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Truth in Art and Law

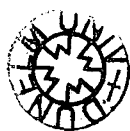
Allocating the Risks Associated with Attribution in the Art Auction House

Sebastian Harter-Bachmann

St. John's College

Thesis submitted for the degree of

Master of Jurisprudence



Department of Law

University of Durham

2007

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Sebastian Harter-Bachmann

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Abstract

This thesis explores the interaction of law with art auction house practices in the area of authentication and attribution. A key issue which is addressed is whether the understanding of authorship which the contemporary art market has adopted is in conflict with the creative processes of artists, both past and present. It is considered whether any such conflict may generate uncertainty, providing a fertile ground for disputes relating to attribution. On the basis of this, an analysis of the complex relationship between the auctioneer and buyer at auction under the current law is made. In particular, the duties and liabilities the art auctioneer owes to the purchaser with regard to the description of lots made in the course of an auction are explored. In an attempt to find the fairest and most cost-efficient solution to the art world's misattribution problem, a move from *caveat emptor* to *caveat auctionator* is discussed.

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1

Introduction

This study will explore the interaction of law with art auction house practices in the area of authentication and attribution. Never in living memory has there been so much interest in buying art: buyers from the traditional markets in the United States and Europe are now being joined by those from Russia, the Middle East and Asia. What is more, this enlarged demographic is being matched by a widening of interest across the categories, from Old Masters, to Impressionists, to Pop Art.[1] Furthermore, good sales are seen not only at the top end of the market but in the middle levels too.[2] Because of this broad spread of interest the market remains strong, and prices for single works of art continuously set new sale records. To a huge extent, auction houses have contributed to this unprecedented boom. In recent years, they have achieved tremendous public visibility, prompted by the fierce competition between large international auction firms to sell the most expensive and captivating art. In an attempt to gain bigger market shares, auction houses have successfully created new groups of buyers. From their previous role as wholesale suppliers to art dealers, auction houses now market art directly to the general public. Many of these new buyers, although they are inexperienced art amateurs, acquire art as an investment. After all, great and memorable art has always been traded and appreciated as much for the power it symbolises as for its aesthetic qualities. Good art speaks of wealth, sophistication and power.

What, however, if a work of art sold at auction turns out to be a fake? In the excitement of the current market it is sometimes forgotten that the world of art is very complex. The high value and status given to art by our general culture often does not correspond with the immense problems experts face when they set out to authenticate and attribute works of art. Yet authenticity has always been a crucial issue in the modern market, not simply for the intrinsic worth of a work of art, but for its monetary value. It is obvious that jurisprudence has to keep up with this development and must tackle the legal

[1] See Joanna Pitman, 'Will the Boom Ever End?' in THE TIMES, 22 August 2006, p. 17.
[2] See statement of Lisa King, international managing director of Christie's, *ibid.*

difficulties arising from it: the higher the price paid for a piece of art, the more severe the problems for the buyer who finds out that its attribution is defective, as this usually results in a significant decrease in its value. Should the auction house be automatically responsible in this situation for any misattribution? Or is it the case that the buyer should employ his own experts unless he wishes to take risks? In order to answer these questions, this thesis explores why truth in art may be an elusive concept and why misattribution may occur.

Chapter 2 introduces the objects this study is concerned with: works of art have many special features that distinguish them from common commercial goods. These predominantly non-physical features explain the desire and "urge of possession" that make auctions an ideal marketplace for selling art.

Chapter 3 intends to create a better understanding of the processes and realities of the art market by examining the pre-sale activities in the auction house especially concerning the attribution and cataloguing of artworks. The legal, historical and social issues that shape the relationships between auctioneers and buyers at auction are considered. A key issue which is addressed is whether the notion of authorship which the modern market has adopted is in conflict with the creative processes of artists, both past and present. A further question is whether any such conflict may generate uncertainty, providing a fertile ground for disputes relating to attribution. With the trend for auction houses to attract increasing numbers of inexperienced buyers, this chapter considers whether the conflict often goes unnoticed by bidders who, not having the expert knowledge to evaluate the works they are planning to bid for, must trust the information given by the auctioneer, especially the description in the catalogue.

Chapter 4 undertakes an analysis of the complex legal relationship between the auctioneer and buyer and explores the duties and liabilities the art auctioneer owes to the purchaser with regard to the description of lots made in the course of an auction. It is concluded that the risks intrinsic to the authentication and attribution of works of art are to a large extent located with the buyer at auction. Since this puts auction houses in a position of unjustified superiority over consumers at auction, theoretical alternatives of auction house liability are examined in chapter 5. A move from *caveat emptor* to *caveat auctionator* is discussed in an attempt to find the fairest and most cost-efficient solution to the art world's misattribution problem.

2

Preliminaries: Works of Art as Commercial Goods and the Significance of the Art Auction

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The aim of this chapter is to work out the significance of the art auction as a forum for the valuation and sale of art. The features that set works of art apart from common commercial goods will be identified. Both will enhance the understanding of the course and workings of auctions to be developed here.

A. The Distinguishing Features of Works of Art

The legal handling of art cases has always involved difficulties inherent in what has been appropriately referred to as the "distinctive autonomy"[1] of art. It will not be addressed here what makes something art in terms of an aesthetic discourse. This question, which would require entering a maze of different theories of art, is well beyond the scope of this study.[2] Yet writing about legal problems in the market for art must start by paying some attention to the peculiarities of artworks, that is, identifying what makes them different from common commercial goods.

Essentially, the exclusivity of artworks is constituted through the way art is created: art is an expression of the individual and independent personality of its creator, the artist.[3]

---

[1] Paul Kearns, *The Legal Concept of Art* (Oxford: Hart Publishing, 1998), p. 176. Kearns identifies problems especially for the areas of obscenity and copyright laws, but extends his diagnosis to other areas of law as well, see p.172. Stephen Guest speaks of a "special intrinsic value of art – its 'sacred' quality", which would be different from values that are the interests of particular individuals which can be protected by rights (such as property interests), see 'The Value of Art' (2002) 7 *Art Antiquity and Law* 305-316, 316.

[2] Two recent introductions to art theory can be found in the works by Cynthia Freeland, *But Is It Art?* (Oxford University Press, 2001) and Robert Williams, *Art Theory: An Historical Introduction* (Oxford: Blackwell, 2004), with further references.

[3] See for example the statement by the painter Caspar David Friedrich (1774-1840) on the artistic process in his 'Observations on a Collection of Paintings by Living or Recently Deceased Artists', translated excerpts in: Lorenz Eitner (ed.), *Neoclassicism and Romanticism 1750 -1850: Sources and Documents* (2 vols., Englewood Cliffs, NJ: Prentice Hall, 1970), vol. II, pp. 53-56 at 54: "The artist's feeling is his law;" ... "the heart is the only true source of art, the language of a pure, child-like soul. Any creation not sprung from this origin can only be artifice. Every true work of art is conceived in a hallowed hour and born in a happy one, from an impulse in the artist's heart, often without his knowledge."

In its highest form, this expression consists in a certain kind of artistic achievement, such as the realisation of the solution to an artistic problem, the development of a new artistic method or the new treatment of an already well established subject.[4] As this process is imaginative and creative, taking place in an individual's mind, the resulting object is an original work. It is this intellectual process of the making of art that constitutes the difference between a work of art and other objects: art originates in a climate of absolute freedom where it is not subject to any order and where no laws and rules apply.[5]

But this absence of order and purpose only relates to the creation of the work of art, not to its further destiny as a commodity.[6] As soon as a work of art appears in the public, such as in the marketplace, it becomes the object of legal and economic rules. Still, the above-described origins of art result in works of art being different from common commercial goods in many aspects.

B. Works of Art as Commercial Goods

One of the most difficult problems of art as a commodity is the formation of its price. In general, the value of art is governed, like other goods, by the concept of supply and demand.[7] However, the determination of the factors that bear upon this concept is more difficult in the case of artwork. The usual objective factors which help to fix the value of a commodity on the supply side, for example, expenses of materials, labour and other production costs, can, in the main, be discounted for artworks, as the intellectual effort, especially in the case of paintings, tends to outweigh the physical input.[8]

---

[4] Matthew Kieran, *Revealing Art* (London: Routledge, 2005), p. 15; Ernst H. Gombrich, *The Story of Art* (16th edn, London: Phaidon, 1995), p. 35.

[5] Compare the writer Heinrich Böll (1917-1985): "What art needs, what art solely needs, is material - it does not need freedom, for art is freedom; ... no state, no city, no society can pretend to give or have given to art what it is by its nature: free." - Translation by the author from Heinrich Böll, 'Die Freiheit der Kunst' in: *Aufsätze - Kritiken - Reden* (Köln: Kiepenheuer & Witsch, 1967), pp. 488-493 at 488.

[6] Some heavily criticise the commodification of artworks, claiming it would harm artistic creation. See further on such views, which this author does not share as they do not distinguish rigorously enough between the moment of creation of a work of art and the completed object: John Henry Merryman and Albert E. Elsen, *Law, Ethics and the Visual Arts* (4th edn, The Hague: Kluwer Law International, 2002), pp. 856-858.

[7] In detail: Bruno S. Frey, *Arts and Economics: Analysis and Cultural Policy* (Berlin, New York: Springer, 2000), pp. 23-34; James Heilbrun and Charles M. Gray, *The Economics of Art and Culture* (2nd edn, Cambridge University Press, 2001), ch. 9.

[8] That does not apply, of course, for artworks where precious materials such as gold etc. were used for.

On the demand side, the commercial value of a work of art is principally determined by the attraction it has for the buyer. As most pieces of art have almost no practical value, it is personal preferences and prevailing tastes that rule the formation of price.[9] Fluctuations of taste[10] do not only concern artistic styles. Works from the school of Spanish *Mannerism*, for example, were not popular in the centuries following their completion[11] and it was only after the First World War that works from that period were rediscovered and rehabilitated through widespread public appreciation.[12] Tastes also differ with regard to subject matter. Dutch seventeenth century winter landscapes, for example, are more highly regarded than paintings of 'common' landscapes. These preferences for certain styles or subjects can elevate the prices of lower quality paintings above those of an ostensibly higher quality.[13]

Quality, however, does not mean 'better' in terms of an aesthetic evaluation.[14] Corresponding to the individual character of a piece of art, such an evaluation is subject to the individual taste of the buyer. Quality rather refers to such characteristics of artworks that though not being physical features, are provable, and thus influence the formation of price, even if they sometimes come in only second to the personal taste of buyers.

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[9] Silvio Ferri, 'The Art Market' in: Istituto per la Collaborazione Culturale (ed.), *The Encyclopedia of World Art* (15 vols., New York: McGraw-Hill, 1959-1968), vol. IV, cols. 248-251 at 249. Ferri enumerates fashion, luxury or prestige value, historical interest, piety or the desire to make a good financial investment as non-aesthetic considerations, *ibid.*

[10] It is important to note here that economists cannot define factors affecting human preferences, see Frey, *Arts and Economics*, p. 24.

[11] Thus it was possible for John Bowes in 1869 to purchase El Greco's *The Tears of St. Peter* for his collection of Spanish paintings for only 200 Francs or £8, the equivalent of about £600 today. See: Charles E. Hardy, *John Bowes and the Bowes Museum* (Newcastle upon Tyne: Frank Graham, 1970), pp. 140-141.

[12] Gombrich, *The Story of Art*, p. 373. Another example is, after decades of neglect, the new interest for German and Austrian *Expressionist* art.

[13] See the example given by Max J. Friedländer in *On Art and Connoisseurship* (Boston: Beacon Press, 1960), pp. 158-159, from the sale of the property left by the late King William II of Holland in 1850, where many paintings of nowadays less regarded subjects brought more than the immaculate *Lucca Madonna* by Jan van Eyck. Further examples are given by George Savage, who drastically refers to the nineteenth century as "... a period when fantastic aberrations of taste were common. For instance, the National Gallery bought one of their most noted van Eyck's in 1857 for little more than half what Landseer was paid for the *Monarch of the Glen*, while Mantegna's *Agony in the Garden*, unsold in 1849 at £420, was bought by the National Gallery in 1894 for £1500." See *The Market in Art* (London: The Institute of Economic Affairs, 1969), p. 18.

[14] See for a distinction and a more detailed definition of "aesthetic" and "artistic" value: Peter H. Karlen, 'Appraiser's Responsibility for Determining Fair Market Value: A Question of Economics, Aesthetics and Ethics' in: Martine Briat (ed.), *International Sales of Works of Art* (Paris: International Chamber of Commerce, 1990), pp. 667-705, p. 682-684.

Authenticity must be enumerated as a highly significant characteristic affecting the quality of a piece of art. Because of its individual character, a piece of art is normally unique.[15] Consequently, it is decisive for the value of a work of art whether it really stems from the master's own hand, or whether it was only executed in the studio or workshop of the artist, whether it is a copy of a work by a master or whether it is a forgery.[16] The provenance of a work of art is important in this context. Provenance refers to the origins and history of an object, which, in an ideal case, can be traced back to the studio of an artist and thus help confirm its authenticity.[17]

A further important factor for establishing the quality of a piece of art is its place within art history. Aspects to be considered in this respect are, for example, whether a work is from an unexciting period of an artist's career, or whether it marked a turning point in his oeuvre.[18] Finally, as a physical mark, the condition of a work is influential when considering its quality. Significant questions concern the conservation of the work, whether it has suffered any damages and whether it has ever been restored.[19]

However, the personal appreciation of potential buyers and aspects of quality, do not sufficiently explain the price outbursts witnessed on the art market in recent decades, with single works continuously setting new price records. The formation of prices for art is influenced by a further factor, which mainly concerns the supply side and gives auctions their special significance as a marketplace for art.

C. IMPORTANCE OF THE ART AUCTION

Works of art, as mentioned above, are usually unique. Consequently, the market for art is characterized by a shortage of goods: each piece of art represents a rarity. As soon as there is more than one person interested in buying the work, the shortage will regularly result in an escalation of the work's price, limited only by the financial power of the bidders and their urge for possession.

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[15] Exceptions are, for example, serial art such as the series by Andy Warhol (1928-1987) or functional art, such as the ceramics by Pablo Picasso (1881-1973). See further Merryman and Elsen, *Law, Ethics and the Visual Arts*, pp. 923-938, on such contemporary art forms that are based on mechanical reproduction.

[16] See for a detailed categorization below, ch. 3, pp. 29-34.

[17] See Nancy H. Yeide, Konstantin Akinsha and Amy L. Walsh, *The AAM Guide to Provenance Research* (Washington, DC: American Association of Museums, 2001), p. 9. Another important aspect of provenance research is as a means of confirming legal ownership of an object.

[18] Merryman and Elsen, *Law, Ethics and the Visual Arts*, p. 859. See also Eduardo Potter, 'Economists Have Advice for Buyers as the Art Market Heats Up' in THE NEW YORK TIMES, 1 December 2004, p. E1.

[19] Merryman and Elsen, *Law, Ethics and the Visual Arts*, p.859.

A further important aspect is the rareness associated with the oeuvre of an individual artist. The moment an artist dies, his work is completed so that the number of his works can no longer increase.[20] Should the number of buyers interested in that artist increase, or museums and foundations buy up a certain amount of his works, a sellers' market with rising prices will be the logical consequence.[21]

Considering all these particularities, which show that the price formation for art is difficult in the majority of cases, the importance of the art auction for the art market relative to other ways of selling goods becomes clear: in other words, because of the unique nature of many art objects, only an auction allows a concentration of all those interested in a single work at a particular place and time.[22] At this point, supply and demand come together and can be adjusted until they are in equilibrium by the emergence of the highest bid, which establishes the value of the work of art.[23] In contrast to a private treaty sale, the vendor gains the security of realizing a true market price, which will be regularly higher than a price formed through negotiations, where those involved cannot be exactly sure about the price forming factors, as there is no real exchange market for art.[24]

D. ORIGINS OF THE ART AUCTION AND ITS SIGNIFICANCE FOR THE ART MARKET

Though the origins of auctions can be traced to antiquity, and auction sale rules under Roman law, in particular, were very similar to the rules still in use in present day auctions,[25] the first documented auction of paintings in England took place only in 1674.[26] It was not before the late seventeenth century that an interest in the arts emerged

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[20] Consequently, with the threat of future increases in supply removed, the price of an artist's work increases, see the study by Robert B. Ekelund, Rand Ressler and John Keith Watson, 'The "Death" Effect in Art Prices: A Demand Side Exploration' (2000) 24 *Journal of Cultural Economics* 283-300.
[21] A shortage in an artist's work can be created artificially as well, as the example of the art dealer Joseph Duveen shows, who bought up all works by Jean-Antoine Houdon with the intention of increasing their value. See Meryle Secrest, *Duveen: A Life in Art* (New York: Alfred A. Knopf, 2004), pp. 297-298.
[22] See Orley Ashenfelter and Kathryn Graddy, 'Auctions and the Price of Art' (2003) 41 *Journal of Economic Literature* 763-786.
[23] Lyndel Prott and Patrick O'Keefe, *Law and the Cultural Heritage: Volume 3 - Movement* (London: Butterworths, 1989), para. 634.
[24] Brian W. Harvey and Franklin Meisel, *Auctions: Law and Practice* (3rd edn, Oxford University Press, 2006), para. 1.27.
[25] Leonard D. DuBoff, 'Auction Problems: Going, Going, Gone' (1977) 26 *Cleveland State Law Review* 499-513, 501, with further references.
[26] Brian Cowan, 'Arenas of Connoisseurship: Auctioning in Later Stuart England' in: Michael North and David Ormrod (eds.), *Art Markets in Europe, 1400-1800* (Aldershot: Ashgate, 1998), pp. 153-166 at 153.

in England. At that point, art was mainly bought for decorative reasons rather than out of sophisticated connoisseurship.[27] Art auctions were part of the social round, an "arena for elite competition for status and for public recognition of that status"[28] and bidders did not expect their bargains to be originals.[29] In the eighteenth and nineteenth century, along with the discovery of many ancient sites and the opening of public museums, knowledge about art became widespread and the more learned connoisseur established his position.[30] Accordingly, the art market experienced a tremendous expansion: galleries opened throughout Europe and in America. Because private collectors, at that point, preferred to buy from knowledgeable and reliable dealers operating as middlemen, galleries also had the biggest market share.[31] Auction houses, by contrast, were mainly wholesale businesses that supplied dealers with stock.[32] It is only about fifty years ago that auction houses became dominant players in the art market. The turning point is widely regarded as the auction sale of the collection of Gabriel Cognacq in Paris in May 1952.[33] From then on, auction houses consistently replaced dealers as the traditional sellers of art,[34] and recent figures show that the British art and antiques market, valued at around £4.2 billion in 2001, is now almost evenly split between dealers and auctioneers.[35]

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[27] Neil de Marchi provides the following example from a Bullord auction sale catalogue of January 1690: "Paintings ... Fit for Chimneys, Stair-Cases, Halls, ladies Closets, &c." See: 'Auctioning Paintings in Late Seventeenth-Century London: Rules, Segmentation and Prices in an Emergent Market' in: Victor A. Ginsburgh (ed.), *Economics of Art and Culture* (Amsterdam: Elsevier, 2004), pp. 97-128 at 121.

[28] Cowan, 'Arenas of Connoisseurship', p. 163. Though connoisseurship and investment reasons are today's driving forces, competition and social aspects still form an important part of the thrill of the art auction and contribute to its status as indelible fixture in the cultural life of the art centres in the world.

[29] *Ibid.*, quoting from a letter by Jonathan Swift (1667-1745) where he expresses his doubts about a *Titian* he bought for cheap at auction being an original, p. 153 and p. 157 - at the same time, the first art auctioneers did not pretend to have any expert knowledge about the works they sold.

[30] Luigi Salerno, John Rewald and Bernard S. Myers, 'The Modern and Contemporary Art Market' in: Istituto per la Collaborazione Culturale (ed.), *The Encyclopedia of World Art* (15 vols., New York: McGraw-Hill, 1959-1968), vol. IV, cols. 252-262 at 255. On the influence of dealers and critics: David W. Galenson and Robert Jensen, *Careers and Canvases: The Rise of the Market for Modern Art in the Nineteenth Century (Working Paper 9123)* (Cambridge, MA: National Bureau of Economic Research, 2002). A more detailed account of the development of the art market as we know it today follows in ch. 3, E.2., pp. 27-29.

[31] According to Sophy Burnham, *The Art Crowd* (New York: MacKay Inc., 1973), p. 53, galleries had a market share of 90 per cent of the New York art market in the time before the Second World War.

[32] George Savage, *The Market in Art*, p. 25.

[33] Burnham, *The Art Crowd*, p. 52.

[34] From the 1980s onwards, this process was further catalysed through the fierce competition between the auction houses Sotheby's and Christie's, which had to open up new groups of buyers in the fight for market leadership - an impressive account of this can be found in Christopher Mason, *The Art of the Steal: Inside the Sotheby's-Christie's Auction House Scandal* (New York: G.P. Putnam's Sons, 2004), especially ch. 4.

[35] See House of Commons Culture, Media and Sport Committee, *Sixth Report of Session 2004-05: The Market for Art* (London: The Stationary Office Ltd., 2005), p.7, referring to a study undertaken by the European Fine Art Foundation.

E. RESULT

The creative processes of artists result in works of art having special features that distinguish them from common commercial goods. Besides uniqueness, it is mainly non physical features, foremost authenticity and provenance, which qualify works of art and that are essential to their value. In addition to personal matters of taste and the strength of the urge of possession, these are the reasons for the merchantability of art following its own economic rules, especially with regard to the prediction of prices.

