to him that the information has or may have a damaging impact on the addressee[322]. Moreover, the expert must not withhold fundamental facts that are known to him, or give false information intentionally or against better knowledge[323]. Nonetheless, the Federal Court has affirmed tort liability for false advice or information only in crass cases[324].

Furthermore, where the expert makes false or misleading statements about himself or others and their goods, services, business relationships, and prices, or respectively favoured third parties, his undertakings may constitute unfair competition[325]. Considering the impactability of the art market, such liability may particularly occur when experts make misleading or false statements in the media[326].

English and United States law are antipathetic to imposing liability for economic loss between non-contracting parties[327]. As a main exception, the expert may be answerable for negligent misstatement for providing a negligent, though honest, misrepresentation, spoken or written, causing financial loss to the party seeking information. This duty of care is imposed on the party possessing a special skill and in the exercise of which the victim trusts, and where expert knew or ought to have known that reliance was being placed on his skill and judgment[328]. The tort of negligent misrepresentation may apply regardless of whether the negligence is conscious or inadvertent[329].

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321 See Bruno Glaus, "Die Haftung des Experten," in *Neuigkeiten im Kunstrecht – Schriftenreihe des Instituts für Rechtswissenschaft und Rechtspraxis (IRP-HSG)*, Vol. 53, ed. Ivo Schwander and Peter Studer, 109 – 125 (St. Gall: IRP-HSG, 2008).

322 Federal Court Rulings 57 II 81, 86; 111 II 471, 474; and 130 III 345.

323 Federal Court Rulings 57 II 81, 86; 80 III 41, 54; 111 II 471, 474; and 116 II 695, 699; cf. Article 41 Code of Obligations.

324 Honsell (note 11), 9.

325 See Article 3 (a) and (b) LCD.

326 See Glaus (note 321).

327 See Palmer (note 106), 32; Karlen (note 217), 6.

328 *Hedley Byrne v Heller* (note 166), at 486, 502 and 514; *Struna v Wolf* (note 166); Karlen (note 217), 12-13.

329 See Karlen (note 217), 10.

The range of potential victims must be very limited and predictable to entitle a claimant to sue[330]. In other words, the expert must have known that the appraisal would be communicated to the victim, or that it was very likely that the victim would rely on that information in deciding whether to conclude the contemplated transaction[331]. This requirement is easily met where the false appraisal was directly and intentionally communicated to the victim by the appraiser[332].

Moreover, the expert must be fully aware of the nature of the transaction that the potential victim is contemplating and through which he might suffer damages[333]. For example, the purchaser of a painting may be protected in relying on the valuation provided, not to him directly, but to a potential lender on the security of the work, to ascertain the painting's value as collateral[334]. In any case, the creation of a duty of care is subject to the effect of any disclaimer of responsibility[335]. Considering the requisite degree of foreseeability concerning the potential victim's reliance on the appraisal, and the possibility to validly disclaim third party liability, the prospects of lawsuits by claimants not party to an appraisal contract must be seen as relatively remote.

When experts give unsolicited opinions to third parties, they may be responsible for acting in disparagement of the owner's property[336]. Furthermore, when unnecessarily intermeddling with the affairs of others where they are wholly unconcerned, experts risk the possibility of being found to have acted maliciously[337]. Pursuant to case law, malice is generally determined based on the expert's actual state of mind[338]. For example, voluntary statements "recklessly made" are deemed to constitute malice[339]. Finally, statements by experts directly attacking a seller's personality and business reputation, such as "this dealer only sells meritless works", may constitute defamation if untrue[340].

In the context of auction houses, attributions and estimate values are rapidly disseminated to third parties by means of auction sale catalogues. In a recent case, the Supreme Court of the County of New York was asked to determine whether detrimental third party reliance on

330 See Palmer (note 106), 35.

331 *Caparo Industries plc v Dickman* [1990] 1 All ER 568, [1990] UKHL 2, [1990] 2 AC 605.

332 See Palmer (note 106), 32. See also *Galliford Try Infrastructure v MottMacDonald* [2008] EWHC 1570 (TCC), 120 Con. L.R. 1, [2009] P.N.L.R. 9.