In that respect, the art auction house plays an important part as a forum for the turnover and price transparency of goods in a difficult market. It is not too far fetched to compare art auctions with a stock exchange.[36] Similar to a stock broker who mediates between supply and demand, which allows the formation of a price, the activities of the auctioneer allow rare goods such as works of art to find their market value on the auction room floor. However, the art market is different in terms of the importance of attribution of artworks. As regards stock markets, companies are easily identified; in contrast, a work of art may generate much debate in terms of its provenance. Whether the auctioneer is thus only a mere intermediary who neutrally arranges the transfer of property from the vendor-consignor to the purchaser, needs to be seen in the following chapter, where an in depth study of the preliminaries worked out here will be made.

[36] See Dede Brooks, Sotheby's CEO from 1994 to 1999, quoted in Mason, *The Art of the Steal*, p. 83.

3

Preparing the Art Auction: Attributing and Cataloguing Works of Art

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The purpose of this chapter is to examine the pre-sale activities in the auction house concerning the attribution and cataloguing of artworks. Before an auction can be carried out, important preliminary steps need to be taken with regard to each individual object of art that has been consigned for sale. Among the questions that need to be clarified, the authentication and attribution of the consigned artworks are of the greatest importance.[1] As *Jáuregui* stated, attribution is the 'cornerstone' of the process of selling art.[2]

Basically, attribution means the identification of the authorship of a work of art. This allows the work to be put into its historical context and thus translates into a higher appreciation of the aesthetics of the work.[3] The more information the attribution-dependent description of a work of art can provide, the more the value of that particular work increases and thus the potential profit for the seller.[4] Often, however, buyers as well as sellers are induced to buy or sell works of art on the basis of attributions which can, later on, turn out to be wrong. In such cases the question arises whether the auctioneer can be held liable or not, and under what circumstances. A look behind the scenes from the buyer's point of view can ease the establishment and classification of the legal duties and liabilities of the auctioneer to the purchaser. This will be done in chapter 4. For the purpose of this chapter, however, the structure will be taken from the

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[1] Another important preparatory task is the valuation of the art object and the decision on its presale estimate. This requires a thorough knowledge of the art market as usually only auctioneers have it and is also heavily dependent on the result of the here discussed attribution of the object – see ch. 1 on factors influencing the formation of price and the references given there. In recent years, the establishment of an immaculate provenance, especially for the years 1933 to 1948, has become increasingly important to confirm the legal ownership of the seller and to avoid later disputes of title. See on provenance research as it is carried out in an auction house: Lucian J. Simmons, 'Provenance Research: an art market perspective' [2001] *Spoils of War. Special Edition* 18-22.

[2] Raúl Jáuregui, 'Rembrandt Portraits: Economic Negligence in Art Attribution' (1997) 44 *U.C.L.A. Law Review* 1947-2029, 1950.

[3] See on the influences of our appreciation of art and why authenticity matters: Matthew Kieran, *Revealing Art* (London: Routledge, 2005), ch.1: Originality and Artistic Expression.

[4] Jáuregui, 'Rembrandt Portraits', 1950.

chronological schedule of an art auction, which can be broadly divided as follows: first, there is the transaction between the vendor and the auctioneer, where a first exchange of information on the artworks takes place; secondly, there is an internal phase within the auction house where the auctioneer is researching and valuing a lot and editing the information for the catalogue entry; finally, there is a phase in which the results of the attribution and the valuation are communicated to the bidding public in general through the auction catalogue.

A. SELLING ART VIA AN AUCTION HOUSE

The auction house's supply of artworks comes from several sources: most important are private owners and collectors who consign single works or their collections in whole or in part to auction houses.[5] Art dealers form another significant group of consignors.[6] Further, institutional collectors, such as public museums and libraries, periodically dispose of artworks from their collections via auctions.[7]

The reasons behind arranging for an auction house to sell a work of art are manifold. Auctioneers act as agents for sellers, bringing sellers into a contractual relationship with buyers.[8] Especially for the private seller without specialist knowledge and without access to the art market, it is important to have an expert agent act as intermediary, as this helps to balance the information asymmetry which characterizes the common situation of an art sale, where the layman faces an expert dealer.[9] Often, auction houses are also the only entities in the art market that can handle the sale of large collections or of collections that consist of a variety of objects from different periods or of different styles or makings. In contrast to the specialized art or antique dealer, big auction houses have the facilities and the organisational capacity for splitting diverse consignments into

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[5] See George Savage, *The Market in Art* (London: The Institute of Economic Affairs, 1969), p. 21.

[6] John Henry Merryman and Albert E. Elsen, *Law, Ethics and the Visual Arts* (4th edn, The Hague: Kluwer Law International, 2002), p. 898.

[7] See on the controversies caused by this: Carol Vogel, 'Museums Set to Sell Art, and Some Experts Cringe' in THE NEW YORK TIMES, 26 October 2005, p. A24; and especially the criticism by Hilton Kramer, 'Deaccession Roulette' (2005) 24 *The New Criterion* 21.

[8] Lyndel Prott and Patrick O'Keefe, *Law and the Cultural Heritage: Volume 3 - Movement* (London: Butterworths, 1989), para. 601. See on the auctioneer's position as agent for the seller in detail: Brian W. Harvey and Franklin Meisel, *Auctions Law and Practice* (3rd edn, Oxford University Press, 2006), ch. 3. See further below, ch. 4, text accompanying n. 2 and n. 2.

[9] It must be mentioned that dealers sometimes also act as agents for sellers in arranging a sale. See about the advantages this involves: Prott and O'Keefe, *Law and the Cultural Heritage*, para. 601. On the role of art dealers in general and especially as sellers of contemporary art: Sophy Burnham, *The Art Crowd* (New York: McKay Inc., 1973).

smaller clusters and of grouping them together with similar objects from other consignments.[10] Such specialised auction sales promise to achieve the best possible price for the single object - an effect that is, as examined before,[11] further supported by the genuine competitive bidding created by an auction situation.

B. THE QUALIFICATION OF THE ART AUCTIONEER

Once art owners have considered selling their possessions by way of auction, it is important for them to obtain exact information about the value of their objects which will enable them to make a final decision on a consignment. Many do not possess the expertise and the knowledge to detect the significance and the value of their possessions themselves. Often, art and antiques have been in families for many generations before they come up for sale, and the original price of the purchase has been forgotten or cannot be of guidance any longer, as the market environment has changed in between.

Because auction houses are always interested in consignments, they advise on current estimates and make appraisals of items.[12] Further, consignment agreements usually include a clause saying that the auctioneer will undertake the scholarly work involved in a consignment, especially researching a lot for the purpose of valuation.[13] This raises the question of the level of expertise and experience expected from art auctioneers. It may come as a surprise here that the profession of auctioneer is more or less unregulated.[14] The law does not require any special qualifications from those who want to practice as auctioneers.[15]

[10] Further, the staffs of all leading auction houses nowadays not only consist of art historians, but market analysts and international tradesmen, tax experts and lawyers who can provide all services involved in difficult art transactions. See, in general, the portraits of Sotheby's and Christie's in Christopher Mason, *The Art of the Steal* (New York: G.P. Putnam's Sons, 2004).

[11] See ch. 2, C., pp. 6-7.

[12] See, for example, the services offered on the websites of Bonhams, Christie's and Sotheby's.

[13] Franklin Meisel, 'Auction' in: Lord MacKay of Clashfern (ed. in chief), *Halsbury's Laws of England* (4th edn, London: Butterworths, 2003), Vol. 2(3), para. 216; Joe A. Och, 'Sotheby's: Anatomy of an Auction House' in: Pierre Lalive (ed.) *International Sales of Works of Art* (Geneva: Institute of International Business Law and Practice, 1985), pp. 251-281, 251.

[14] See Harvey and Meisel, *Auctions Law and Practice*, paras. 2.01 and 2.02.

[15] Meisel, 'Auction', para. 203; Prott and O'Keefe, *Law and the Cultural Heritage*, para. 643.

1. Standard of Care and Skill

It has been established, however, that an auctioneer is charged with a general duty under the common law to exercise such skill and knowledge as is reasonably to be expected from members of that profession.[16] Especially in the context of fine art auctions, it has been recognized that the standard of care must vary depending on whether the auctioneer is regarded as a specialist or more of a general practitioner: in *Luxmoore-May* v *Messenger May Baverstock*[17] the Court of Appeal justified a lower standard of care and skill to be required of provincial art auctioneers on the hypothesis that the valuation of art would "not [be] an exact science", but rather capable of accommodating wide ranging views and opinions.[18]

In that case, a provincial firm of fine art auctioneers who advertised themselves as offering expert and specialist advice on fine art undertook to make an appraisal of two small oil paintings picturing foxhounds for the plaintiff clients with a view to their being put up for auction. The auction house had three of its representatives examine the paintings, and all agreed that they were not works of quality or note, valuing them at £30 to £50 for the pair. Evidence was also given that shortly before the auction the paintings were taken to Christie's for their opinion, as one of the firm's representatives thought that there was a possibility that the paintings were by the eighteenth century artist George Stubbs (1724-1806). They were handed over at Christie's front counter, taken away to a department behind and handed back some 5 to 10 minutes later with nothing favourable being said about them. The paintings were subsequently sold at the defendant's auction for £840. Five months later they were sold with a full attribution to George Stubbs at Sotheby's for £88,000. The plaintiffs brought an action against the defendant firm claiming the difference between the two sale prices. In the High Court, the judge held that no competent appraiser could have failed to spot the Stubbs potential of the two paintings. In the judge's opinion this demonstrated actionable negligence and he gave judgment for the plaintiffs.

[16] Particularly on auctioneers in *Denew* v *Daverell* [1803-1813] All E.R. 199, KB. For the providers of services in general, now s.13 of the Supply of Goods and Services Act 1982 (implied term about care and skill). See further Francis Reynolds, *Bowstead and Reynolds on Agency* (18th edn, London: Sweet & Maxwell, 2006), paras. 6-015 to 6-022.

[17] [1990] 1 W.L.R. 1009; [1990] 1 All E.R. 1067, CA.

[18] [1990] 1 W.L.R. 1009, 1021. The difficulties arising when valuating art will be investigated in detail in sections D. and E. of this chapter.

The Court of Appeal reversed that decision, naming a number of factors that made it reasonable even for experts to question the attribution of the paintings to Stubbs.[19] Still, both, Slade LJ, who gave the main judgment in the Court of Appeal, and the judge in the High Court were in substantial agreement as to the proper standard of skill and care which the law expects provincial auctioneers to display when they make appraisals of artworks, differing only in their conclusions as to whether that standard had been fulfilled. Rather than formulating a specific standard of skill and care for provincial art auctioneers, an analogy was drawn with what is expected from general medical practitioners. In his dictum, Slade LJ applied a statement of the law adopted in the medical malpractice case of *Maynard* v *West Midlands Regional Health Authority*[20] in which the House of Lords endorsed the reasoning of Lord President Clyde in *Hunter* v *Hanley*,[21] where he stated that:

> "In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of other professional men ... the true test of establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care ..."[22]

It appears, therefore, that a "general practitioner" will be regarded as negligent only if it can be said that no auctioneer of ordinary skill and care would have acted or failed to act similarly, given an identical set of circumstances. As such, so long as the auctioneer has acted honestly and diligently in attempting to arrive at his view, he cannot be charged with negligence if it transpires to be incorrect.

Accordingly, in dealing with the standard of care, Slade LJ said:

> "The defendants submitted ... that they were to be regarded as akin to general practitioners and that

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[19] *Ibid.*, 1023-1024.
[20] [1984] 1 W.L.R. 634; [1985] 1 All E.R. 635, HL.
[21] 1955 S.C. 200.
[22] At 205-206.

> (1) the required standard of skill and care allows for differing views, and even a wrong view, without the practitioner holding that view (necessarily) being held in breach of his duty;
> (2) the standard is to be judged by reference only to what may be expected of the general practitioner, not the specialist - here provincial art auctioneers, rather than one of the leading auction houses; and
> (3) compliance with the required standard is to be judged by reference to the actual circumstances confronting the practitioners at the material time, rather than with the benefit of hindsight.
> The judge 'unhesitatingly' accepted these propositions, and so would I."[23]

2. The Importance of Reputation

The Court of Appeal did not, however, explicitly state what the specific standard of care expected from provincial art auctioneers should be, nor has it established what the higher standard of care and skill required of "leading auction houses" should include.[24] Bearing in mind that the Court of Appeal considered the valuation of art as "not an exact science"[25] and knowing that legislation leaves it open to the discretion of anybody to call themselves "appraiser, "valuer" or "expert" either in one of the fields of art or in all of them, some conclusions as to the qualifications to be expected from either group can be drawn from the evidence accepted during the proceedings.

The expert in the defendant's firm had

> "no formal fine art qualifications, but in about 1976 he started dealing in paintings and according to his evidence, before he was engaged by the defendants had attended auctions daily since 1976. It has not been submitted that, on the face of it, he was not fully competent to do the job for which he was engaged."[26]

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[23] [1990] 1 W.L.R. 1009, 1021.
[24] Further, as one commentator points out, the Court of Appeal did not offer any guidelines as to the categorisation of businesses in either of the two groups, which leaves especially those firms in uncertainty that fall in the middle of the spectrum. See Nicholas J. Mullany, 'Let the Seller Beware' (1991) 107 *Law Quarterly Review* 28-31, 30.
[25] [1990] 1 W.L.R. 1009, 1021.
[26] *Ibid.*, 1014.

In contrast, the persons later engaged with the valuation of the paintings at Sotheby's were

> "a director and since 1981 in charge of Sotheby's British painting department specialising in the period 1500 to 1850. [That expert] immediately recognized the foxhounds as related to a celebrated Stubbs painting at Goodwood House, a large painting known as the 'The Third Duke of Richmond with the Charlton Hunt' painted in 1759-60."[27]

and

> "Mrs. Judy Egerton, universally acclaimed as the world's greatest expert on George Stubbs. She has recently retired after 14 years at the Tate Gallery, latterly in the post of assistant keeper. Before that she worked for Paul Mellon in America, in 1978 cataloguing his collection of British sporting and animal paintings. This included some 38 Stubbs, the largest collection of his work in the world. In 1984 she catalogued 190 works for a major exhibition of George Stubbs held at the Tate Gallery. She has for some years past been engaged on a catalogue raisonné of all Stubbs' work. Suffice to say that her qualifications and experience amply justify her reputation as the world's leading expert."[28]

It becomes obvious from these profiles that the persons involved in making appraisals are very different with regard to their experience and their particular field of expertise in leading auction houses when compared to their provincial counterparts. By drawing a distinction between provincial auctioneers and leading auction houses, it is implicit in the Court of Appeal's judgement that this is exactly what is expected from the latter: that they act in accordance with the current general and approved valuing practices, and that the experts involved in their appraisals have a thorough knowledge in the particular fields concerned.[29] This finds support in the way big auction houses present themselves. Knowing that the competent appraisal of a consignment requires an extensive amount of knowledge, such institutions usually get only authorities involved who are eminent in

[27] *Ibid.*, 1017.
[28] *Ibid.*, 1018.
[29] This found confirmation in *Thomson* v *Christie Manson & Woods Ltd.* [2004] E.W.H.C. 1101, QBD, where Jack J adopted the terminology from the *Luxmoore* case, speaking of Christie's as an "international auction house" of which it is expected that, with regard to them making appraisals, "[T]he examination must be as thorough as the circumstances reasonably require and it must be done by persons of appropriate qualifications and experience", at paras. 186 and 188.

the field of the particular object and who fulfil the highest professional standards.[30] As the examples in *Luxmoore-May* show, their professional skills are usually evidenced by the private records of the experts, such as a long-time directorship in an art-trading house, or by the exercise of their functions as experts during many years, often in museums as well as in private occupations as freelance appraisers or employees in trading firms or in insurance companies.[31] Beyond this, many big auction houses make contributions to scholarship;[32] some of them host scholarly exhibitions[33] or subsidize exhibitions elsewhere - all this with a view to winning the trust of sellers as well as bidders;[34] for with the profession being unregulated, the maintenance of an immaculate reputation is one of the most important assets in attracting customers. On the other side of the spectrum, the decision in *Luxmoore-May* arguably opened the opportunity to provincial auctioneers to say that if a consignor chooses them to sell artworks, and provided no negligence is shown, consigned goods ought to find their own value on the auction room floor.[35] It is thus for the sellers to give their property to an auctioneer most capable of handling its sale efficiently.

C. THE SOURCES OF OBJECT INFORMATION

When an auctioneer has been commissioned with attributing and describing an individual work of art and getting it ready for being sold at auction, the next question is which sources of information he will draw on when making his appraisal.[36]

[30] See, for example, for Sotheby's: Och, 'Sotheby's: Anatomy of an Auction House', p. 251. For Christie's: Noël Annesley, 'Attributing Old Master Drawings' in: Ronald D. Spencer (ed.), *The Expert Versus the Object: Judging Fakes and False Attributions in the Visual Arts* (New York: Oxford University Press, 2004), pp. 79-88, p. 88.

[31] See further Otto Sandrock, 'Appraisal' in: Martine Briat (ed.), *International Sales of Works of Art* (Paris: International Chamber of Commerce, 1990), pp. 615-659, p. 622.

[32] See Gertrude Prescott Nuding, 'Saleroom Practice' (1988) 128 *Apollo* 34-41, fn. 62: Auction houses often give scholars access to works consigned to them, or provide them with information and photographs, as well as they forward scholarly enquiries to the new owners of artworks which were sold in one of their auctions.

[33] See for example the praise for Christie's presale exhibition of 35 works by Donald Judd (1928-1994): "This exhibition is the most beautiful survey of Judd's work ever seen in New York, and the first to be displayed under conditions of space and light the famously demanding artist might have found satisfactory." Roberta Smith, 'Christie's Presale Show: Light and Space Enough to Really See Judd' in THE NEW YORK TIMES, 24 April 2006, p. E1.

[34] Nuding, 'Saleroom Practice', 40.

[35] See conclusion on the *Luxmoore-May* case by Brian W. Harvey, *Violin Fraud* (2nd edn, Oxford: Clarendon Press, 1997), p.70. Mullany, 'Let the Seller Beware', 30, criticises that the decision might induce lesser auctioneers to remain ignorant of the most advanced valuing techniques to avoid the higher and more onerous standard of care and skill expected from leading firms.

[36] It is important to stress here that this examination does not deal with the formal consignment procedure and the details of the consignment agreement beyond the question concerning the attribution and description of consigned property. See for a detailed examination of the contractual relation between the seller and the auctioneer: Harvey and Meisel, *Auctions: Law and Practice*, chs. 3 and 4. With regard to

The first source of information is the vendor. It is apparent that with a consignment the auctioneer will also require from vendors a disclosure of all they know about the work of art.[37] This is especially important for establishing the provenance of an object. Often, the information given by the vendor stays the only source of information on the ownership of a work of art. It is thus common that auction houses include clauses in their conditions of business where the seller warrants to the auction house and the buyer that he is the true owner of the property and is able to transfer good and marketable title to the property free from any third party claims.[38] In cases where the ownership information provided by the vendor has to be accepted without the possibility of further verification,[39] the adoption of previously made attributions without subsequent examination will remain an exception.

Of course, objects come up for sale that are well known in the market, and for which reliable documentation already exists,[40] which the auctioneer will use and include for his own description. Such famous consignments, however, make up only a minority of transactions in the auction house, with the majority being objects, among them mostly antiques and handcrafts, which often make their first market appearance after their creation and decades or even centuries of private ownership. The information that can be provided for such objects is often ambiguous and starting an appraisal on the basis of dubious object information can often lead one in the wrong direction, as too little attention is paid to the obvious.[41]

His own examination and qualification of the consigned object thus remain the most important sources of information for the auctioneer's appraisal. As mentioned before,

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the variety of controversial financial arrangements practiced by auction houses to attract consignments, such as the 'secret reserve' and 'guarantees', see introductory Brenna Adler, 'The International Art Auction Industry: has competition tarnished its finish?' (2003) 23 *Northwestern Journal of International Law and Business* 433-466.

[37] See, for example, Simmons, 'Provenance Research', 19.

[38] See clause 5(a) of Christie's Consignment Agreement; condition 2(a) (i) and (ii) of Sotheby's Conditions of Business for Sellers.

[39] Such as in the case of *Rachmaninoff* v *Sotheby's and Eva Terenyi* [2005] E.W.H.C. 258, QBD, paras. 8 and 13, where Sotheby's pleaded that further historical research conducted by them had remained fruitless with regard to confirming or questioning the vendor's ownership of the autograph manuscript of Rachmaninoff's *Second Sympony*. The decision was on the continuation of a granted injunction until trial; case pending.

[40] For example, a clear auction or exhibition record.

[41] For example, in *de Balkany* v *Christie Manson & Woods Ltd* [1997] Tr.L.R. 163; THE INDEPENDENT, 19 January 1995, the auction house gave the question of attribution of a painting only the briefest attention because of relying on a dubious scholarly article and thus missing that the painting was heavily overpainted. From this overpainting, it became evident that the painting had been misattributed, and, moreover, forged.

the previously collected information will be considered and factual information on, for instance, the artworks' provenance or previous exhibitions etc. will certainly find entry into the auctioneer's description. Further, the auctioneer might find it necessary to consult external experts for obtaining a view on attribution problems that cannot be solved within the auction house.[42] Regularly, however, it is the auctioneer and the experts within the auction house who are responsible for the appraisal and the description of objects. Though they act as the seller's agent, auction houses are keen to ensure that works which they sell have been described by their own staff. Indeed, the conditions of business concerning the seller often make it clear that the auction house has even a "complete" or "sole and absolute" discretion as to the description of a lot in the catalogue.[43]

D. Attribution Methods And Their Recognition by the Courts

The attribution process, in the auction house also referred to as the "hilling process",[44] which is the detailed examination of objects to determine their proper description, can consist of a combination of several methods.

1. Connoisseurship: Visual Inspection by a "Knowing Eye"

The primary means of determining the attribution of a work of art and the most difficult for the layman to understand is connoisseurship.[45] Basically, the exercise of connoisseurship involves a careful visual inspection of an object by a "knowing eye" – the connoisseur.[46] The purpose of such an examination is to identify those formal and structural characteristics in an object that are typical of a particular artist's technique. This stylistic approach was first exercised and described by Giovanni Morelli (1816-1891), a comparative anatomist and connoisseur, who believed that each painter has an

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[42] Clause 6(a) of Christie's Consignment Agreement; condition 3(b) of Sotheby's Conditions of Business for Sellers.
[43] See clause 6(a) of Christie's Consignment Agreement; condition 3(a) of Sotheby's Conditions of Business for Sellers.
[44] See *Thomson* v *Christie Manson & Woods Ltd.* [2004] E.W.H.C. 1101, QBD, para. 29.
[45] See for a more detailed history of connoisseurship: Mansfield Kirby Talley, Jr., 'Connoisseurship and the Methodology of the Rembrandt Research Project' (1989) 8 *The International Journal of Museum Management and Curatorship* 175-214.
[46] Francis V. O'Connor, 'Authenticating the Attribution of Art' in: Spencer (ed.), *The Expert Versus the Object*, pp. 3-27, p. 6.

inimitable use of schemata and techniques which a trained connoisseur can identify beyond reasonable doubt: by carefully analysing and comparing the way in which the Italian Renaissance artists executed details, such as the way they painted parts of the body, for example a finger or ears, he was able to attribute certain paintings to the hand of certain masters.[47]

Morelli's method, developed principally for the attribution of paintings from the Italian Quattrocento, was then further developed and adjusted to be effective for artworks from other periods and schools as well. While a uniqueness of form can especially be found in the details of a work, Max J. Friedländer (1867-1958) highlighted the importance of the impression gained from looking at a work of art as a whole.[48] Further, Friedländer added[49] the inspection of the composition of a work of art,[50] of its subject matter,[51] of the brushwork[52] and colour scheme, as well as of the materials used, as elements to the standard repertoire of the stylistic examination of paintings.

As *Talley Jr.* states, both Morelli and Friedländer recognized that their initial judgement on a piece of art was informed by intuition.[53] However, using a systematic and organised approach, such as the methods of visual examination just described, allows the connoisseur to support an initially subjective attribution with facts and reasons and puts his attribution on a scientific footing.[54] *O'Connor* consequently compares the

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[47] "[E]very great artist sees and represents these forms in his own distinctive manner; hence, for him they become characteristic." At p. 23 in Giovanni Morelli's groundbreaking work *Italian Painters: Critical Studies of Their Works* (2 vols., London: John Murray, 1892), in which he reattributed many paintings hanging in German galleries.

[48] See the chapter 'On Intuition and the First Impression' in Friedländer's work *On Art and Connoisseurship* (Boston: Beacon Press, 1960), pp. 172-178.

[49] *Ibid.*, chapter 'The Analytical Examination of Pictures', pp. 184-196.

[50] For instance, attention must be paid to the degree of symmetry; the proportions of figures; the disposition of figures in the plane or depth of space; the relationship of the figures to space as indicated by, for example, landscapes. See *ibid.*, pp. 195-196.

[51] Elements such as the depicted iconography (political, religious and social motifs) and its relationship to tradition; the pictured persons, their costumes, arms and armour; geography and architecture, ornaments, etc. See *ibid.*, pp. 195-196.

[52] For example, layers of paint; reconstruction of the process of creation from the edges to the middle, from left to right or vice versa, etc. – see O'Connor, 'Authenticating the Attribution of Art', p. 14, where he gives an example of inspecting the facture of a painting by Jackson Pollock (1912-1956).

[53] Talley, Jr., 'Connoisseurship', 189.

[54] The necessity of a methodological approach to an appraisal is widely acknowledged among connoisseurs, see for example David Best, 'The Objectivity of Artistic Appreciation' (1980) 20 *British Journal of Aesthetics* 115-127, at 127: "if I make an artistic judgment it is incumbent upon me, if challenged, to substantiate it by citing not my subjective feelings about it, but objective features of the work of art itself."

See further on the importance of objectivity in making a judgment about authenticity as a guideline to determine whether negligence is given, below, ch. 4, B.3.d., pp. 81-82 and n. 142 and Peter H. Karlen, 'Fakes, Forgeries and Expert Opinions' in: Lalive (ed.) *International Sales of Works of Art*, pp. 219-249, p. 241.

evidence drawn from the work of the connoisseur of art with the reasoning of forensic pathologists, anthropologists and medical doctors, who often deduce forensic causes from visual inspection alone, based on a perception trained over a long period of time and the experience of a high number of cases:

> "All these experienced perceptions of form would be considered scientific by most reasonable persons, in the sense that they are based on a studied empiricism and interpreted according to recognized standards and theory. The art expert, confronted with a painting of questioned authenticity, operates in much the same manner as the professionals just described. He or she has seen hundreds, maybe thousands, of works by the artist in question, and has absorbed into visual memory the artist's characteristic form ... to the extent that such an expert can tell, at a glance ... that the work presented is authentic or fake."[55]

Friedländer himself stresses the importance of a "vigorous visual memory" as indispensable for the work of the connoisseur and such "concepts of visual imagination" as his most important tools.[56] Still, to withstand judicial review, an attribution that is solely based on connoisseurship must have thorough methodological foundations. This becomes apparent from the famous case of *Hahn* v *Duveen* before the New York Supreme Court,[57] in which Jack J instructed the jury as to what expert evidence would not be acceptable for proving the authenticity of a painting:

> "I have profound respect for critics whose conclusions rest upon facts. What they say should be carefully considered by a jury. The opinions of any other kinds of experts are as 'sounding brass and tinkling cymbals.' Some of them expound their theories largely by vocal expression and gesture; others wander into a zone of speculation founded upon nothing more tangible than 'psychological correlation.' I do not say this is as absurd as it sounds to a layman, but it is too introspective and subjective to be the basis of any opinion a jury can pin its faith upon. There are also experts who admit that

[55] O'Connor, 'Authenticating the Attribution of Art', pp. 7-8.

[56] Friedländer, *On Art and Connoisseurship*, p. 176.

[57] 133 Misc. 871, 234 N.Y.S. 185 (Sup.Ct. N.Y.Co. 1929). In this case, Mrs Andrée Hahn brought a libel claim against the art dealer Joseph Duveen for expressing doubts on whether a supposed Leonardo da Vinci painting owned by the claimant was an original and stating that the real *La Belle Ferronnière* was in the Louvre. The case was settled out of court.

they have no formulas, rules, or ability to produce any artistic thing, but who claim to have a sixth sense which enables some of them after they have seen a picture even for five minutes to definitely determine whether it is genuine or not. I do not say that this faculty may not be possessed by some men, but it is not based upon enough objectiveness to convey definite meaning to a jury."[58]

In a positive way, Buckley J enumerated the skills a connoisseur must possess when making an attribution before a court in *Drake* v *Thos Agnew & Sons Ltd.*[59] as follows:

> "While it is vital to have keen observation it is also necessary to have knowledge of an artist's methods and style and to be sufficiently familiar with his work to be able to recognise his artistic "handwriting". Even that is not all. It involves also a sensitivity to such concepts as quality, emotion, mood and atmosphere. To an extent "eye" can be developed but, like many other human attributes it is partly born in a man or woman. Were it otherwise there would be many more true experts."[60]

In addition to a precise visual examination, the attribution of a work of art is usually supplemented by other methods, though this is not always the case.

2. Historical Evidence and Scholarly Publications

Where possible, the expert will conduct research into the documentation connected with the object of the appraisal. A very persuasive evidence of authenticity is when a complete provenance record can be established, leading from the work's current ownership to the original artist.

As suggested before, the information the vendor can provide will be considered for this purpose. This may include the mentioning of the work in house inventories or in wills or in letters, memoirs and diaries.[61] Often, though, the information that can be obtained from the vendor is limited. For example, in *Thomson* v *Christie's*, when trying to

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[58] *Ibid.*, at 877 resp. 191-192.
[59] [2002] E.W.H.C. 294, QBD.
[60] *Ibid.*, at para. 43.
[61] David Philipps, 'Forgery' in: Jane Turner (ed.), *The Dictionary of Art* (34 vols., London: Macmillan Publishers, 1996), vol. XI, pp. 305-311, p. 309.

establish the provenance of two vases for reasons of dating them as either eighteenth or nineteenth century, the only information available to Christie's from the vendor was that they were shown on a photograph taken in 1921, thus only establishing that the purchase must have been before that date but revealing nothing about the date of their creation.[62]

Besides the vendor's records, the known writings of an artist and his contemporaries will be consulted for references about a work, as well as – if available – the catalogue raisonné[63] and further scholarly publications about the artist and the period under examination.

A problem limiting the evidentiary persuasiveness of historical research is the ambiguity of documents. Particularly when it is very old works of art, the available information can often be inaccurate. Besides this, provenance research itself is not a static process and scholars may interpret old facts in new ways at different times.[64] Another aspect the researcher must be cautious of is the authenticity of the documents themselves, as contrived provenances are one of the means forgers use when trying to convince experts of the authenticity of faked art objects.[65]

It is well acknowledged, however, that historical research, if conducted in a manner sensitive to the above-mentioned problems, constitutes persuasive evidence of a work's authenticity.[66] In contrast, works of art that have left no historical traces must be considered as dubious.[67] This is especially the case if the work is attributed to a prominent artist. In *de Balkany* v *Christie's*,[68] the authenticity of a painting attributed to

[62] *Thomson* v *Christie Manson & Woods Ltd.* [2005] E.W.C.A. Civ. 555, at para. 22.
[63] See on the catalogue raisonné as the standard reference used to attribute a work of art: Michael Findlay, 'The Catalogue Raisonné' in: Spencer (ed.), *The Expert Versus the Object*, pp. 55-62.
[64] Annesley, 'Attributing Old Master Drawing', p. 88: "Each generation is, however, the victim, or maybe the beneficiary, of a fresh historical and aesthetic perspective on and interpretation of the Old Masters which can on occasion render older views quite baffling." In consequence, the appraiser of art needs to assess the reliability of previous writings on an object, and check the confidence the art market has in the opinion of the scholar, see John Tancock, 'Issues of Authenticity in the Auction House' in: Spencer (ed.), *The Expert Versus the Object*, pp. 45-53, p. 49.
[65] In an unreported criminal case from 1999, the accused was convicted of having contaminated vital archives at the Tate Gallery and the Victoria & Albert Museum with fake provenances. These bogus backgrounds were then used to convince purchasers of the authenticity of fake paintings. See 'Faker who flooded art world is jailed for 6 years' in THE GUARDIAN, 16 February 1999, p.7.
[66] See as to the dating of objects: *Thomson* v *Christie Manson & Woods Ltd.* [2004] E.W.H.C. 1101, QBD, paras. 111 and 188; explicitly on authenticity in the US case of *Greenberg Gallery* v *Bauman* 817 F.Supp. 167 (D.C. 1993), p. 173.
[67] O'Connor, 'Authenticating the Attribution of Art', p. 18; Philipps, 'Forgery', p. 309.
[68] [1997] Tr.L.R. 163; THE INDEPENDENT, 19 January 1995.

Egon Schiele (1890-1918) was under consideration. With regard to the painting's history, the court noted not only the absence of a flawless provenance, but also that there was no history of publication or public exhibition of the work available until the publication of an article in 1968 that, for the first time, attributed the painting to Schiele.[69]

If a work does not satisfy the expert's visual inspection and remains without convincing documentation, there is still the possibility of scientific testing. It has been suggested, though, that such objects are most likely to be faulty and that it would not be worth taking the effort of undergoing further, often expensive, scientific analysis.[70] This needs to be decided on a case-to-case basis.

3. Scientific Examination

The option of employing scientific and technical means to assist in the attribution of artworks has evolved during the twentieth century and new techniques are still appearing.[71] The main purposes of scientific examination are to reveal anomalies in the manufacture, in the materials, or in the age of the object under scrutiny.[72]

The studying of materials and of construction is mainly done with the aid of microscopy, ultra violet, X-ray and X-ray related methods, all of which enable a closer visual examination of the object. This way, restorations, repairs and overpainting as well as the binding agents or glues and false patina can be detected.

While these techniques have the advantage of being non-destructive, those analysing the molecular components of an object for reasons of dating require samples being removed from the object. The most prominent of the techniques which allow for the determination of the age of objects is radiocarbon dating.[73] It is generally used for

[69] A catalogue raisonné published in 1930 and revised in 1966 had the painting not included, *ibid.* See also n. 41 above.
[70] O'Connor, 'Authenticating the Attribution of Art', p. 18.
[71] Fractal analysis, using digital technology to identify an artist's unique mathematical fingerprint, only to be named as the latest. See Alison Abbott, 'In the Hands of a Master' (2006) 439 *Nature* 648-650.
[72] See for a detailed account of testing techniques: Stuart J. Fleming, *Authenticity in Art: The Scientific Detection of Forgery* (London: Institute of Physics, 1975); Mark Jones (ed.), *Fake? The Art of Deception* (London: British Museum Publications Ltd, 1990), pp. 275-289.
[73] Other dating techniques are, for example, thermoluminescence for ceramics and dentrochronology for wood panels.

dating wood, bone, ivory, textiles, leather, parchment and paper by measuring the natural radiocarbon decay from around the time of manufacture.

Since the objectiveness of scientific methods is undoubted, the evidence that can be drawn from them is regularly given substantial weight by the courts, as long as the method is well established and not a "developing science".[74]

Nevertheless, the usefulness of scientific methods is seen as limited among art experts, as the following excerpt from an article by *Simon Schama* on the subject of the Metropolitan Museum's 1995 exhibition "Rembrandt/Not Rembrandt" reveals with regard to the Rembrandt Research Project:

> "And while the Amsterdam-based project was established in 1968, essentially as a committee of kenners, its experts were no longer willing to put their faith solely in the sharpness of their collective 'eye'. Instead, a new generation of techno-toys was marshalled to probe beneath the skin of the painting and to deliver final, irrefutable verdicts. No self-respecting Rembrandt exhibition catalogue these days is complete without x radiographs, infrared spectographs, auto radiographs, canvas warp and woof counts, dendrochronological (tree ring) analysis of panels, and microscopically differentiated strata of grounds, glazes, and pigments. But the techno-kenners had hardly donned their lab coats before it became apparent that scientific investigation was a lot stronger on promise than on delivery. For while dating wood or cloth samples could distinguish paintings made in Rembrandt's lifetime from later imitations, the vast bulk of questionable work originated from Rembrandt's own period – and in more than one instance, from the master's own studio. Technology, it seems, is ^^good for exposing [recent] fakes but no good for winnowing out Rembrandt wannabes. ... The exhibition presents its scientific evidence in

[74] X-ray has been successfully employed as evidence as early as 1929 in the case of *Hahn* v *Duveen* 133 Misc. 871, 234 N.Y.S. 185 (Sup.Ct. N.Y.Co. 1929), pp. 878 resp. 193. The case of *de Balkany v Christie Manson & Woods Ltd.* [1997] Tr.L.R. 163; THE INDEPENDENT, 19 January 1995 has been mainly decided on grounds of the evidence drawn from scientific analysis. In *Thomson* v *Christie Manson & Woods Ltd.* [2004] E.W.H.C. 1101, QBD, while generally acknowledging the persuasiveness of scientific methods, Jack J did not accept the method used for dating metal objects by their composition on grounds of the method being a "developing science" with no collections of metallurgical data being established, paras. 151-177; confirmed by the Court of Appeal in *Thomson* v *Christie Manson & Woods Ltd.* [2005] E.W.C.A. Civ. 555, paras. 58-69.

form of photographs and other graphic displays, but also supplies ample reason not to put much faith in such evidence."[75]

4. Analysis

The art expert in the auction house conventionally uses a range of tools to determine attribution, but, as seen, each has a caveat. Among those regularly making attributions, the primacy of connoisseurship is acknowledged.[76] Still, the help of scientific testing and provenance are appreciated as they can help to reduce doubts and can confirm the result of a visual assessment. Of course, it is also possible that the various methods turn up contradictory results.

It is thus misleading to assume that scientific advance and scholarly expertise can solve all problems arising in the area of attribution. For many artworks, an absolute attribution is not possible.[77] As the excerpt from *Schama's* article indicates, this is mainly due to the way art has been created over the ages, accompanied by a changing understanding of authenticity. This needs to be further investigated in the following section of this chapter. If the appraiser in the auction house cannot find a definite answer on a question of attribution, such uncertainty must be expressed in the description of the lot in the catalogue.

E. CATALOGUING WORKS OF ART

In contrast to museums and other art institutions, where attributions are made for reasons of scholarship and education,[78] the attribution in the auction house is done with a view to selling the object. In the auction house, the result of an attribution is used for advertising the object to prospective buyers. This is primarily done through the medium of the auction catalogue.

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[75] Simon Schama, 'Did He Do It? Sleuthing at the Met's Rembrandt Show' in *The New Yorker* (Issue of 13 November 1995), pp. 114-118, p. 115 (as quoted in Spencer, 'Authentication in Court', p. 203).
[76] Instead of many: Ronald D. Spencer, 'Introduction' in: Spencer (ed.), *The Expert Versus the Object*, pp. xi-xviii, p. xiii.
[77] See the chapter 'The limits of expertise' in Jones (ed.), *Fake?*, pp. 291-307. Further below, text accompanying n.148 and n.148.
[78] See Christopher Reynolds, 'When the Artist Is Sketchy' in LOS ANGELES TIMES, 4 May 2006, col. 1, quoting J. Patrice Marandel, curator of European paintings at the Los Angeles County Museum of Art, on re-attributions: "You tend to show on your walls the things you believe in, because that's our role with the public, to educate with quality, not with question marks."

1. The Auction Catalogue and Its Functions

The result of an attribution sets the basis for the description of a lot in the auction catalogue. Catalogue entries usually consist of specific information which characterises an object, and of an estimate of the object's value. The purpose of cataloguing is to give prospective bidders information that should awaken their interest and allow them to decide whether they are going to set a bid or not. At the same time, auction houses use their catalogues as a marketing tool to influence groups of buyers and through them the outcome of an auction. Since the 1980's, big auction houses started to increase the distribution of their catalogues with the intention of directly targeting private buyers, among them many who have not invested into art before.[79] After all, increasing the audience attending an auction promises better auction results, with the possibility of less spectacular consignments also finding buyers.[80]

Both functions of the auction catalogue, providing a description of the lots and canvassing for buyers, need to be examined more closely. First, the groups of buyers and their expectations of the catalogue will be investigated. Secondly, it will be examined whether the information contained in a catalogue can fulfil these expectations. This requires an art historic excursus into the perception of authorship, before it can be established which information determining the characteristics and value of an art object must be expressed in the catalogue to give potential buyers an accurate basis for making their personal decision on the object.

2. The Audience Addressed: Groups of Buyers

It is still a widespread assumption that buyers of art belong exclusively to the moneyed upper classes that purchase art for reasons of patronage and connoisseurship. This is only partly true and might be traced to the times when painters and sculptors got their artworks commissioned[81] from monarchs, the aristocracy and the church, as well as the

[79] See Mason, *The Art of the Steal*, p.37: "All that was required ... was to convince moneyed folk that Sotheby's was the most exciting and congenial place to buy fine art, furniture, rugs and jewelry, and that acquiring beautiful objects could improve the quality of their life and social status."
[80] Compare David Norman, director of Sotheby's Impressionist and Modern department, as quoted in Marc Spiegler, 'The Hunt for the Red Collector' in *New York Magazine* (Issue of 28 August 2006): "If you get three to five more bidders on a piece, it completely changes the face of a sale."
[81] See Michelle O'Malley, *The Business of Art: Contracts and the Commissioning Process in Renaissance Italy* (New Haven and London: Yale University Press, 2005).

wealthy citizens of free cities.[82] However, from the nineteenth century, interest in art became more widespread, which was paralleled by a greatly increased number of new potential buyers.[83] This development was related, of course, to the rise of the bourgeoisie and industrialisation. Patronage disappeared and was replaced by the art market as we know it today, with art dealers and auction houses getting established.[84] The motivations for buying art were extended by the facet of art as an investment, to be traded like any other commodity.[85] Today, the upper end of the market is dominated by the new rich made up of businesspeople such as hedge fund managers, bond traders and arbitragers who often came to art because of reports of soaring prices.[86] At the same time, the constantly growing wealth in the second half of the twentieth century allowed an even broader audience to engage their interests and to buy art. The popularity of television programmes such as the BBC's *Antiques Roadshow* demonstrates that the purchase and collection of artwork is no longer a privileged entertainment for the wealthy only.[87] Finally, the evolution of the market for prints,[88] which are less expensive to make and also often cheaper than historical artefacts, has attracted a younger and more fashion orientated audience to participate in the art market. It can therefore be said that, today, virtually all groups in society are active on the art market. As seen, auction houses take regard of this in the way they compete for customers.[89] However, the shift towards art buyers becoming a more diverse and dynamic group also

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[82] To give just one example, Basel hosts the world's oldest municipal art museum, the core formed by a collection which was purchased by the city in 1661.

[83] See also ch. 2, 'Origins of the Art Market and Its Significance for the Art Market', p. 7.

[84] This development was further pushed by the shifts in the world economy in the time between the late nineteenth century and the Wall Street crash of 1929, when European agricultural revenues collapsed and the land-rich families of the European aristocracy, who owned most of Europe's cultural treasures, faced economic ruin. The new rich were American industrial magnates and Wall Street titans who bought what the Europeans had to sell and so unprecedented quantities of Old Master paintings, sculpture, furniture, porcelain, ecclesiastical art pieces, libraries etc. were shipped from Europe to the United States - the art work that formed the basis of the great American museum collections we know today. This massive transfer was mainly handled by a small group of art dealers, such as Agnew's, Colnaghi, Knoedler and Duveen. See Meryle Secrest's biography of Joseph Duveen, *Duveen: A Life in Art* (New York: Alfred A. Knopf, 2004).