333 *Caparo Industries plc v Dickman* (note 331).

334 See Palmer (note 106), 35.

335 *Hedley Byrne v Heller* (note 166); *Caparo Industries plc v Dickman* (note 331).

336 *Hahn v Duveen*, 133 Misc. 871, 234 N.Y.S. 185 (N.Y. Sup. Ct. 1929).

337 *Idem*, at 873; *Travis v Sotheby Parke Bernet Inc*. (note 157).

338 See Jeffrey Orenstein, "Show Me the Monet: The Suitability of Product Disparagement to Art Experts," *George Mason Law Review* 13 (2005): 905, 911.

339 See Merryman et al. (note 95), 1087.

340 For the claims of defamation and fraud, see Spencer (note 106), 167 et seqq.; for a defense under American constitutional law, see Ronald D. Spencer, "Opinions About the Authenticity of Art," *Spencer's Art Law Journal* Vol. 2, Iss. 2 (2011): 2-6.

such catalogue information may engage the auction house's liability where the information was incorrect[341]. The plaintiff in the underlying case, Guido Orsi, had purchased from the Tony Shafrazi Gallery a Jean-Michel Basquiat painting that the Basquiat Authentication Committee later declared to be counterfeit.

During the sale negotiations, the Gallery owner showed Orsi the catalogue of a Christie's auction at which the Gallery had acquired the painting, its provenance, and the price paid. In his complaint, Orsi stated that "art purchasers rely on the expertise of a prestigious auction house such as Christie's", termed as "market maker", and "that when Christie's provides a warranty concerning the authenticity, or provenance of a painting, the custom and practice of the art industry is that the provenance of the work of art has been firmly and permanently established"[342].

The Court allowed the plaintiff to pursue his actions for fraud and fraudulent inducement. It considered that the plaintiff had sufficiently alleged that "Christie's fraudulently misrepresented the painting's provenance, and published that misrepresentation in its catalogue, which Christie's could reasonably anticipate would be relied upon by bidders at its auction, as well as subsequent purchasers"[343].

The two actions were finally dismissed because of the plaintiff's failure to demonstrate that Christie's possessed knowledge of the misrepresentation and intent to defraud[344]. While the plaintiff's allegation that Christie's should have followed-up after the sale and intervened as soon as it knew about the counterfeit might have supported a claim for negligence, it was held insufficient to sustain a fraud claim[345].

From a legal viewpoint, auction houses may hardly be answerable towards third parties for the accuracy of their catalogue content. In practice, however, this does not matter. The art market continues to rely on auction sale data as a value and attribution benchmark.

CONCLUSIVE REMARKS

Pricing art is a complex undertaking, led by the mastery of critical discourse only a few art dealers control. The taste-making process remains prosperous as long as art market actors do not critically question the cultural arbiters' choices. In any event, the market's preferences index the market value for the given artworks, which must be taken into account

341 *Tony Shafrazi Gallery, Inc., and Guido Orsi v Christie's, Inc.*, Index No. 112192/07 (N.Y. Sup. Ct. 2008).

342 Complaint para. 20, reproduced in *Tony Shafrazi Gallery et al. v Christie's, Inc.*, *idem*, at 6 (Original transcript).

343 *Idem*, at 6-7.

344 *Tony Shafrazi Gallery, Inc., and Guido Orsi v Christie's, Inc.*, No. 112192/07 (N.Y. Sup. Ct. 2011).

345 *Ibid*.

by experts when commissioned to appraise or sell art. When doing so, written agreements expressly delineating the appraiser's or seller's liability may be helpful in avoiding unfulfilled expectations and their legal consequences.

Notwithstanding any disclaimer, it is still in the experts' interest to exercise utmost diligence when appraising and attributing art. Primarily, it ensures the stability of a market that very much depends on accurate attributions and values. Moreover, experts are held by the law to conduct their performance with a certain level of diligence and care. Finally, going forward, the law may very well adapt to the art market reality and increase expert liability to ensure greater quality in attributing and pricing art.