[85] The first investment fund solely investing into art was established in France in 1904, see James Surowiecki, 'Cash for Canvas' in *The New Yorker* (Issue of 17 October 2005).

[86] See, for example, Landon Thomas Jr. and Carol Vogel, 'A New Prince of Wall Street Uses His Riches to Buy Up Art' in THE NEW YORK TIMES, 3 March 2005, p. A1. Further Mason, *The Art of the Steal*, p. 51. On other reasons why people engage in buying art, see Merryman and Elsen, *Law, Ethics and the Visual Arts*, pp. 858-861. Just like the American industrialists of the early twentieth century, n. 84, Russian oligarchs have recently entered the art market which has lead to the biggest art market boom in history, as the traditional buyers in Europe and the United States are still active too, see Joanna Pitman, 'Will the Boom Never End?' in THE TIMES, 22 August 2006, p.17.

[87] Nuding, 'Saleroom Practice', at 34, speaks of "a mass media age version of the Victorians' notion of enjoyable and improving 'education'".

[88] See on a definition Merryman and Elsen, *Law, Ethics and the Visual Arts*, p. 923.

[89] A further example is Sotheby's 1984 business decision to stop selling objects that are valued below thousand US dollars (with the exception of inexpensive objects consigned as part of a larger estate) - a decision smaller auction houses hugely benefited from, see Mason, *The Art of the Steal*, p. 38.

went along with potential buyers now presenting a spectrum of knowledge on the subject. Even though general knowledge about art has increased, the opening of the art market has meant that nowadays people buy art at auction who lack the required expertise and experience; and it is this audience in particular who depend on and expect from the auctioneer an unambiguous and correct communication of information in the catalogue.

3. Catalogue Description: Authorship as Essential Information on an Object

When one thinks about the essentials for a description of an artwork in a trade context, the question arises which characteristics determine and influence the work's economic value. A look at art market headlines quickly reveals that nowadays the authorship of a piece of art is to be considered as the foremost characteristic for determining its monetary value: rather than referring to the pictured subject of a piece of art, such as for example "Study of a Male Torso", "Dora Maar With Cat" or "Small Torn Campbell's Soup Can (Pepper Pot)", the market tends to favour to refer to these works as "Michelangelo", "Picasso" and "Warhol" first.[90] This shows that in today's market a strong relationship is perceived between a piece of art and its creator. In consequence, the attribution to a well-known and demanded artist has a great influence on the value of an artwork.[91]

The notion of authenticity and singularity of artworks has, however, changed through time, as well as the understanding of the creative process. This, of course, has an impact on the characteristics of art objects from different periods, and must be heeded if the conditions for a correct description in the auction catalogue are to be laid out.

a. Authorship and Authenticity

Authorship has not always been a central characteristic of a work of art: "concern with the creator's hand would seem to be the exception rather than the rule throughout

[90] See the NEW YORK TIMES' headlines: "Michelangelo Drawing Is Headed to Auction Block", 14 October 2005, p. E33; "A Picasso Sells for $95 Million as Spring Art Auctions Continue", 4 May 2006, p. B5; "Warhol and Judd Soar in $143 Million Art Sale", 10 May 2006, p. B4.

[91] See the statement by the London dealer Rory Howard: "Artists like Picasso and Warhol are big brand names. So their paintings are like international currency." in Marc Spiegler, 'The Hunt for the Red Collector' in *New York Magazine* (Issue of 28 August 2006). Likewise Paula Weideger, '"Who Dunnit" and the Numbers Game' in FINANCIAL TIMES, 26 August 2006, p.8.

Antiquity, when the name of the artist, alone, stood for certain pictures or statues. Therefore, when copies were made, even at a far later date than the originals, they were given the names of the original creators."[92] During the Middle Ages, artistic expression only served as an auxiliary craft for "giving visual form to the beliefs of church and state – to express the ideas of patrons."[93] Artists were seen as craftsmen who specialised in painting or sculpture.[94] Consequently, questions such as about the rarity or the authorship of a work of art did not play a role. Artists did not sign their works[95] and the audience was unacquainted with concepts of originality or of manner and style.[96] This understanding only began to change in the middle of the fifteenth century: with Humanism, the school of thought underlying the fundamental cultural and social changes of the Renaissance, the value of each individual human being was redefined, which also allowed artists to put their personal satisfaction and original ideas ahead of what their patrons demanded and thus develop art further and shape new, individual styles.[97] Accordingly, the understanding of art by the patrons slowly began to change: beginning with the Renaissance, the uniqueness of the artist's creation as an expression of his individual personality came into the foreground, which made authenticity an essential characteristic of a work of art.

Authenticity was at the centre of a dispute as early as 1457:[98] the frescoes for the Ovetari Chapel in the church of the Eremitani in Padua had been commissioned by the Imperatrice de Ovetari to, *inter alia*, Andrea Mantegna (1431-1506) and Niccolò Pizzolo (1421?-1453) in 1448.[99] When Pizzolo died, Mantegna's share of the work became bigger. Still, when it came time for the Imperatrice to pay for the work, she refused to compensate Mantegna for his efforts, which resulted in a law suit over

[92] Talley, Jr., 'Connoisseurship', 175, stating that at that point the 'invention' was of more importance for the collector than the 'execution' of the art.

[93] Jonathan Jones, 'This Is What Heaven Must Look Like' in THE GUARDIAN, 6 March 2006, pp. G2-6-17, 8.

[94] Larry Shiner, *The Invention of Art* (The University of Chicago Press, 2001), p. 31: "But the artificer, as Bonaventura said, was a maker, not a creator. God creates nature out of nothing, nature in turn brings potential being to actuality; the artificer simply modifies what nature has made actual."

[95] Jáuregui, 'Rembrandt Portraits', 1954.

[96] Talley, Jr., 'Connoisseurship', 176.

[97] Ernst H. Gombrich, *The Story of Art* (16th edn, London: Phaidon, 1995), p.315, gives an example of this "feeling of proud independence" by quoting from a letter by Michelangelo: "Tell him not to address his letters to the sculptor Michelangelo, for here I am known only as Michelangelo Buonarrotti ... I have never been a painter or sculptor, in the sense of having kept a shop ... although I have served the popes; but this I did under compulsion."

[98] Case quoted by Jáuregui, 'Rembrandt Portraits', 1953. See for a translation of the original witness statement by Pietro da Milano: Creigthon E. Gilbert, *Italian Art 1400-1500: Sources and Documents* (Englewood Cliffs, NJ: Prentice-Hall, Inc., 1980), pp. 31-32.

[99] See O'Malley, *The Business of Art*, p. 270 *app*.

exactly how much he was entitled to, depending on the work he did and thus a tacit that a work of art is above all the result of its maker's creative activity.[100] This was confirmed when another painter, Pietro da Milano, who was called to identify the authorship, was able to establish that certain disputed scenes were painted by Mantegna, not because "that he the witness saw him painting them, but out of long experience, which he has in this art of painting, he knows that these paintings are by the hand of the said Master Andrea" – according to *Gilbert*, in fact, probably the first record of a stylistic attribution of a painting.[101] It becomes clear from this case that patrons from about this time onwards were paying for the authorship of a work of art rather than for the artwork itself.

As a result, authenticity can be defined as a work of art originating from a particular artist.[102] For works whose value depends primarily upon their antiquity regardless of the artist's identity, e.g., in the case of furniture and handcrafts, authenticity refers to the object originating from a specific culture, period or school.[103]

b. Forgeries

The authentic object must be distinguished from the forgery. A forgery is an object that has been made with the intention of passing it off as the work of a different hand or of a different period.[104] Definite forgeries fall into four main categories:[105] the first group are

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[100] Gilbert, *Italian Art 1400-1500*, p.32.
[101] *Ibid.*, p.31.
[102] See for a definition of 'authenticity': Spencer, 'Introduction', p. xi.
[103] Nelson Goodman, 'Authenticity' in: Turner (ed.) *The Dictionary of Art*, vol. II, pp. 834-835.
[104] Hans Tietze, *Genuine and False* (1948), excerpt reprinted in Merryman and Elsen, *Law, Ethics and the Visual Arts*, pp. 940-945, p. 940.
[105] The following taxonomy is supported by section 9 of the Forgery and Counterfeiting Act 1981 which exhaustively defines eight ways in which a document may be "false" for the purposes of forgery-based offences:
"(1) An instrument is false for the purposes of this Part of this Act –
(a) if it purports to have been made in the form in which it is made by a person who did not in fact make it in that form; or
(b) if it purports to have been made in the form in which it is made on the authority of a person who did not in fact authorise its making in that form; or
(c) if it purports to have been made in the terms in which it is made by a person who did not in fact make it in those terms; or
(d) if it purports to have been made in the terms in which it is made on the authority of a person who did not in fact authorise its making in those terms; or
(e) if it purports to have been altered in any respect by a person who did not in fact alter it in that respect; or
(f) if it purports to have been altered in any respect on the authority of a person who did not in fact authorise the alteration in that respect; or
(g) if it purports to have been made or altered on a date on which, or at a place at which, or otherwise in circumstances in which, it was not in fact made or altered; or
(h) if it purports to have been made or altered by an existing person but he did not in fact exist."

copies or exact reproductions that try to imitate an original.[106] The second group are the rare fakes without a model,[107] best explained with the famous forgery *Christ and His Disciples at Emmaus* by Han van Meegeren (1889-1947), done in imitation of Jan Vermeer (1632-1675): in that painting, van Meegeren adopted the style and technique from the least documented period of Vermeer's career and created a completely new work which was indeed taken as a so far unknown Vermeer.[108] A third group is formed by alterations and additions to an existing work,[109] which includes restorations that change the character of a work and the inscription of false dates and signatures.[110] The form of pastiche is to be mentioned as a fourth group of forgeries, where the forger assembles units from a variety of authentic materials for his own copy.[111]

Yet, the distinction between authentic works of art and forgeries is still too broad to illustrate the circumstances that can lead to disappointment on the part of the buyer of art. In order to clarify this, an excursus into the workshop routines of the Old Masters[112] is required.

c. Routines in the Workshops of the Old Masters

As *Shiner* demonstrates, speaking of Renaissance artists as being generally "autonomous", "sovereign" or "absolute" would be an exaggeration: most of them still worked - without feeling offence to their creative individuality – in cooperation out of workshops that fulfilled specific contracts for patrons who still stipulated the terms of their commissions, such as the size of the object, its subject matter and the materials.[113] The manner in which art was created in the times from the Renaissance onwards opens up the possibility of a whole range of further variations on the scale between an authentic work of art and forgeries as categorised above. They can best be exemplified by looking at traditional workshop practices in seventeenth century Flanders and Holland. Peter Paul Rubens (1577-1640) and Rembrandt van Rijn (1606-1669), for

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[106] Tietze, *Genuine and False*, p. 941.

[107] Fleming, *Authenticity in Art*, pp. 7-8.

[108] See Jones (ed.), *Fake?*, pp. 237-240.

[109] Fleming, *Authenticity in Art*, p. 8.

[110] See the case of the overpainted Schiele, *de Balkany* v *Christie Manson Woods Ltd* [1997] Tr.L.R. 163; THE INDEPENDENT, 19 January 1995.

[111] Fleming, *Authenticity in Art*, p. 9.

[112] The term "Old Masters" is commonly used to refer to the great European painters from the Renaissance up to about 1800. See Gombrich, *The Story of Art*, pp. 475-476.

[113] Shiner, *The Invention of Art*, pp. 42-47. See further on the collaboration between patrons and artists, the illuminating study by O'Malley, *The Business of Art*.

example, had their studios fully employed with assistants and disciples who were working under their supervision and following their instructions: many of them were occupied with the task of carefully colouring their master's drawings for the pictures after his colour sketches, subsequently to which the master would return to put final finishing touches to the paintings.[114] It was also common for assistants to complete works by the master's own hand through the addition of staffage or landscapes or other accessories to sections that were left blank by the master. Especially with large commissions, the master often provided only a drawing and left the minutiae to his assistants.[115] Then, there were the joint efforts between specialists. For instance, Jacob van Ruisdael (1628?-1682), considered as the pre-eminent landscapist of the Golden Age of Dutch art, collaborated with other masters who contributed figures and animals to his panoramic views and landscapes.[116]

Ever since early Renaissance times, when materials for drawing and painting became more generally available and also dropped in price, copying has become a fundamental element in the training of artists[117] – according to *Merryman*, a time-honoured practice with a benign motivation, but still, when the resulting copies are accurate, creating confusion and inviting misrepresentation.[118] Indeed, this practice was also designed to ensure that students achieved a uniformity of style within a single studio.[119] The masters

[114] See the description of Rubens' studio routine according to Jacob Burckhardt, *Recollections of Rubens* (New York: Phaidon Publishers Inc., 1950), pp. 28-32.
[115] Jáuregui, 'Rembrandt Portraits', 1954: "Many of Rembrandt's sitters wore expensive jewellery or lace that is often painstakingly recorded in the oils. There is little discernible difference between one pearl and the other, or between one ruff and the other. What then would be the point of keeping the master occupied with this minutiae when any competent assistant, under the master's direction, could finish the job and definitely bring forth the master's creation to the master's specifications?"
[116] See Seymour Slive, *Jacob van Ruisdael: Master of Landscape* (London: Royal Academy of Arts, 2005). Cat. 20 (*The Great Oak*) was painted in collaboration with Nicolaes Berchem; cat. 38 (*Stag Hunt in a Wood with a Marsh*) and cat. 45 (*Extensive Landscape with a Ruined Castle and a Village Church*) are examples for joint efforts between van Ruisdael and Adriaen van de Velde.
Rubens and Jan Brueghel the Elder (1568-1625) formed another famous working partnership. In a series of about twenty-five works, Rubens painted the figures and Brueghel the landscapes, flora and fauna, see Anne Woollett (ed.), *Rubens and Brueghel: A Working Friendship* (Los Angeles: Getty Publishing, 2006).
[117] Jones (ed.), *Fake?*, 41.
[118] John Henry Merryman, 'Counterfeit Art' in: John Henry Merryman (ed.), *Thinking about the Elgin Marbles: Critical Essays on Cultural Property, Art and Law* (London: Kluwer Law International, 2000), pp. 378-430, p. 403.
[119] Jones (ed.), *Fake?*, 41. See further Christiana J. Herringham (ed. and transl.), *The Book of the Art of Cennino Cennini* (London: George Allen, 1899), a contemporary manual in which Cennini (c. 1370 – c. 1440) encourages students to copy from the master as "... daily following him, it will be against nature if you do not come close to his manner and style ...", at p. 22.

often extensively retouched and corrected their pupils' sketches, passing sheets back and forth to stimulate their pupils to imitate their work.[120]

Of course, the masters themselves acquired their bravura only by intensively studying the works of other masters. Either works were simply copied, often using different materials, or they served as the inspiration for new compositions, with only slight variations on the original.[121] It was even common that works of other masters were reworked. A famous example is *The Feast of the Gods*, a painting by Giovanni Bellini (1431?-1516), that was later extensively overpainted by the most famous of the Venetian painters, Bellini's pupil Titian (1485?-1576), who added a mountain with cliffs and an ultramarine blue sky.[122]

The studio routines as described above were publicly stated by the masters themselves. In a letter to Sir Dudley Carleton, Rubens described with great care the exact degree of authenticity with regard to each single painting he offered in negotiations about a purchase.[123] *Inter alia*, he used the following degrees of authenticity: "Original by my hand"; "Original by my hand, and the eagle done by Snyders"; "Original, by my hand, except a most beautiful landscape, done by the hand of a master skilful in that department"; "begun by one of my pupils, after one which I did in a much larger size … but this one, not being finished, would be entirely retouched by my own hand, and by this means would pass as original"; "begun by one of my pupils, after one that I made … but all retouched by my hand"; "done by the best of my pupils, and the whole retouched by my hand".[124]

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[120] See for example the training of artists as it is described for Michelangelo's studio in Hugo Chapman, *Michelangelo Drawings: Closer to the Master* (London: The British Museum Press, 2005), pp. 192-202, esp. cat. 59 ("Draw Antonio draw Antonio, draw and don't waste time") and cat. 60 ("Andrea have patience").

[121] Jones (ed.), *Fake?*, 43.

[122] David Jaffé (ed.), *Titian* (London: National Gallery Company Ltd., 2003). Titian's modifications did not happen with the intention of covering up Bellini's original authorship, thus making it a forgery, but to harmonise the painting with other decorations that were added to the owner's favourite room in which the painting hung, see cat. 15 and pp. 101-111. This example also sheds light on a Renaissance patron's attitude towards art. Today, with Bellini being regarded as one of the greatest painters, altering his work would not be tolerated. Back then, a work of art was seen as personal property with a decorative purpose, and with the owner having the freedom of changing it at will.

[123] Letter from 28 April 1618. See Ruth Saunders Magurn (ed. and transl.), *The Letters of Peter Paul Rubens* (Cambridge, MA: Harvard University Press, 1971), pp. 59-61.

[124] *Ibid.*

d. Perception of the Concept of Authorship

It is important to state that at the time of their creation such joint efforts were appreciated in the context of having come from the workshop of the master. As described, the scope of style afforded to artists increased as time went on. But it was usually only the leading masters, whose skills were supreme, who had the freedom to express new ideas and thus develop art further.[125] They also acquired the most important commissions; patrons, though, knew that works commissioned to a famous master were likely to be produced collaboratively, but they were satisfied with this, as a work coming from a studio still had the master's "seal of approval" and conformed to his standard of excellence.[126]

The perception of authorship and therewith authenticity only changed towards the end of the eighteenth century, when, with the birth of Romanticism, our modern idea of the artist took shape. As a movement, Romanticism pulled away from the rationalism of the preceding era of the Enlightenment and put an emphasis on individual inspiration and feeling.[127] Romantic artists rejected the idea that great art depended on adhering to long established models: genius was innate and the artist should follow his own vision, even if that meant isolation from society.[128] Only with the Romantic era, the process of creation, and therefore the figure and status of the artist, started to be accorded an importance it has not yet shaken off.[129] The re-evaluation of art that went along with this movement, making art the individual creation of inspired outsiders, combined with the consequent emphasis on attribution by nineteenth century art historians such as Morelli, created an art market in which what an image represented became less important than when, where and by whom it had been made.

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[125] Gombrich, *The Story of Art*, p. 503.

[126] See Jáuregui, 'Rembrandt Portraits', who gives the example of Marie de Medici's commission of the *Medici-cycle* to Rubens and his studio – 24 canvasses so monumental in scale and composition that they "obviously" could not have been completely painted by Rubens without the help of assistants, at 1957 and n.10.

[127] Kieran, *Revealing Art*, p. 46.

[128] Gombrich, *The Story of Art*, p. 503. See further on the glorification of artists as nonconformists: Alexander Sturgis *et al.*, *Rebels and Martyrs: The Image of the Artist in the Nineteenth Century* (London: National Gallery Company Ltd., 2006).

[129] Jáuregui, 'Rembrandt Portraits', 1956.

e. Art Market Consequences: Attribution Problems

The standards developed during Romanticism still govern contemporary art market expectations. In today's market environment, the key test is no longer whether a work of art has aesthetic qualities but whether it is an original work, thus explaining what *Jáuregui* calls an "obsessive interest" in knowing who painted even the smallest details in a work.[130] As the previous discussion tries to explain, this disregards the reality of the art production process of previous, non-Romantic periods where a different understanding of authorship dominated.[131]

Unsurprisingly, the flowing transitions from authentic works of art, created from beginning to end by one artist, collaborative efforts and studio works, and copies through to forgeries, are the reason for art experts facing such immense difficulties when they set out to establish the oeuvre of a particular artist and when they have to make definite and precise attributions. A review of recent press reports will show this.

The most ambitious project in the area of attribution, the previously mentioned Rembrandt Research Project, which is endeavouring to determine a corpus of authentic works by Rembrandt, still regularly hits headlines with the results of its research: in January 2006, a painting that had previously been rejected to be by Rembrandt and thought to be by one of his students instead, headed for the auction block as a newly authenticated work by the master himself.[132] For many years, experts were puzzled by the dark fur collar of the *Elderly Woman in a White Bonnet* reflecting the light falling from behind the sitter instead of absorbing it – something Rembrandt, who was known as the "painter of light", would not have gotten wrong. Scientific examinations then revealed that the fur collar had been added about a century later to make the sitter look

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[130] *Ibid.*, 1957.

[131] An area where the pre-romantic concept of authorship is accepted by contemporary scholars is French furniture from the seventeenth and eighteenth century: Under the *ancien régime*, all trade was subject to strict control through specialist guilds. Every trade had its own guild. At that time, fine furniture design demanded gilt-bronze mounts. But the cabinet-makers, or *ébénistes*, did not have the right to design, cast, chase or gild such mounts. They had to commission this work to the *bronziers* and become the owner of the models. Aware of the strict regulation, scholars of French furniture do not try to attribute parts of one piece of furniture to one or the other master of the particular workshops involved, but attribute the pieces to the person principally responsible for their creation, thus acknowledging that the work as a whole would not exist without the *maître-ébéniste*, "a sort of manager of talent, and an artist in his own right." – see Jáuregui, 'Rembrandt Portraits', n. 22, and further John Whitehead, *The French Interior in the Eighteenth Century* (London: Laurence King, 1992), p. 41 and F.J.B. Watson, *Louis XVI Furniture* (London: Alec Tiranti, 1960), pp. 62-66.

[132] Carol Vogel, 'A Storied Rembrandt Goes to a Mystery Bidder' in THE NEW YORK TIMES, 27 January 2006, p. E31.

more like a lady and make the painting more saleable. After removing the overpainting, uncovering a whitish collar, the reflections made sense and the painting could unmistakably be classified as an oil study Rembrandt did to experiment with the issue of light.[133] In the same way, scholars from the Rembrandt Research Project do not hesitate to rigorously de-attribute paintings that have previously been admired as *Rembrandts*, the most spectacular cases being the downgrading of the Frick Collection's *Polish Rider* in 1984 and the Gemäldegalerie Berlin's *Man With The Golden Helmet* in 1985.[134]

In 2005, Scotland's most loved painting, *The Skating Reverend*, was in the spotlight, when the curator of the National Portrait Gallery in Edinburgh presented striking evidence[135] that the painting could not be by the Scottish master Sir Henry Raeburn (1756-1823), but by a little known French painter instead.[136] Similarly, severe doubts have been expressed about the National Gallery's celebrated purchase of *The Madonna of the Pinks* in 2004. This painting has traditionally been attributed to Raphael (1483-1520), but eminent Raphael scholars have since pointed out that the painting displays too many infelicities to be from the hand of the master, and criticise the National Gallery for having spent twenty two million pounds without first having established its authenticity using modern methods.[137]

The list of Old Master paintings left in attributional limbo could be continued at will. It is especially in American museums, which have the most advanced technologies for scientific analysis available, that collections get continuously reassessed.[138] Problems of attribution, though, are not limited to the works of Old Masters. For example, previously unknown works supposed to be by Jackson Pollock (1912-1956) recurrently

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[133] See on a more detailed account: Carol Vogel, 'The Case of the Servant With the Fur Collar' in THE NEW YORK TIMES, 22 September 2005, p. E1.

[134] On this case, as well as further demoted paintings previously attributed to Rembrandt: Richard Cork, 'The Old Masters That Weren't: Authentic Rembrandt?' in THE TIMES, 14 March 1992, p. 19.

[135] The evidence is based on stylistic analysis and historical research. There have been doubts about the attribution to Raeburn for a long time, but what stopped experts from making any headway was that no one knew who else the painting could be by. The starting point thus was to investigate which other portraitists were in Edinburgh at the time of the painting's creation, then applying their style and technique on the portrait under investigation. See Stephen Lloyd, '"Elegant and Graceful Attitudes": The Painter of the "Skating Minister"' (2005) 147 *The Burlington Magazine* 474-486.

[136] Shirley English, 'Scots Icon Is Skating on Thin Ice' in THE TIMES, 4 March 2005, p. 3.

[137] Alasdair Palmer, 'A Lot of Pounds for a Few Pinks' in THE SUNDAY TELEGRAPH, 23 October 2005, p. R5.

[138] Julia M. Klein, 'The Barnes Revises Attributions of Old Masters' in THE NEW YORK TIMES, 27 August 2005, p. B7. Further Samir S. Patel, 'Museums Use New Tools to Fix Old Works' in THE NEW YORK TIMES, 5 July 2005, p. F3.

emerge in the United States, causing fierce controversies between experts about their authenticity.[139]

On the other hand, the tightening of attribution standards in the post-Romantic era can be seen as a sign of art history progressing. For instance, the results of the revision of Rembrandt's entire work have led to enhanced reputations for some of his students, such as Carel Fabritius (1622-1659) or Willem Drost (1633-1659), who are now appreciated in an individual light.

However, especially for the works of the Old Masters, the change in definition which led to the downgrading of many previously celebrated masterworks can have dramatic consequences. Questioned works where no new unambiguous attribution can be made will forever remain marked by the stigma of accusation, in the worst case making them unsaleable.[140] As a matter of fact, a de-attribution also results in a significant drop of the monetary value of the work affected.[141] This might have lesser consequences for works owned by museums, as they are usually unmarketable anyway. From a private owner's point of view the situation looks different, though. Here, the art expert who writes an attribution sets a commercial system to work. The drop in value alone, if it emerges that an object does not stem from the name previously given to it, is sufficient proof for showing that the matter of attribution is most essential for the merchantability of an artwork.

f. Conclusions for the Description of Lots in the Catalogue

Bearing all this in mind, it needs to be answered what specifications about the art objects presented in the auction catalogue are required if accurate information is to be

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[139] See on the find of 32 paintings supposed to be by Pollock in a metal storage bin in Wainscott, N.Y., in 2003: Randy Kennedy, 'Is This a Real Jackson Pollock?' in THE NEW YORK TIMES, 29 May 2005, p. 2.1, and 'Computer Analysis Suggests Paintings Are Not Pollocks' in THE NEW YORK TIMES, 9 February 2006, p. E1. On the theft of an unauthenticated Pollock in 2005: Paul Vitello, 'The Case of the Purloined, Unauthenticated Pollock' in THE NEW YORK TIMES, 14 February 2006, p. E1.

[140] On this and further implications, see Peter Landesman, 'A Crisis of Fakes: The Getty Forgeries' in *The New York Times Magazine*, 18 March 2001. For instance, *La Belle Ferronière*, the painting in the centre of the lawsuit *Hahn* v *Duveen* 133 Misc. 871, 234 N.Y.S. 185 (Sup.Ct. N.Y.Co. 1929), remains unsold. See Secrest, *Duveen: A Life in Art*, p. 243, and further n. 57 above.

[141] In case of an object being identified as a forgery, it becomes "virtually worthless". This art market fact has been acknowledged in *May* v *Vincent* (1990) 154 J.P. 997 and in *Harlingdon & Leinster Enterprises* v *Christopher Hull Fine Art* [1991] 1 Q.B. 564, at 583. For the downgrading of a work, see Sarah Jane Checkland, 'Who drew the Michelangelo?' in THE TIMES, 6 July 1991, quoting Leo Steinberg: "A lot of money is involved. If a drawing is by Michelangelo, it would sell to the Getty for $1 million or $2 million; if by one of his followers, such as Condivi, you would be lucky to get £500 for it."

conveyed to potential bidders. For unlike other areas of trade, private law in England does not provide definitions or guidelines that are specifically drafted for transactions in art.[142] Instead, as we shall see in the next chapter, English law treats works of art like any other tangible property.[143]

So long as there are no legally binding guidelines, lawyers have to draw on the practice in the art trade and make it the basis for their legal assessment. If there is material doubt as to the description or the dating of a work of art offered for sale at auction, good auctioneering practice requires the auctioneer to articulate the doubt in suitable terms.[144]

The glossaries which the two leading auction houses of Sotheby's and Christie's use in their catalogues are identical in essence. In both, different levels of attributional certainty are distinguished, which take the characteristics of historical artefacts into account. These sets of qualifications allow for catalogue descriptions with an exactly defined meaning and give the bidder at auction an exact idea of what they can expect.[145]

Christie's distinguishes seven categories:

> "A work catalogued with the name(s) or recognised designation of an artist, without any qualification, is, in our opinion, a work by the artist.
> In other cases, the following expressions, with the following meanings are used:

[142] Especially typical areas of consumer sales are governed by very detailed regulations as to the quality and fitness of particular types of goods, for instance those supplied for public consumption in the Food Safety Act 1990. The reason for regulating this area is that consumer protection is regarded high in this area and a permanent control and supervision by the authorities is required to provide and enforce this protection. See Patrick S. Atiyah, John N. Adams and Hector MacQueen, *The Sale of Goods* (11th edn, Harlow: Pearson Longman, 2005), pp. 288-290.
[143] An in depth discussion of the common law and statute governing transactions in art follows in chapter 4. Tax legislation must also be considered. The Value Added Tax Act 1994 contains a provision on works of art in s. 21 (5) and (6). However, this provision is only applicable in the context of relief from value added tax on the importation of works of art and is not directly helpful. The Value Added Tax Act 1994 counts, *inter alia*, paintings, drawings, collages and any original engravings, lithographs or other prints among works of arts (s. 21 (6)(a)-(h)). More detailed, paintings and drawings belong to works of art relieved from tax when they were executed by hand (s. 21 (6)(a)). The age, style, or artist's technique do not matter to qualify for this purpose, nor does the authorship. For engravings, lithographs and other prints the tax relief is granted when they were produced from one or more plates executed by hand by an individual who executed them without using any mechanical or photomechanical process (s. 21 (6)(b)). It does not matter whether the prints were signed by the artist. See David R. Harris, Michael McGarvey and Andrew Young, 'Value Added Tax' in: Lord MacKay of Clashfern (ed. in chief), *Halsbury's Laws of England* (4th edn, London: Butterworths, 2005), Vol. 49(1), paras. 119 and 132.
[144] See *Thomson* v *Christie Manson & Woods Ltd.* [2005] E.W.C.A. Civ. 555, para. 73.
[145] Some argue that these definitions would still be misleading, see Charlotte Higgins, 'The Auction House, the Fashion Designer, and the £78,000 Refund' in THE GUARDIAN, 8 November 2006.

'Attributed to ...' in our opinion probably a work by the artist in whole or in part.
'Studio of ...'; 'Workshop of ...' in our opinion a work executed in the studio or workshop of the artist, possibly under his supervision.
'Circle of ...' in our opinion a work of the period of the artist and showing his influence.
'Follower of ...' in our opinion a work executed in the artist's style but not necessarily by a pupil.
'Manner of ...' in our opinion a work executed in the artist's style but of a later date.
'After ...' in our opinion a copy (of any date) of a work of the artist."[146]

Further, it is specified that:

"'Signed ...'; 'Dated ...'; 'Inscribed ...' in our opinion the work has been signed/dated/inscribed by the artist. The addition of a question mark indicates an element of doubt.
'With signature ...'; 'With date ...'; 'With inscription ...' in our opinion the signature/date/inscription/stamp is by a hand other than that of the artist."[147]

In answer to the question above it can thus be said that a simple classification of especially old master paintings into "authentic" and "fake" only is not feasible. Absolute certainty is not always possible.[148] The previous analysis has shown that what matters is what the particular object pretends to be, that is, with what attribution and description it enters the market. What matters is whether the description accorded to the work is objectively correct or whether the work in fact departs from this description.

In the course of this it must be admitted that a description can only be based on the art historic and scientific knowledge available and generally accepted for use at the time

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[146] See 'Explanation of Cataloguing Practice' as stated in: *Auction Catalogue 5819 - Impressionist and Modern Art, South Kensington, 27 October 2005.*

[147] *Ibid.*

[148] See above, D. 4., p. 26; further: Peter H. Karlen, 'Appraiser's Responsibility for Determining Fair Market Value: A Question of Economics, Aesthetics and Ethics' in: Briat (ed.), *International Sales of Works of Art*, pp. 667-705, p. 680; Robyn Sloggett, 'The Truth of the Matter: Issues and Procedures in the Authentication of Artwork' (2000) 5 *Art Antiquity and Law* 295-303, 298; Ernst van de Wetering, 'Thirty Years of the Rembrandt Research Project: The Tension Between Science and Connoisseurship in Authenticating Art' (2001) 4/2 *IFAR Journal*, 14.

when the description is written.[149] Of course, new scientific processes can establish new certainties at a later point in time. However, when it comes to assessing the description attached to a work of art one has always to look to the knowledge then current when it entered the market, which in the case of an auction will be the time when it is held.[150]

F. SUMMARY AND RESULT

Issues relating to the attribution of works of art are immensely complex. This is because they hang on a complex resolution between the creative processes of artists, both past and present, and the overburdened expectations of authenticity and value that arise when works of art enter the modern market.

The auctioneer of art stands in the centre of this conflict. As the discussion in this chapter has shown, the position and function of the auctioneer is not merely one of a neutral intermediary who arranges for the confluence of supply and demand. Rather, he is processing the works consigned for a sale by attributing and valuing them. The result of this process is then communicated to potential buyers via the description of the goods in the auction catalogue. This description forms a key feature of the buyer's decision when setting a bid. Considering the problems that can arise during the attribution process one is justified to say that "no aspect of auctioneering is so fraught with potential hazard as the application of descriptions to lots to be sold."[151]

On the one hand, the auctioneer has to be vigilant so as not to fail to describe a lot to its full potential, since undercataloguing to produce a "sleeper", such as in the case of *Luxmoore-May* v *Messenger May Baverstock*, may give rise to a breach of a duty of care to the vendor-consignor. On the other hand, there is the danger of overdescribing objects which may result in liabilities towards the buyer at auction. Here, the analysis of the problems arising from the attribution of especially old master paintings has shown that the question of "authentic" / "fake" becomes less important in the light of the question of whether the attribution and description of the object offered is correct. The never ceasing process of re- and de-attribution, which is an intrinsic risk in relation to historic works of art, does not allow the establishment of an everlasting definition of authenticity. The pragmatic solution of legal disputes over issues of attribution should

[149] See above, D. 2., pp. 22-23; further: Karlen, 'Fakes, Forgeries and Expert Opinions', p. 244.
[150] Acknowledged in *Thomson* v *Christie Manson & Woods Ltd.* [2005] E.W.C.A. Civ. 555, para. 78.
[151] Harvey and Meisel, *Auctions Law and Practice*, para. 5.13.

thus follow the practice of the art market and waive this criteria to base attribution on the description attached to an object at the time of the auction sale instead.

To what extent the art auctioneer is liable to the purchaser for his services, especially to what extent he is liable for the description of lots in the catalogue, is the subject matter of the next chapter.

4

Holding Auctioneers Accountable for Describing Works of Art: Duties and Liabilities Owed to the Purchaser

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The sale of works of art at auction has changed dramatically over the past couple of decades. From previously being wholesale businesses which supplied art dealers with stock, auction houses have grown to multinational corporations which market art directly to the public. It has become obvious in the preceding chapter that the auctioneer is deeply involved in the transaction of art objects from the vendor-consignor to the purchaser at auction. As the character of auction houses and the course and workings of art auctions have changed, it is questionable whether the traditional application of the laws of agency, contract and tort, which primarily govern auctions, are still capable of regulating the complex relationships in which the art auctioneer is involved.

A. CONCEPTUAL OUTLINE

The concern of this chapter is the duties and liabilities of the art auctioneer owed to the purchaser with regard to the description of lots made in the course of an auction. In the context of an auction, three significant relationships exist from which disputes about attributions normally arise: the relationship between the seller-consignor and the auctioneer; the relationship between the seller-consignor and the buyer; and the relationship between the auctioneer and the buyer. The last relationship is of particular interest. In contrast to sellers of art, buyers have less freedom of choice when entering the art market. Sellers have the option to consign their artworks to an auctioneer, to sell them through a dealer, or to conduct a sale on their own. In a market for goods whose

main characteristic is their uniqueness, the potential buyer thus must deal in the setting the seller has chosen.[1]

In the auction situation, it is undisputed that the auctioneer's role is primarily that of an agent for the seller-consignor.[2] The seller at auction obtains legal protection with regard to misconduct by the auctioneer, such as misrepresentations, from, *inter alia*, the agency relationship that exists between him and the auctioneer, because the auctioneer owes to him a duty of care and skill and fiduciary duties.[3] The question is, however, whether the buyer of a work of art through such an intermediary receives an equal protection against possible misconduct, if any at all.

This question is of such importance because the catalogue description, for which the auctioneer is responsible, forms a key feature for the potential buyer's decision to engage in the bidding or not. After authentic works of art have become established as an investment vehicle and auction sales an important method for acquiring and evaluating that investment, the problems of the buyer who finds out that the object purchased at auction is defective have become more severe and urgent, as a misattribution usually results in a significant financial loss.

Still, there are only a few decisions spread across English case history that confront the issues of the liability of the auctioneer who sells an incorrectly attributed work of art. It can be assumed, though, that many such cases are settled out of court because neither the deceived buyer nor the auction house have an interest in making a case of a disputed attribution public, due to embarrassment and fear of getting "bad press".[4] A survey of the existing case law reveals a considerable variety in the reasoning of those cases which makes it difficult to distinguish any sort of consistent authority. Further, the courts seldom clearly differentiate between the various doctrinal bases which underlie

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[1] Jorge Contreras, 'The Art Auctioneer: Duties and Assumptions' (1991) 13 *Hastings Communications and Entertainment Law Journal* 717-751, 731.

[2] Lyndel Prott and Patrick O'Keefe, *Law and the Cultural Heritage: Volume 3 - Movement* (London: Butterworths, 1989), para. 601. This role is usually also emphasized by auction houses in their terms and conditions of trade, see for example, Condition 1 of Christie's Conditions of Sale: 'Except as otherwise stated Christie's acts as agent for the seller. The contract for the sale of the property is therefore made between the seller and the buyer.'; Condition 1(b) of Sotheby's Conditions of Business for Buyers: 'As auctioneer, Sotheby's acts as agent for the Seller. A sale contract is made directly between the Seller and the Buyer.' See also ch.3, text accompanying n.8.

[3] A detailed account of the capacity, the authority, the duties and the liabilities of the auctioneer in relation to the vendor-consignor can be found in Brian W. Harvey and Franklin Meisel, *Auctions Law and Practice* (3rd edn, Oxford University Press, 2006), chs. 3 and 5.

[4] Kai B. Singer, '"Sotheby's Sold Me a Fake!" – Holding Auction Houses Accountable for Authenticating and Attributing Works of Fine Art' (2000) 23 *Columbia Journal of Law and the Arts* 439-455, 443.

the suits of the disappointed buyer. Here, the analysis of the law is further complicated by the use of conditions of sale which always accompany auction sales.

In attempting to establish a conceptual framework governing the auctioneer's liabilities to the disappointed buyer with regard to disputes over attribution, the following structure has been chosen: the chapter will conduct a detailed review of the relevant case law as to how the courts have decided to allocate responsibility and risk in the misattribution context. The structure of the chapter is prescribed by the general legal regime governing auction sales: after an examination of the auctioneer's liability on the contract of sale and possible independent contractual liabilities, the chapter will turn to an investigation of the auctioneer's liability to the buyer in tort. The chapter will end with an analysis of the conditions of business usually employed by auction houses in relation to buyers and finally make an excursus to possible compensation claims under criminal statute.

Once an account of the current legal regime has been given, conclusions can be drawn on whether the level of responsibility for misattributions by auctioneers is adequate. Finding that the law puts auction houses in a position of unjustified superiority over buyers, theoretical alternatives under which auction house accountability for erroneous attributions may be strengthened can be discussed. This will be done in chapter 5.

B. LEGAL TREATMENT OF DISPUTES OVER ATTRIBUTION: THE CURRENT REGIME GOVERNING THE LIABILITIES OF THE AUCTIONEER TO THE PURCHASER

As said,[5] an auctioneer predominantly acts as an agent for a principal who is interested in selling goods via auction. The most important effect of the agency agreement between the seller and the auctioneer is that it enables the auctioneer to make a contract of sale between his principal and a third party, here the successful bidder at auction.[6]

When an auctioneer is acting as the seller's agent, liabilities to the buyer can arise in a variety of ways. Not all of them are relevant with regard to disputes over attribution.

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[5] See text accompanying n. 2 and n. 2 above.
[6] Franklin Meisel, 'Auction' in: Lord MacKay of Clashfern (ed. in chief), *Halsbury's Laws of England* (4th edn, London: Butterworths, 2003), Vol. 2(3), para. 207.

The following examination will concentrate on those circumstances under which a liability for misattributions may arise. First, the legal situation for possible liabilities arising from the contract of sale the auctioneer has arranged for will be considered. Next, liabilities under specific contractual arrangements besides the contract of sale will be explored. Finally, the examination will turn to the law of tort, in particular to liabilities arising in tort for negligent misrepresentation.

1. Liability on the Contract of Sale

The general effect of a disclosed agency agreement, where the agent is acting within his actual or apparent authority, is that an agent is neither liable under, nor entitled to enforce, a contract which he makes on behalf of his principal:[7] by reason of the fact that he is acting as an agent, the agent does not have a contract with the third party. Because an agent owes a duty of care to his principal in relation to the transaction on which he is employed,[8] and if there has been a breach by the agent of this duty to his principal, for example in form of a contractual misrepresentation for which the principal becomes accountable, then it is possible for the third party to recover from the principal, and for the principal to recover from the actual person at fault, the agent.[9] The agent, however, is not directly liable to the third party upon the contract. In an agency situation, claims based upon misrepresentations by auctioneers are usually brought directly against the principal. There are, however, two exceptions that are of significance in the auction context.

a. Undisclosed Principal

Where the agency is undisclosed at the time of the contracting, the existence of the principal will not be obvious to the third party. The contract therefore is, objectively

[7] Francis Reynolds, *Bowstead and Reynolds on Agency* (18th edn, London: Sweet & Maxwell, 2006), para. 9-001; Guenter Treitel, *The Law of Contract* (11th edn, London: Sweet & Maxwell, 2003), p. 732.
[8] *Bowstead and Reynolds on Agency*, paras. 6-015-6.022.
[9] Notwithstanding matters of solvency. *Cf.* wording of Hobhouse LJ in *McCullagh* v *Lane Fox & Partners Ltd* [1996] P.N.L.R. 205, CA, at 226.

interpreted, made between the agent and the third party. Consequently, the agent is personally liable and entitled to sue on the contract.[10]

In relation to auctions, one might argue that an auctioneer can never sell for an undisclosed principal, because it is necessarily implied in the conduct of business of an auctioneer that he acts as an agent, which is known by the party bidding at auction. However, it is settled that there is no objection to an auctioneer also being allowed to sell his own property at an auction.[11] In such a case the auctioneer sells as a principal in his own right and becomes a party to the contract of sale with the fall of the hammer.[12]

Still, a case of an undisclosed principal is nowadays unlikely to happen at an art auction. While the general rule of the auctioneer acting as an agent is usually always clearly stated in the terms of trade applying to a sale,[13] it is also common usage to attach symbols to lots which indicate when the auction house has any ownership interests in the property that is up for sale, so that there is no room for uncertainty.

b. Disclosed but Unidentified Principal

More problematic is the situation where the agency is disclosed but not the identity of the principal. This is a circumstance that is very common especially at art auctions.[14] Due to the values at stake, not only sellers, but also buyers often prefer to remain unidentified. This desire can be easily fulfilled with the secrecy an auction sale offers.[15]

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[10] See *Siu Yin Kwan* v *Eastern Insurance Co Ltd* [1994] 2 A.C. 199, PC, 207; *Boyter* v *Thomson* [1995] 2 A.C. 629, HL, 632. At the point when the principal is disclosed the third party may elect whether to proceed against the agent or against the principal, so that the agent's personal liability may continue after the principal's existence becomes known, see *Clarkson Booker Ltd* v *Andjel* [1964] 2 Q.B. 775, CA. Further *Bowstead and Reynolds on Agency*, para. 9-012 and authorities cited there.
[11] *Flint* v *Woodin* (1852) 9 Hare 618.
[12] See on possible liabilities of the auctioneer in that situation briefly below, 4.a., pp. 84-87.
[13] See n. 2 above.
[14] Typical descriptions in auction catalogues where the principal remains unidentified are, for example, "Various properties"; "Property from a private European collection"; or "Property from an estate".
[15] This practice has come under scrutiny in the recent case of *Rachmaninoff* v *Sotheby's* and *Eva Terenyi* [2005] E.W.H.C. 258, QBD, where Tugendhat J pointed to the "dark side to the confidentiality surrounding the identity of an auctioneer's principal." Namely that "[t]he public and the law have increasingly come to recognise the potential for abuse by criminals of works of art, and of those who deal in them (consciously or unconsciously), for money laundering, and for disposing of the proceeds of crime. The less the legal risks involved in committing a work for auction, the more attractive the market in works of art and manuscripts becomes for criminals.", at para. 35. See also note by Norman Palmer, 'Keeping the Score – The Rachmaninoff Claim and the Circumspection of Auction Houses' (2005) 10 *Art Antiquity and Law* 317-324, who welcomes that the judge "placed transparency above confidentiality in his evaluation of the relative rights of the parties", at 322.

Whether an agent of a disclosed but unnamed principal becomes liable upon a contract cannot be answered in the same clarity as in the case of an undisclosed principal. It has been suggested in *Teheran-Europe Co. Ltd* v *S.T. Belton (Tractors) Ltd* that in an ordinary commercial transaction a willingness on the side of the third party to enter into a contract with the principal, notwithstanding who he is, may be assumed by the agent in the absence of other indications.[16] *Reynolds* points out that this would sometimes be an "improbable construction to put on the situation", because, at the other end of the spectrum, the facts may give rise to the conclusion that the third party deals only with the agent. In such a case the agent's position in relation to his principal (of whose existence the third party knows from the start) would be disregarded.[17]

In *N & J Vlassopolus Ltd* v *Ney Shipping Ltd (The Santa Carina)*,[18] Lord Denning favoured a middle course suggested in para. 321 of the American *Restatement of the Law of Agency*,[19] which states that: "Unless otherwise agreed, a person purporting to make a contract with another for a partially disclosed principal is a party to the contract." However, this general proposition has been rejected by the Court of Appeal in *The Santa Carina* case in respect of unwritten contracts,[20] and in the Supreme Court of Canada in respect of a written contract.[21]

Reynolds thus argues that the courts should be willing to adopt a prima facie rule (applicable to both written and unwritten contracts) making the agent liable together with the unnamed principal unless it is absolutely clear that the person concerned acted solely as an agent.[22] Such a prima facie rule would help to avoid the confusion previously created by the courts by wrongly classifying unnamed principal cases as undisclosed principal cases with the intention of preventing the agent escaping from personal liability.[23]

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[16] [1968] 2 Q.B. 545, *per* Diplock LJ, at 555.
[17] *Bowstead and Reynolds on Agency*, para. 9-016.
[18] [1977] 1 Lloyd's Rep. 478, CA, at 481.
[19] *Restatement of the Law Second, Agency* (St. Paul, Minn.: American Law Institute, 1958). Excerpt of para. 321 in Len Sealy and Richard Hooley, *Commercial Law: Text, Cases and Materials* (3rd edn, London: Butterworths, 2003), p. 167.
[20] [1977] 1 Lloyd's Rep. 478, CA, at 482.
[21] *Chartwell Shipping Ltd* v *Q.N.S. Paper Co Ltd* [1989] 2 S.C.R. 683; (1989) 62 D.L.R (4th) 36.
[22] *Bowstead and Reynolds on Agency*, para. 9-016.
[23] *Ibid.*

The case law involving auctions goes into this direction. In the case of *Benton* v *Campbell Parker & Co*,[24] it has been presumed, quite contrary to the *Teheran-Europe* case, that a purchaser would only be willing to contract with an unknown principal if the auctioneer made himself personally liable, if called on, to perform the contract which he arranged for his principal.[25] On the basis of this presumption, the principle applied in previous auction cases[26] on the question was restated by Salter J, namely that: "Where an agent purports to make a contract for a principal, disclosing the fact that he is acting as an agent, but not naming his principal the rule is that, unless a contrary intention appears, he makes himself personally liable on the authorised contract."[27]

However, in the same section Salter J interprets this liability of the agent to perform the contract which he arranged for his principal as quite limited:[28]

> "But where the agency, as in this case, is an agency for the sale of a specific chattel, which the buyer knows is not the property of the agent, it seems to me impossible to presume that the buyer, who contracts to buy that chattel from the principal, would stipulate that the agent, if called on, shall himself sell the chattel to the buyer and shall himself warrant his own title to a thing which the buyer knows is not his. It is impossible to presume that the agent would agree to undertake such a liability. The only way in which he could discharge it would be by acquiring the chattel from his principal, a thing he has no right to demand and a thing inconsistent with the contract he has been instructed to make, by which the principal sells that chattel to the buyer. For this reason I think that the presumption above mentioned is rebutted in the case of a sale of a specific chattel by an unknown agent for an undisclosed principal."

What, then, is the extent of the personal liability of the auctioneer? This question has been considered by Williams J in the earlier case of *Wood* v *Baxter*:[29]

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[24] [1925] K.B. 410.
[25] *Ibid.*, at 414.
[26] *Hanson* v *Roberdeau* (1792) Peake 120; *Franklyn* v *Lamond* (1847) 4 CB 637.
[27] *Benton* v *Campbell Parker & Co* [1925] K.B. 410, at 414.
[28] *Ibid.*, at 415.
[29] (1883) 49 LT 45, at 46.

"What is the character and extent of the contract entered into by the auctioneer when he sells without disclosing the name of his principal? ... [I]t would certainly be going too far to say that an auctioneer, selling without disclosing the name of his principal, makes himself a contracting party in the same way and to the same extent that another agent acting for an undisclosed principal does. The auctioneer sells, not as an owner having a right to sell by virtue of his own right of property, but as an auctioneer empowered and entrusted by his employer to sell. If he is selling livestock or implements in the market place or furniture in a room, the extent of his contract would ordinarily be to deliver the goods to the buyer; ... if he was selling timber stacked in a yard ... or growing crops on a farm, it would be in each case to give such constructive delivery as according to the nature of the subject matter was practical and usual. Upon making such delivery, his obligation would ordinarily be fulfilled."

It follows from this dictum[30] that the duty of performance is limited to a delivery of the goods sold at auction. This duty to deliver, however, does not arise from the contract of sale. Rather, it is the other side of the coin that gives the auctioneer the right to sue for the price. This right to sue for the price is from a contract quite separate from the contract of sale, as stated in the *Benton* case:

"These rights and liabilities do not arise from the contract of sale which binds only the buyer and the principal. They arise from the contract which the auctioneer makes upon his own account with the buyer ... The duty to deliver and the right to receive the price are usually expressed in the conditions of sale. But whatever its terms may be, the contract is entirely independent of the contract of sale."[31]

Harvey and Meisel conclude from this that if the duty to deliver is the correlative of the right to sue for the price,[32] then it would be obvious that the liability of the auctioneer should not extend beyond this duty to deliver.[33] If the buyer is unable to take recourse from the auctioneer for any want of title, as seen in the *Benton* case, then it is also

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[30] Confirmed in *Benton* v *Campbell Parker & Co* [1925] K.B. 410, at 416.
[31] *Ibid.*, at 415. Treitel, *Law of Contract*, p. 738, qualifies this agreement as a collateral contract.
[32] According to *Bowstead and Reynolds on Agency* this right of the auctioneer is traditionally said to be based on his lien over the goods, at para. 9-023.
[33] *Auctions Law and Practice*, para. 5.124.

impossible for the buyer to have recourse against the auctioneer if the goods are defective. Interestingly, this result arises quite independent of considerations about the importance of the seller's identity.

Still, *Harvey and Meisel* point to the fact that if the auctioneer fails to identify an unnamed principal, the buyer will be unable to bring any actions against the seller,[34] which would speak for making the auctioneer personally liable where he declines to name the vendor. However, this obstacle can be overcome by an action for discovery.[35] As *Harvey and Meisel* sum up, an action for discovery against the auctioneer would even be justified in cases where the buyer would otherwise be unable to bring an action against the seller-consignor for a breach of implied terms under the Sale of Goods Act 1979.[36]

c. Result

In summarising the above discussion, the following conclusion can be drawn: the liability of the auctioneer in disputes over attribution can hardly be established upon the contract of sale which he has arranged for his principal, the seller at auction. This follows from the application of general rules of the law of contract and the law of agency: in a disclosed principal situation, it is apparent to the buyer that the counter-party of the contract is the principal and not the agent. A situation where the existence of a principal remains completely unknown to the buyer, which would result in the agent becoming the counter-party of the contract of sale, is very unlikely to happen at a modern auction, due to auction houses taking the necessary precautions in their descriptions of lots, namely whether they are being sold for a principal or as own property of the auction house, so that there remains no room for uncertainty.

The interesting question then is whether a liability might arise in the case very common at auctions where the agency is disclosed but the identity of the principal remains unknown to the buyer. In so far, a general rule to the effect that the agent is liable on the contract he has arranged for the principal has not emerged.[37] The tendency in the

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[34] *Ibid.*, para. 5.125.
[35] *Ibid.*, based on the principle laid down in *Norwich Pharmacal* v *Customs and Excise Comrs* [1974] AC 133, [1973] 2 All E.R. 943, HL, that an action for discovery can also be brought against a non-party – which the auctioneer would be in claims other than for non-delivery.
[36] *Ibid.*
[37] *Cf.* Treitel, *Law of Contract*, p. 734.

case law goes towards establishing such a liability. However, with regard to auctions, this liability has been held to be quite limited and in no case extending beyond a liability for non-delivery – a result that, again, follows from the application of general principles of the law of contract. It can thus be concluded that the liability for a false statement about an auctioned chattel generally lies with the seller-consignor rather than with the auctioneer, as a liability upon the contract of sale is not established in that respect in any of the cases typical in the agency context of an auction.

2. Independent Contractual Liability of the Auctioneer

It has been shown in chapter 3 that auctioneers ensure that they have sole discretion as to the description of lots in the catalogue, and it has been concluded that this description is of overwhelming importance from the buyer's point of view.[38] Considering the above, it can be said that the auctioneer finds himself in a comfortable situation: buyers are induced to rely on the auctioneer for the description of goods offered. In case the buyer develops doubts about whether that description has been correct at a later point, he can only take recourse against the seller-consignor, which, as has been seen, is especially difficult in cases where the seller remained unnamed.[39]

It is probably also in an effort to mitigate this asymmetry[40] that the leading auction houses include in their standard conditions a provision that the auctioneer will set aside a sale and refund the amount paid to the buyer if it is shown under certain limited circumstances that the lot is not authentic.[41] The nature and scope of such provisions came under scrutiny in the case of *de Balkany* v *Christie's*, which requires a close analysis.

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[38] See above, ch. 3, text accompanying n. 43.

[39] There might also situations occur where the buyer does not want to try for the seller, for example because of jurisdictional difficulties.

[40] Brian W. Harvey, 'Problems of Identity and Description in the Saleroom' (1995) 46 *Northern Ireland Legal Quarterly* 423-433, argues, at 427, that the reason for such provisions might be to mitigate the effect of the other terms of trade which are largely excluding any responsibilities on the auctioneer's or seller's side as to authenticity questions.

[41] In the case of Sotheby's, this provision is called "Authenticity Guarantee", see Condition 4(a) of Sotheby's Conditions of Business for Buyers; Christie's terminology is "Limited Warranty", see Condition 6 of Christie's Conditions of Sale.

a. *De Balkany* v *Christie's*[42]

The facts in *de Balkany* v *Christie's* were as follows.[43] In 1987, Madame de Balkany, a Swiss collector, bought a painting for £500.000 plus a ten per cent buyer's premium[44] at a Christie's auction in London. She was delighted because she believed that the picture was, according to the catalogue description, by the Austrian expressionist Egon Schiele (1890-1918), "signed with initials" and "painted in 1908". Before the painting came up for auction, it was displayed on permanent loan in the Kunsthaus Zürich, one of the most reputable and well-known art museums in Switzerland, where it was exhibited as a painting by Schiele. In 1990, however, a new catalogue raisonné of Schiele's paintings was published which expressed considerable doubts regarding the authenticity of the painting in question. Having learned about these doubts, Mme de Balkany complained to Christie's in 1991 under their conditions of sale. By reason thereof, a buyer has five years from the date of purchase to exercise the right to return a forged painting and to rescind the contract. The painting was then sent to another expert whose examination revealed "ill-matched over-painting" and concluded that the painting must be subjected to chemical and spectographical tests.

This evidence was given in the High Court in 1994, after Mme de Balkany had sued Christie's for the purchase price, claiming that the painting was a forgery. There, Morison J found that an unknown person had extensively overpainted what had previously been on the canvas. Although clearly far from certain, Morison concluded, "on a balance of probabilities" that the original painting (i.e., the underpainting), was by Schiele. However, some time after Schiele's death in 1918, 94 per cent of its surface area had been overpainted. Christie's argued that no amount of overpainting could make the painting a forgery if the overpainter followed the design of the original artist and reproduced as best as he could the original colours used by the artist. Yet, for the judge, this case was distinguished from other restoration cases because of the addition, by the unknown overpainter, of the blue initials "E" and "S" in the left and right hand corners of the painting. Schiele's original mauve monogram, which could be seen by X-ray, consisting of the initials "E" and "S" intertwined, had been overpainted with black. The judge reasoned that a restorer who simply overpaints, to a greater or less extent, is

[42] [1997] Tr.L.R. 163; THE INDEPENDENT, 19 January 1995.
[43] See for certain aspects of the case already above, ch. 3, text accompanying ns. 41 and 68.
[44] See on reasons for the introduction of a buyer's premium by British auction houses from 1975 onwards: Christopher Mason, *The Art of the Steal* (New York: G.P. Putnam's Sons, 2004), pp. 69-74.

not seeking to deceive. By adding the blue E and S initials over the black paint which covered Schiele's mauve monogram, however, the overpainter sought to deceive viewers that the initials were painted by Schiele.

Having summarised these facts, Christie's Conditions of Business now needed to be analysed to assess their effect. The forgery condition at that time read as follows:

> "A. 11. Guarantee
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> ...
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> (b) if, within five years of the date of the auction, (1) Christie's has notice in writing from the Buyer of any Lot that in his view the Lot is a Forgery, (2) within fourteen days of such notice, Christie's has the Lot in its possession in the same condition as at the date of the auction, and (3) within a reasonable time thereafter, the Buyer satisfies Christie's that the Lot is a Forgery and that the Buyer is able to transfer a good and marketable title to the Lot free from any liens or encumbrances, Christie's will set aside the sale and refund to the Buyer any amount paid by the Buyer in respect of the Lot provided that the Buyer shall have no rights under this Condition if:
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> > (1) the catalogue description at the date of the auction was in accordance with the then generally accepted opinion of scholars or experts or fairly indicated there to be a conflict of such opinion; or
> >
> > (2) it can be established that the Lot is a Forgery only by means of a scientific process not generally accepted for use until after publication of the catalogue or by means of a scientific process not generally accepted for use until after publication of the catalogue or by means of a process which at the date of the auction was unreasonably expensive or impractical or likely to have caused damage to the Lot;
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> (c) The Buyer shall not be entitled to claim under this Condition for more than the amount paid by him for the Lot and, in particular, shall have no claim for any loss, consequential loss or damage whether direct or indirect suffered by him;"

Further, the term "Forgery" as used in the Conditions of Business was to have the following meaning:

> "... a Lot made or substantially made with an intention to deceive as to authorship, origin, date, age, period, culture or source which is not shown to be such in the description in the catalogue and which at the time of the auction had a value materially less than it would have had if it had been in accordance with the description."[45]

Morison J had no difficulties in identifying that Christie's had incurred independent direct contractual liability to the buyer with their forgery condition: "Christie's do not, vis-à-vis the buyer, simply act as an agent for a named principal. Thus, for example, if the painting is a forgery it appears to be Christie's who take the risk, if it is discovered after the seller has been paid the price. In other words, Christie's contracts both as agent and principal." It appears that the judge constructed this independent contract as a bilateral contract because the buyer gave consideration in the form of the buyer's premium, in exchange for the auctioneer's promises contained in the Conditions of Business.[46]

The question then was whether the forgery condition applied in the circumstances, which was, as Morison J clarified, a question of contractual construction[47] rather than one of evidence capable of contributing to the academic debate, based on the explicit definition of forgery Christie's provided in their Conditions. Therefore, bringing the addition of the new monogram under the definition provided, Morison J had no problems in concluding that the painting was a forgery.

Still, Christie's argued that they were not obliged to compensate the buyer because the plaintiff did not act within reasonable time as required under Condition 11. And further that they would be exculpated because their catalogue description was in accordance with the then generally accepted opinion of scholars, and, for this reason, the buyer would have lost her rights under the forgery condition. Both objections were rejected.

As to the first point, the judge confirmed that the plaintiff acted promptly after she had become aware of the new catalogue raisonné. That Christie's remained unconvinced over a long time that the painting was a forgery was simply because of the view they

[45] Then Condition C. 7.

[46] *Cf.* Norman Palmer, 'Misattribution and the Meaning of Forgery: The de Balkany Litigation' (1996) 1 *Art Antiquity and Law* 49-58, at 56. Harvey and Meisel, *Auctions Law and Practice*, para. 5.126.

[47] See Palmer, 'Misattribution and the Meaning of Forgery', 50.

had advanced of what a forgery as used in the contract would be. Any time that would be reasonably required for a buyer to persuade the defendant through a court process would be included in the "reasonable time" provided for in Condition 11.

As to the second point, the judge was satisfied that any competent art dealer or auctioneer would have been able to tell that the picture had been substantially overpainted and that the initials had been put on afterwards if a careful inspection had been made.[48] Interestingly, the reliance on the "state of the art" exceptions would have only been available for Christie's if they had been able to show that they took reasonable care in their attribution. The defences only worked where Christie's neither knew, nor should reasonably have known, that the work was a forgery.[49] That, however, had not been the case.

Because the plaintiff had proved that the painting was a forgery within the meaning of Christie's Conditions, and the exceptions under this Condition were not available to relieve Christie's of liability, the repudiation of Mme de Balkany's complaint by Christie's meant a straightforward breach of contract and she was entitled to the refund of the money she had paid.[50]

b. Result

The practice of auction houses of including anti-forgery conditions in their terms of trade overrides common law and creates a contract between the buyer and the auction house which provides the disappointed buyer of a forgery with a contractual remedy. Due to wide reaching exculpatory clauses usually included in such provisions, the circumstances under which they become effective are very limited. The reason of liability in the *de Balkany* case was quite narrow, based on the judge's understanding of the definition of forgery as expressed by Christie's being wider in scope than that for

[48] This was the conclusion from the expert evidence heard in the court, whereof one witness stated that virtually all that was visible was the restorer's work and that he would have "dismissed the painting out of hand." See also above, ch. 3, n. 41.
[49] Palmer, 'Misattribution and the Meaning of Forgery', 51 and at 54, interpreting the exculpatory provisions: "No measure of scholarly opinion in support of an attribution will therefore by itself exonerate an auction house if other circumstances should reasonably have alerted it to the contrary. Such other circumstances will conventionally include, it seems, the availability of the work for ultra violet or other physical examination. It follows that if, for some reason, the exculpatory provisions … do not operate, the auctioneer who fails to take such active verificatory measures as are reasonably within his capability is answerable for an unwarranted attribution."
[50] In an *obiter dictum*, the judge also considered whether Christie's had any liability to the plaintiff in tort. An examination of this part of the judgment follows below, pp. 64-68.

which the auction house had contended.[51] Also, as a result of the *de Balkany* litigation, both, Christie's and Sotheby's further tightened their warranties in 1995.[52] Compared to the bulk of exclusion clauses usually contained in the conditions of business, these voluntary provisions cannot be considered as a far reaching attempt of self governance.

3. Liability to the Buyer in Tort

It has been stated above that an auctioneer who is acting within his authority does not incur liabilities which arise out of the contract of sale he has arranged for his principal. This must also apply to statements[53] made by the auctioneer during the course of contractual negotiations: if an agent acts within the scope of his authority, it must be the principal upon who the liability for misrepresentations in contract will fall, where that contract was entered into on the basis of a false statement made by the agent.

a. Dogmatic Distinction of Tortious Liability

And indeed, in *Resolute Maritime Inc* v *Nippon Kaiji Kyokai (The Skopas)*,[54] it was held that it is the principal and not the agent, upon whom the statutory liability for misrepresentations arising from section 2(1) of the Misrepresentation Act 1967 falls.[55] The question posed there, as a preliminary point of law arising out of the sale of a ship, was as follows: if an agent, A, makes a negligent representation to B as a result of which B enters into a contract with A's principal, can B use section 2(1) to found a cause of action against A? Mustill J answered this question with "no", relying, first, on

[51] Palmer, 'Misattribution and the Meaning of Forgery', 54. Further, even in case of the wider understanding, forgeries are rare, *ibid.*
[52] See Harvey, 'Problems of Identity and Description in the Saleroom', 433. Sotheby's now use the term "counterfeit" rather than "deliberate forgery" in their Authenticity Guarantee, which is defined as "... an imitation created to deceive as to authorship, origin, date, age, period, culture or source ..." and provide that "No lot shall be considered as counterfeit by reason only of damage and/or restoration and/or modification work of any kind (including repainting or over-painting)." Christie's current provision appears to be even more cautious, warranting under Condition 6 Limited Warranty as follows: "... that any property described in headings printed in UPPER CASE TYPE ... in this catalogue ... which is stated without qualification to be the work of a named author or authorship, is authentic and not a forgery. The term 'author' or 'authorship' refers to the creator of the property or to the period, culture, source or origin, as the case may be, with which the creation of such property is identified in the UPPER CASE description of the property in this catalogue." Further, it is clarified that the warranty does not apply to any supplemental material which appears below the upper case type headings and any responsibility for any errors or omissions in such material is explicitly excluded. The five-year period remains in both cases.
[53] Notwithstanding the legal nature of such statements in the context of transactions of art. See on this question below, 4.a., pp. 84-87.
[54] [1983] 1 W.L.R. 857, QBD (Comm).
[55] *Ibid.*, at 861. This has been recently confirmed in favour of an auctioneer in *Morin* v *Bonhams & Brooks Ltd* [2003] E.W.H.C. 467, QBD (Comm), at paras. 42 and 43.

the fact that a principal was clearly liable for the representations of his agent and, secondly, on the draftsman's intention to fill a gap which existed in the remedies of one contracting party for an innocent representation by the other.[56]

The judge also found that such a gap did not exist in relation to the agent. Although it has been stated above that the general rule is that an agent drops out of any contract made on behalf of his disclosed principal, this does not mean that the mere fact that a person acts as agent allows him to escape from all liabilities to the third party. Or, as Lord Scarman put it in *Yeung Kai Yung* v *Hong Kong and Shanghai Banking Corp*:[57]

> "It is not the case that, if a principal is liable, his agent cannot be. The true principle of law is that a person is liable for his engagements (as for his torts) even though he acts for another, unless he can show that by the law of agency he is to be held to have expressly or impliedly negatived his personal liability."[58]

While the agent's exculpation under the section 2(1) Misrepresentation Act 1967 liability functions because the rule only applies where the negligent misstatement results in a contract between the party making the representation and the party receiving it, such agency based exculpation is not possible for actions that give rise for a liability in tort.

Tort liability differs from contract liability. It is in general no defence for a tortfeasor to prove that he acted under the authority of another. Rather, the general rule is that an agent, who causes loss or injury to a third party through a wrongful act (or omission) while he is acting on behalf of his principal, is personally liable, regardless of whether he is acting with the authority of his principal or not, to the same extent as if he were acting on his own behalf.[59]

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[56] [1983] 1 W.L.R. 857, QBD (Comm), at 860 and 861.
[57] [1981] A.C. 787, PC.
[58] *Ibid.*, at 795.
[59] See, for example, for the tort of deceit *Standard Chartered Bank* v *Pakistan National Shipping Corpn (Nos 2 and 4)* [2003] 1 A.C. 959, HL; for the tort of negligence for misrepresentation *McCullagh* v *Lane Fox & Partners Ltd* [1996] P.N.L.R. 205, CA. See further Janet Ulph, *Commercial Fraud* (Oxford University Press, 2006), paras. 8.19 and 8.20. Further, *Bowstead and Reynolds on Agency*, para. 9-112. This does not mean, however, that agency is excluded in tort altogether. See on the principal's vicarious liability in the law of tort: *ibid.*, paras. 8-176 and following.

Equally, an auctioneer cannot rely on the fact that he is acting as an agent when he makes statements during the course of an auction. While he may not find himself liable to the buyer for contractual misrepresentations under the common law or statute, he may still face common law liabilities under the tort of deceit and the tort of negligence for misrepresentations.

The circumstances under which a liability of the auctioneer particularly in tort of negligence can arise are most complex and require careful consideration.

b. Tort of Deceit

An action in tort for deceit is straightforward to construct: such action requires a false statement made by the defendant with intent to defraud the claimant, who acts on it and suffers damage as a result.[60] To be liable in deceit, it is required that the defendant had acted fraudulently. In *Derry* v *Peek*,[61] Lord Herrschell explained: "... fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false".[62]

Problematic is that for deceit to be committed there must be a false representation of fact. The mere representation of an opinion is not sufficient.[63] This requisite can make the remedy inadequate for buyers of art: as will be discussed below,[64] statements on the authenticity of art are regularly qualified as expression of an opinion only,[65] so that the remedy would fail. The requisite can be overcome, though, as it has been held that when the person rendering what is an "opinion" has special knowledge, a person relying on the statement may do so as if it were a statement of fact.[66]

However, notwithstanding the legal nature of statements on traded goods in the context of art transactions, it is upon the claimant to show that the defendant did not honestly believe that what he said was true. As *Harvey and Meisel* put it: "If [the defendant] did

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[60] *Pasley* v *Freeman* (1789) 3 Term. Rep. 51.
[61] (1889) L.R. 14 App. Cas. 337.
[62] *Ibid.*, at 374.
[63] John Cooke, *Law of Tort* (5th edn, Harlow: Longman, 2001), p. 325.
[64] See below under 4.a., pp. 84-87.
[65] The decision in *Jendwine* v *Slade* (1797) 2 Esp. 572 established the traditional approach to this issue and has been confirmed for the auction context only recently by the Court of Appeal in *Thomson* v *Christie Manson & Woods Ltd.* [2005] E.W.C.A. Civ. 555, para. 161, referring back to para. 188 of Jack J [2004] E.W.H.C. 1101, QBD.
[66] *Esso Petroleum Co Ltd* v *Mardon* [1976] Q.B. 801, CA.

have that honest belief, however foolish, credulous or negligent he might have been, he will not be liable to the [claimant] for deceit." It is obvious that the buyer at auction will rarely ever be able to prove that the auctioneer acted with the intention to deceive.

c. Tort of Negligence for Misrepresentation

The real liability of the auctioneer with regard to attributions, in most cases, will be for negligence.

(1) Preliminaries

Under the famous doctrine of *Derry* v *Peek* (1889, HL), a mere negligent representation was ruled not to entitle the claimant to recover his damages. However, this doctrine was reversed in 1963 by the House of Lords in its opinion in *Hedley Byrne & Co. Ltd* v *Heller & Partners Ltd.*[67] It was stated there that a duty of care was the foundation of the tort of negligence and it was established that such duty could also be violated by a misrepresentator who, though not being linked to the injured party in contract, was in a "special relationship" with him obliging the misrepresentator to exercise reasonable care when giving his information and advice. In the words of Lord Morris:[68]

> "My Lords, I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies on such skill, a duty of care will arise. The fact that the service is to be given by means of or by instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely on his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows, or should know, will place reliance upon it, then a duty of care will arise."

The precise circumstances under which a special relationship will be held to exist were doubtful for some time after the ruling in *Hedley Byrne*. A clarification came when the

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[67] [1964] A.C. 465.
[68] *Ibid.*, 502-503.

case of *Esso Petroleum Co Ltd* v *Mardon*[69] was decided by the Court of Appeal in 1976. In that case, the Court ruled that a mere negligent representation could give rise to a claim in contract as well as in tort and that the "special relationship" justifying such action in tort could result from the trust placed by the injured party upon the information, advice or opinion given by the misrepresentator. It was held by Lord Denning MR:[70]

> "A professional man may give advice under a contract for reward; or without a contract, in pursuance of a voluntary assumption of responsibility, gratuitously without reward. In either case he is under one and the same duty to use reasonable care: ... in the one case it is by reason of a term implied by law. In the other, it is by a reason of a duty imposed by law. For a breach of that duty he is liable in damages; and those damages should be, and are, the same, whether he is sued in contract or in tort."

In summary, it can be said that a special relationship incurring liability exists whenever someone possessed of special skill undertakes to apply it for the assistance[71] of another who relies upon it.

However, when considering the tort of negligence for misrepresentation, one must bear in mind that the courts have always taken a cautious approach to claims for pure economic loss (as opposed to physical damage),[72] because of, *inter alia*, the risk of exposing a defendant to limitless claims and limitless liability. The law on this subject is still at an early stage of development. In particular, a theory of liability has still not emerged in this area.[73] It is arguable, however, that certainty is required in this area of law, if only to guide the indemnity insurance market.

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[69] [1976] Q.B. 801, CA.
[70] *Ibid.*, 820.
[71] *I.e.* a "voluntary assumption of responsibility".
[72] *Cf.* Norman Palmer, 'The Civil Liability of the Professional Appraiser or Attributer of Works of Art under English Domestic Law' in: Quentin Byrne-Sutton and Marc-André Renold (eds.), *L'expertise dans la vente d'objets d'art: aspects juridiques et pratiques* (Zürich: Schulthess Polygraphischer Verlag, 1992), pp. 19-36, p. 32.
[73] Cooke, *Law of Tort*, p. 67 and pp. 87-89, pointing to the problem whether this form of liability represents a change in the doctrine of privity of contract in cases which are "equivalent to contract", or whether it is an expansion of the tort of negligence into the area of pure economic loss (the former making the scope of liability narrow, the latter massively expanding the scope of negligence liability).

(2) The Tort in the Auction Context

Yet the principles of the tort as mentioned above, if applied to the auctioneer, would make him liable as to all persons who, trusting upon his description in the catalogue, suffer a loss, provided he has acted negligently when preparing his appraisal. The auctioneer who has assisted the seller-consignor of an object of art in the sale of such an object may be sued by the buyer for the damages sustained by him if and in so far as the auctioneer has carelessly prepared a false description which has led the buyer into the bad deal.

Interestingly, there is little authority on the question of an auctioneer's liability to the buyer for negligent misrepresentations under the principles of *Hedley Byrne*. One reason for this may be that buyers will usually prefer to take recourse against the seller, as the seller's liability in cases of negligent misstatement of the auctioneer as his agent is easier to establish: the seller is in a contractual relationship with the buyer and, under section 2(1) of the Misrepresentation Act 1967, it is for the seller positively to disprove negligence, whereas in the law of tort the burden of proof is on the buyer.[74] Conversely, the rules under the law of tort may be more advantageous in certain circumstances, especially when rules on limitation come into play.[75]

Considering the individual requirements necessary for establishing the tort, the difficulty in the auction context cannot lie in an absence of a "special relationship" between auctioneer and buyer. Following *Harvey and Meisel*, there can be little doubt that an auctioneer finds himself in a position that results in a "special relationship" with the buyer at auction.[76] As the following review of the case law will show, the controversy seems to arise from the more complicated question of the standard which the auctioneer should be held to in relation to the duty of care.

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[74] Harvey and Meisel, *Auctions Law and Practice*, para. 5.145.

[75] *Cf.* Ruth Redmond-Cooper, 'Time Limits in Art and Antiquity Claims' (1999) 4 *Art Antiquity and Law* 323-346, 341.

[76] *Auctions Law and Practice*, para. 5.145.

(a) *Hoos* v *Weber*[77]

The first case to refer to, although it is not about an action in tort, is *Hoos* v *Weber*, which was decided before the Court of Appeal in 1974. In this case, a personal liability of the auctioneers was not at stake, rather, the circumstances were about the effect of the auctioneers' conduct on the rights of their principal (the seller): the defendant bought a painting auctioned by Sotheby's as a Rembrandt self-portrait. On the day following the auction, doubts about the painting's authenticity were published in a newspaper article, and the defendant subsequently refused to accept delivery. He argued that Sotheby's had not taken proper care in their catalogue description because they did not consult the (at that time newly established) Rembrandt Research Project, which later confirmed the doubts of the trade mentioned in the newspaper article. On the basis of this, the defendant resisted the seller's action for the price. He referred, *inter alia*, to the opening statement of the Sotheby's catalogue, stating that:

> "Care is taken to ensure that any statement as to authorship, attribution, origin, date, age, provenance and condition is reliable and accurate but all such statements are statements of opinion and are not to be taken as statements of representation or fact. Sotheby & Co. reserve the right, in forming their opinion, to consult and rely upon any expert or authority reasonably considered by them to be reliable."

Lord Denning MR found that this statement was an express assumption of a duty of care by Sotheby's. However, he could not find want of care in Sotheby's preparation of the catalogue description: in the statement they had expressly reserved the right to consult and rely on those persons whom they considered reliable. So they were not bound to consult the Rembrandt Research Project. In Sotheby's opinion, the painting was by Rembrandt. Nevertheless they did in the catalogue draw attention to doubts expressed by the Rembrandt scholar Professor Gerson:

> "Rembrandt's authorship of the picture is accepted by all the authorities mentioned in the bibliography with the exception of Gerson."

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[77] THE TIMES, 5 October 1974. A transcript of the judgment can be found as enclosure 4 in Joe A. Och, 'Sotheby's – Anatomy of an Auction House' in: Pierre Lalive (ed.) *International Sales of Works of Art* (Geneva: Institute of International Business Law and Practice, 1985), pp. 251-281.

According to Lord Denning MR that was enough to conclude that Sotheby's had produced the catalogue "honestly and fairly":

> "Any sensible buyer bidding for this picture in sums of this magnitude, ought to have consulted Gerson. I do not know whether Mr. Weber did or not. If he did, he would be perfectly aware of the doubts. If he did not, he has only himself to thank. In any case, he had the advantage – the very considerable advantage – of having Sotheby's opinion themselves. In their opinion, it was a work by Rembrandt."

While this is a clear enforcement of the principle of *caveat emptor* in the auction context, the court did not, unfortunately, determine what extent of details is to be given in a catalogue description to satisfy the duty of care. Here, Sotheby's had warned as to Gerson's doubts. Thus it became unnecessary for the court to decide whether there is, in general, an obligation to disclose in a catalogue description that other scholars have a different opinion on an object to that concluded and expressed in the catalogue by the auction house.[78]

(b) *De Balkany* v *Christie's*[79] on Liability in Tort

In the case of *de Balkany* v *Christie's*, there was also an allegation made against Christie's that they had a liability to the plaintiff in tort. Mme de Balkany argued that Christie's had voluntarily undertaken responsibility to her for the exercise of reasonable care in the making of their attribution. Since this attribution was inaccurate, caused by negligence on the side of Christie's, they would be concurrently liable to her in tort. Because of the success of the contractual claim as analysed above, it became unnecessary for the judge to formally decide on this question.[80] Still, Morison J felt obliged to say something on this topic, which was at this point *obiter*.

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[78] This question has now been considered in the recent case of *Thomson* v *Christie Manson & Woods Ltd.* [2005] E.W.C.A. Civ. 555, see discussion below, pp. 72-80. See further on an art seller's duty to inform: Carolyn Olsburgh, *Authenticity in the Art Market* (Leicester: Institute of Art and Law, 2005), p.37.

[79] [1997] Tr.L.R. 163; THE INDEPENDENT, 19 January 1995.

[80] As stated before, it would normally be easier for the claimant to proceed an action against the seller in respect of the defect description of the lot given by the seller's agent, the auctioneer. In this case, the seller was not sued at all, though, which left the auctioneer the only target. Here, the circumstances gave the exceptional possibility of an action in contract, as the Condition could be qualified as a contractual one, so that the remedy did not depend on a sophisticated analysis whether there was a duty of care where only economic loss results, which is part of the law of tort. See discussion of this case above, pp. 53-57.

Based on *Hedley Byrne*, Morison J summarised that the following principles were to be applied:[81] the judge acknowledged that a voluntary assumption of responsibility existed as a distinct and independent basis for a duty of care in tort. In the words of the judge, "there is no necessity for any further inquiry as to whether it is 'fair, just or reasonable' to impose such liability". Further, the judge accepted that an assumption of responsibility may be negatived by an appropriate disclaimer: "Clear words are needed to exclude liability in negligence."

Morison J then turned to the question of whether Christie's had assumed responsibility to the plaintiff for making the statements in the catalogue with due care and skill. For the purpose of this, the judge first looked at the question generally, leaving aside the effect of any disclaimers. In a very comprehensive paragraph he identified the reasons which were in his opinion material for regarding Christie's as having undertaken a responsibility in tort for the accuracy of their attribution. *Palmer* disentangled and summarised the judges' reasoning in his analysis of the case and enumerated five facts which are set out here *in extenso*:[82]

> "1. The special nature and position of Christie's, as compared to the role of ordinary auctioneers. An ordinary buyer at auction has no reason to suppose that the auctioneer, who is the seller's agent, is assuming any responsibility towards the buyer, and becomes contractually bound by the auctioneer's conditions only when his/her bid is accepted.
> 2. The fact that Christie's reserve to themselves, in their dealings with potential sellers, the sole discretion as to the manner in which a lot is to be described, and maintain a skilled staff whose task it is to ensure the accuracy of catalogue entries.
> 3. The fact that Christie's cataloguing practice allows considerable latitude for margins of qualification where this is thought necessary.
> 4. The fact that the foregoing circumstances are known generally to buyers. Buyers at Christie's know that Christie's will have satisfied themselves as to the authenticity of a lot which is attributed without qualification.

[81] Relying on the clarifications of *Hedley Byrne* by Lord Goff in the House of Lords' decisions in *Spring* v *Guardian Assurance plc and others* [1994] 3 W.L.R. 354, HL and *Henderson and others* v *Merrett and others* [1994] 3 W.L.R. 761, HL.
[82] See Palmer, 'Misattribution and the Meaning of Forgery', 53.

> 5. The imposition of the buyer's premium. Buyers like Madame de Balkany pay substantial sums to auction houses for the privilege of buying at auction. As the judge implied, for what is this payment made, if not in return for some assumption of responsibility on the part of the auctioneer?"

Morison J stated that it was primarily because Christie's take sole responsibility for the catalogue description and because the buyer pays a premium that he was inclined to upheld a duty of care on the basis of voluntary assumption of responsibility, such that Christie's became, prima facie, liable to a buyer for negligent misstatement in the catalogue entry.

However, referring to the numerous Conditions in the terms of trade which excluded Christie's responsibility for "the correctness" of any statement of description, his conclusion was that Christie's had effectively disclaimed any responsibility which they might otherwise have assumed or undertaken. The judge did not regard this conclusion as satisfactory because it meant that a buyer had got nothing of substance for his premium. This last finding was later criticised as an "oddity"[83] as the judge refrained from a discussion of whether any such disclaimer should not first be assessed for reasonableness under the terms of the Unfair Contract Terms Act 1977. A full consideration of this issue cannot be made in the present context.[84] However, it needs to be mentioned that it was made clear in a number of cases, but particularly in the House of Lords' decision in *Smith* v *Eric S Bush*,[85] that the Act does catch disclaimers which try to bypass the statutory obligation to show reasonableness by claiming to exclude the relevant duty of care rather than liability for breach of such a duty, as was the case in the Conditions employed by Christie's.[86]

In the present context, the important point of *de Balkany* v *Christie's* remains the fact that, absent the disclaimers, the court was prepared to regard Christie's as having voluntarily assumed a duty of care. As said, the judge mainly based his reasoning on Christie's charging a buyer's premium and the auction house's sole responsibility for the catalogue description. These two arguments concern specific points in the way

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[83] Harvey, 'Problems of Identity and Description in the Saleroom', 432. See also criticism by Palmer, 'Misattribution and the Meaning of Forgery', 55.
[84] The problem of the reasonableness of conditions of business will be discussed further below, 4., pp. 83-92.
[85] [1990] 1 A.C. 831, HL.
[86] See Palmer, 'Misattribution and the Meaning of Forgery', 55.

auction houses conduct business nowadays, and, for this reason, they certainly weigh heavily when it comes to identifying a voluntary assumption of responsibility in a particular case.[87]

However, it is also important to note that Morison J, on a more general level, recognized a difference between auction houses: "The wide variety of circumstances in which auctions may take place must, I think, be borne in mind when deciding whether Christie's have assumed responsibility. Not every auctioneer conducts business as Christie's do." At the time *Hoos* v *Weber*[88] was decided, that is in the 1970s, such considerations did not play a role when it came to identifying the criteria filling the duty of care expected from an auctioneer of art. As put forth in chapter 3,[89] it has only been since the 1980s that a separation in the ways auction houses operate took place which was mainly due to the fierce global competition between Sotheby's and Christie's and further stirred up by the boom the art market experienced at that time. The first time the diversity in the auction market was acknowledged was in the Court of Appeal's 1989 decision in *Luxmoore-May* v *Messenger May Baverstock*,[90] where the standard of care and skill expected from an art auctioneer in relation to the seller-consignor was under consideration.

While the auction house in *Luxmoore-May* was qualified as a "provincial auctioneer", the defendant in *de Balkany* v *Christie's*, decided in 1995, was recognized by Morison J as one of the large international auctioneers. Christie's presented themselves as being knowledgeable about objects of art and their potential value, and as having solid teams of experts with sufficient expertise to make reliable qualifications about the objects offered in the auction – all facts that are commonly known to the buyer.

The judge recognized that Christie's did not play as passive a role as auction houses have in the past. Nonetheless, they sought to define their position as a mere intermediary and facilitator of the transaction between the seller and the buyer. Such a

[87] Considering that a buyer's premium is not charged in every auction, it is argued that this feature should not be regarded as an in any event essential feature, in particular not in an action in tort (in contrast to an action in contract). *Cf.* Harvey, 'Problems of Identity and Description in the Saleroom', 433.
[88] THE TIMES, 5 October 1974.
[89] See ch. 3, text accompanying n. 79.
[90] [1989] 1 W.L.R. 1009; [1990] 1 All E.R. 1067, CA, *per* Slade LJ: "the standard is to be judged by reference only what may be expected of the general practitioner, not the specialist – here provincial auctioneers, rather than one of the leading auction houses", at para. 35. See the discussion of this case above, ch. 3, pp. 13-17.

position could be easily justified in the simplest of regional auctions, where the auction house is seen as merely providing a publicized forum in which buyers and sellers interested in the same type of goods can gather and where none of the parties expects the auctioneer to have more than a guess as to who may have painted a painting. Considering the facts which the judge established here, however, there is good reason to ask whether there is not a need to protect the market against abuses by the auctioneer of his specialised services and know-how.

Of course, the judge was not in a position to decide on this question, because, in the circumstances of this case, a liability could be established under the limited contractual responsibility Christie's had undertaken with their anti-forgery condition. Further, one must recall that the courts generally hesitate to grant damages for pure economic loss on the basis of negligently made misrepresentations. However, Morison J clarified, in line with other judgements, that the fact that someone has undertaken a contractual responsibility does not preclude the existence of a more extensive duty in tort.[91] The judge identified a discrepancy between the sophisticated way large auction houses conduct business nowadays and their claim that their services should nonetheless be assessed under the definitions of the traditional auction house, that is as a mere intermediary and facilitator of transactions. The recognition of this conflict clearly marks a move away from the straightforward application of *caveat emptor* in *Hoos* v *Weber* towards holding auctioneers more accountable for their offering of specialized services which go beyond the traditional task of an auctioneer merely providing a marketplace for the exchange of goods.

(c) *Morin* v *Bonhams & Brooks Ltd* and *Bonhams & Brooks SAM*[92]

The *obiter dictum* in *de Balkany* v *Christie's* has since been considered in the case of *Morin* v *Bonhams & Brooks Ltd* and *Bonhams & Brooks SAM.* In this case, M Morin, a French national who conducted an antiques business in London, commenced an action for misrepresentation against the London parent company of the auctioneering group Bonhams and its Monegasque subsidiary, after he had bought a classic car at an auction sale that was held by Bonhams Monaco in Monte Carlo in 2001, and had subsequently discovered that the car had a much higher mileage than that shown in the catalogue

[91] Palmer, 'Misattribution and the Meaning of Forgery', at 57. *Cf. Holt* v *Payne Skillington* [1996] P.N.L.R. 179.
[92] [2003] E.W.H.C. 467 QBD (Comm) and [2003] E.W.C.A. Civ. 1802.

supplied to M Morin by the London office of Bonhams.[93] The instant proceedings concerned an application by the claimant for permission to serve Bonhams Monaco out of the jurisdiction, and that raised the question of whether the claimant had a reasonable prospect of success against the defendant auctioneers.

M Morin based his action for misrepresentation on a number of claims, including claims for rescission of the contract or alternatively damages in lieu of rescission pursuant to section 2 of the Misrepresentation Act 1967 and most notably at common law under the principles of *Hedley Byrne*. With regard to this last claim, Jonathan Hirst QC, sitting as a deputy judge of the High Court, first considered whether Bonhams London owed any duty to M Morin to exercise reasonable skill and care in the description of the car. The assumption of responsibility was argued to have flown from the fact that, at M Morin's request, they had sent him a copy of the catalogue and had later told him about the estimated sale price for the car in question. This, however, was not seen to be enough for an argument that Bonhams London had entered into a special relationship with M Morin and assumed responsibility to him for the description of the car.[94] The fact that they had sent out the catalogue was considered as a merely ministerial act, not sufficient to add their imprimatur to the catalogue description.[95]

Hirst QC continued to assess a possible liability of Bonhams Monaco under the tort for negligent misrepresentation. However, since he found that the applicable law of any tort possibly committed by Bonhams Monaco would be Monegasque,[96] his considerations on this question became, in his wording, "academic".[97] Because the catalogue was prepared by Bonhams Monaco and because of the buyer's premium paid by M Morin, the judge found a "clear case" for holding that there was a special relationship between Bonhams Monaco and M Morin whereby Bonhams Monaco accepted responsibility for the description in the catalogue, and for holding that Bonhams Monaco owed M Morin a duty of care. However, similar to the circumstances in *de Balkany* v *Christie's*, the

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[93] While the catalogue stated of the car: "Use has always been sparing, and total mileage covered from new by this ultra-rare, virtually one owner Ferrari is a mere 16,626 km", it later turned out that the true kilometerage was about 200,000. The claimant was able to inspect the car visually before the auction, but he was not allowed to start the engine or to test-drive the car. See [2003] E.W.H.C. 467 QBD (Comm), paras. 10-15.

[94] [2003] E.W.H.C. 467 QBD (Comm), para. 45.

[95] *Ibid.*

[96] The claim was regarded as tortious and thus, under sections 11 and 12 of the Private International Law (Miscellaneous Provisions) Act 1995, the law of the country was to apply in which the most significant facts had occured. *Ibid.*, paras. 29-36.

[97] *Ibid.*, paras. 50 and 55.

auction catalogue contained extensive exemption clauses on which the defendant, pointing at Morison J's decision in *de Balkany*, relied. Comparing the situation in *de Balkany* to the current case, the judge said:[98]

> "Plainly this authority provides substantial ammunition for [Bonhams] Monaco to contend that they owed no duty of care to M Morin but, if English law applied, I would hold that he had surmounted the fairly low threshold of showing reasonable prospect of success on this point for the following reasons. (a) But for the conditions of sale, there could be little doubt that [Bonhams] Monaco owed a duty of care. (b) The decision in *De Balkany* on whether Christie's owed any duty in tort was expressly *obiter* and moreover it would appear that the court was not addressed on the impact of s 2(2) of the Unfair Contract Terms Act 1977. (c) The conditions in this case are not the same as Christie's in the case: (d) In particular, cl 3 is prefaced with the following: 'whilst every effort has been made to ensure the accuracy of the description'. I think it is arguable that the exclusions of liability which ensue proceed on the assumption that every effort has indeed been made by [Bonhams] Monaco and that if every (reasonable) effort has not been made the exclusions are not to be effective to exclude a duty of care. It is right to bear in mind that these are [Bonhams] Monaco's conditions of sale, and they should be construed *contra proferentem.* (e) It is unclear what, if any, efforts were made by [Bonhams] Monaco to ensure the accuracy of the description of the Ferrari (especially the kilometerage) in the catalogue. If it is right that the Ferrari had actually done over 200,000 kms, it is a matter of real concern how an international auction house could have stated that it had done 'a mere 16,626 kms' when … a short road test would have revealed the true position."

This reasoning was later confirmed by the Court of Appeal,[99] where Mance LJ stated that in case English law had been found to apply, there would have been a good case for a breach of a duty of care, despite the conditions of business having been at pains to exclude any warranty or guarantee, and to refer to catalogue statements as matters of 'opinion': "It is a usual implication in relation to any expression of opinion by a

[98] *Ibid.*, para. 53.
[99] [2003] E.W.C.A. Civ. 1802.

professional person that due diligence has been exercised in preparing and expressing the opinion, and the opening words of cl. 3 are entirely consistent with this."[100]

It needs to be said that the drafting of Bonhams' conditions of business has meanwhile been modified,[101] and the words "every effort has been made ..." are no longer used.[102] Lord Justice Mance indicates, though, that this does not make a difference with regard to the auctioneer's responsibility: he clearly states that in situations such as the one under consideration it is implied that a duty of competence exists, so that it does not need an express assumption of the same. Only at the end of his reasoning does he mention that his argument finds confirmation in the phrasing of the opening words of the exclusion clause.

Although the reasoning on the existence of a tortious duty between auctioneer and buyer in this case, as well as in *de Balkany* v *Christie's* discussed previously, were clearly *obiter*, both cases give important indications as to current judicial thinking on the potential liability of auctioneers. In the past, it seemed to be practically impossible for buyers to hold auctioneers accountable for misrepresentations made in the auction catalogue.[103] The decisions in both *de Balkany* v *Christie's* and *Morin* v *Bonhams* confirm that auctioneers owe a duty to buyers and that the courts are well prepared to hold auctioneers liable under the principles of *Hedley Byrne* in case the question should become subject to judicial testing.[104]

However, it must be borne in mind that in practice it may be easier to determine the extent of the duty of care expected from auctioneers in cases such as the present, where

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[100] *Ibid.*, para. 24.
[101] See for a set of the present Conditions of Sale employed by Bonhams: http://www.bonhams.com .
[102] It should be recalled that the relevant exclusion clause in *Hoos* v *Weber*, n. 77 above, was construed in a similar way, namely opening with "Care is taken to ensure that any statement ... is reliable and accurate ..." – a wording that is also no longer used by Sotheby's.
[103] On the one hand, as examined above, B.1., pp. 46 *et seq.*, auctioneers can escape from liability because of their position as agents to the seller. On the other hand, in tort, auctioneers for a long time benefited from the non-existence of a tort that granted damages for negligently made representations, and then from the general reluctance of the courts to grant damages under the principles of *Hedley Byrne* because the law first had to be developed in this area. Finally, buyers have to overcome the hurdle of sweeping exclusion clauses in the conditions of business employed by all auction houses, should they seek recovery for damages suffered because of misrepresentations.
[104] See also Harvey and Meisel, *Auctions Law and Practice*, para. 5.150. They point to the Irish case of *McAnarney* v *Hanrahan* [1993] I.R. 492, in which the Irish High Court held that an auctioneer was under a duty of care under the *Hedley Byrne* principles because in providing information, in this case voluntarily, he had created an express assumption of responsibility as to the accuracy of the provided details on the object. The auctioneer also knew that the plaintiff would rely on the information. This created a "special relationship" and a duty of care.

the issues, i.e. the evaluation of the mechanical state of a car, include a larger factual element than is the case in the area of dating and attribution of fine art objects.[105]

(d) *Thomson* v *Christie's*[106]

The question of the extent of the duty of care owed by an expert auctioneer of fine art to his private buyers has now been considered in *Thomson* v *Christie's*. In what must rank as one of the most complex and confusing cases of its kind, the Court of Appeal reversed the judgment in the High Court, which hinted at a wider cataloguing duty owed by auction houses of Christie's level, and decided in favour of the auction house.

In December 1994, Christie's auctioned the contents of Houghton Hall on behalf of Lord Cholmondeley in its London auction rooms. One of the lots were two urns, described in the catalogue as "A pair of Louis XV porphyry and gilt-bronze two-handled vases" (the 'Houghton Urns') with an auction estimate of £400,000 to £600,000. Closely advised by Christie's Special Client Services, the claimant Ms Thomson bought them after competitive bidding for £1,750,000.[107] The Special Client Services were an advisory group Christie's in New York had set up for some years prior to the purchase in order to identify potential buyers, inform them about upcoming lots and to pass on information about the merits of items from the auction house's expert departments, so that the clients could make a judgment about whether to bid or not. Some time after the sale, Ms Thomson received word that the market had serious doubts about the urns indeed being Louis XV, and that they had most likely been made in the nineteenth century instead, when there was a revival of interest in eighteenth century designs. As a result, Ms Thomson commenced proceedings against Christie's. In her action brought against Christie's in 2004, she asserted that the Houghton Urns were not the eighteenth century originals they were sold as, but rather far less valuable nineteenth century copies, worth only some £20,000 to £30,000. Her claim for damages against Christie's was based on an alleged breach of their common law duty of care or for rescission or damages for misrepresentation under section 2(1) of the Misrepresentation Act 1967. Christie's did not rely on the claims being barred by limitation[108] and they

[105] Anthony Hugh Hudson, 'A Tale of Two Urns: Dating and Attribution of Art and Antiques' (2005) 10 *Art Antiquity and Law* 307-316, 316.
[106] [2004] E.W.H.C. 1101, QBD; [2005] E.W.C.A. Civ. 555.
[107] With the buyer's premium payable to Christie's the total price of the urns was £1,957,388.
[108] With regard to the first claim, it was accepted by Christie's that the operation of section 14A of the Limitation Act 1980 saved the claim from being barred; with regard to the second claim, Christie's

further announced that they would not rely on their conditions of business, which sought to exclude liabilities.[109] This meant that the case was to be decided on the accuracy of their original judgment about the urns' dating alone.

(i) The Decision in the High Court

In the High Court, the case was decided in the claimant's favour. The first claim – breach of duty of care – arose in tort under *Hedley Byrne* principles. Jack J first examined whether a breach of duty on Christie's side could be concluded with regard to their dating of the urns, that is, whether the urns indeed originated from the period of Louis XV or whether Christie's was wrong. Jack J concluded his extensive hearing of visual, historical and scientific evidence with a finding that the urns were likely to have been made in the eighteenth century, about 1760 to 1765: "If a figure must be placed on it, I would put it in the region of 70 per cent."[110] With regard to the duty of care, which Christie's admitted to owe, the standard being that of the reasonably competent international auction house specialising in the sale of fine arts and antiques,[111] Jack J ruled that Christie's dating of the urns as Louis XV was an opinion which an auctioneer of their standing could reasonably reach. To conclude as such on the well-established practices of auction houses generally was acceptable and there was no breach of duty in Christie's doing so:

> "It is the well-established practice of auction houses and the art world generally to date items such as the Houghton urns by visual examination in conjunction with such information as to the item as may be already available or obtainable by such research as is reasonably to be expected of the auction house in the circumstances. The examination must be as thorough as the circumstances reasonably require and it must be done by persons of appropriate qualifications and experience. It will not, cannot, and need not be as exhaustive as the examinations which have been carried out for the purposes of this trial: that is impractical. The outcome will be an expression of opinion as to date, which may be expressed in absolute terms such as here, or in more guarded terms, using words such as 'probably' or 'possibly'.

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declared that they did not rely on the action being barred by limitation. [2004] E.W.H.C. 1101, QBD, paras. 6 and 7.

[109] *Ibid.*, para. 14.

[110] *Ibid.*, para. 182.

[111] *Ibid.*, para. 13.

> Where it is expressed in absolute terms it remains nonetheless an expression of opinion, which may later be shown to be doubtful or wrong. That is the basis on which the market proceeds, and that is generally well-understood."[112]

However, Jack J did think that Christie's cataloguing of the urns fell below the standard to be expected of auctioneers of their standing in:[113]

- Failing to add the qualification to the description that the urns may have been made in Parma – which was "an unjustified firming-up of the catalogue description."
- Misleadingly stating that the urns were designed by Petitot when it was not known that this was the case and for the Duke of Parma when there was "not a jot of evidence" to suggest that.
- Saying that the vases were "reworked" by Petitot when there was no grounds for so thinking.

This would have created an unjustified feeling of confidence and certainty about the urns. After the judge had concluded that Christie's had not been negligent in their dating of the urns and thus had been justified in making the catalogue statements so far as the general readership was concerned, he ruled in favour of the claimant in those respects on the basis of her status as "special client". According to the judge, the circumstances of the special client relationship increased Christie's duties and would have required them to warn the claimant that the dating of objects in this area was unusually difficult because of the existence of nineteenth century reproductions and the fact that their dating was based on visual inspection and judgment. Further, the judge said that Ms Thomson should have been told that the catalogue inflated what could properly be said about the urns.[114] This finding was supported by the fact that Christie's knew that the claimant was not an experienced collector and that she did not take independent advice but relied solely on Christie's guidance. It was argued on behalf of Ms Thomson that, if she had been told of the nineteenth century revivalist fashion and of the difficulties which this introduced for the dating of these urns by Christie's special client advisor,

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[112] *Ibid.*, para. 188.
[113] See *ibid.*, paras. 195-196.
[114] *Ibid.*, paras. 197.

she would not have bid for the urns.[115] Since this argument was left unchallenged, Jack J held the defendant auctioneers liable for damages because of breach of their duty of care.[116]

It needs to be repeated that this finding was solely based on the "special client" status granted to Ms Thomson. The judge expressly disclaimed any intention to decide whether an auctioneer such as Christie's owes a general duty of accuracy in cataloguing.[117] As regards the dependency of the breach of duty on the accuracy of the catalogue, it is argued, however, that there does not seem to be a clear basis for distinction between Ms Thomson and another user of the catalogue who might have gone on to purchase.

(ii) The Judgment of the Court of Appeal[118]

In view of that, Christie's immediately launched an appeal, claiming that the judge had been wrong in finding that they had been in breach of duty to Ms Thomson. And indeed, in the Court of Appeal, the judge's findings were largely reversed. May LJ: "... the judge's finding that Christie's were in breach of their duty to Ms Thomson cannot stand upon the reasons which the judge himself gave."[119] Looking at the High Court's evidence, he concluded that Christie's decision about the dating of the urns as eighteenth century was certain and definite. When Christie's were confident in their opinion about the age of the urns, it would be difficult to establish an obligation to express anything other than this confidence, as that would have been an expression of fanciful, unreal doubt, where there was no real doubt.[120] May LJ consequently could not see an obligation on Christie's for pointing out the process by which they had formed their view, which includes any initial doubts and considerations as to whether the urns might be nineteenth century revivalist objects: "If Christie's were, as the judge had held, justifiably confident (sure) in their judgment, extraneous indications of confidence do not make more apparently sure that which is sure already."[121]

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[115] *Ibid.*, para. 198.
[116] Accordingly, Ms Thomson's misrepresentation claim was successful for the reasons stated, see para. 199 of the judgment.
[117] *Ibid.*, para. 187.
[118] [2005] E.W.C.A. Civ. 555.
[119] *Ibid.*, para. 167.
[120] *Ibid.*, para. 157.
[121] *Ibid.*, para. 162.

Thus, the court concluded the judge in the High Court as having:

> "... reached two essentially inconsistent conclusions. In short, if Christie's were, or should have been, less than completely confident about their description ... they should have qualified their description of them. Either Christie's were not negligent in advising Ms Thomson or they were in breach of duty at least to her in their catalogue description."[122]

(iii) Comment

Earlier in his judgment, May LJ seemed to have accepted the High Court judge's reasoning that there is a difference in the extent of the duty owed to the general readership of the catalogue (among them experienced dealers and collectors and those with independent advice) and that owed to Ms Thomson, known to be inexperienced and relying on Christie's:

> "I have no difficulty with ... the submission that Christie's owed Ms Thomson a *Hedley Byrne* duty beyond any duty arising out of the catalogue alone. ... Nor is there a necessary difficulty with Christie's being in breach of the *Hedley Byrne* duty, but not of a catalogue duty."[123]

As seen in the above concluding remark, May LJ combined the two duties in the end. In the particular case, this was possible on the ground of the facts which the judge in the High Court found in relation to the catalogue. Still, when analyzing the case with the intention of drawing conclusions about the extent of the duties owed by the auctioneer of art to the purchaser, it is advisable to distinguish between the two.

Regardless of the "special client" relationship Christie's had promoted with Ms Thomson, the decision has removed remaining doubts whether a catalogue description gives rise to a *Hedley Byrne* liability. Though in none of the cases discussed an auctioneer has been held liable under *Hedley Byrne*, the case of *Thomson* v *Christie's* allows to conclude that such a liability exists. Apparently, as *Meisel* points out,[124] the

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[122] *Ibid.*, para. 167.
[123] *Ibid.*, para. 153.
[124] Franklin Meisel, 'Auctioneers and Buyers: A Special Relationship?' (2005) 21 *Journal of Professional Negligence* 250-256, 255.

existence of such a duty has simply been assumed by the Court of Appeal: as follows from the two quotes above, the Court of Appeal came to the conclusion that Christie's had satisfied their general duty arising out of the catalogue description in overturning the finding in the High Court, in which the judge ruled that the particular duty arising out of the "special client" relationship and voluntarily undertaken by Christie's had been broken.

There seems to be no reason why such liability should not be attached to cataloguing. It is the auctioneer who profits most from high sales prices, as both, the commission he charges the seller and the buyer's premium rise with each additional bid. An optimistic description of a lot can thus increase the auctioneer's profit. The line must be drawn where the description turns, in the light of expert evidence, into a careless overstating of a lot's potential. When doubts remain after a careful examination has been conducted, these must be outlined in the catalogue in form of qualifications as they were laid out in chapter 3.[125] If, however, a buyer is induced to bid or bid higher than he otherwise might on basis of a description that is so lacking in diligence or care as to risks of authenticity which might exist, than the auctioneer may, depending on the extent of the duty of care which is to be expected of the particular firm of auctioneers, be held liable for damages in tort of negligence.

With regard to the wider duty found by the judge in the High Court to arise out of the "special client" relationship between Christie's and Ms Thomson, things are, however, more complicated. To recall, the judge held that Christie's should have warned Ms Thomson about the dating of the urns being difficult; that they based their judgment on visual inspection; and that the catalogue description overstated what could be said about the urns.[126]

Does this finding conform with the general rules of law? Two insurmountable difficulties suggest that this is not the case. Again, it must be recalled that, according to the judge, the duty arose out of the circumstance that Christie's had specifically undertaken to give advice to Ms Thomson as a special client, knowing that she was not seeking her own independent advice but that she was relying on them as her expert

[125] See above, ch. 3, pp. 38 *et seq.*
[126] See above, p. 74.

advisers. In principle, that would have required that she be treated not just as anyone or every one but in accordance with her individual needs and skills.

In an art auction situation, however, there are two reasons which imply that the extra care owed to a "special client" in addition to the contents of the cataloguing duty can be only limited. In the Court of Appeal, May LJ rightly pointed to the fact that an auctioneer still primarily acts as the seller's agent, a fact well-known to potential buyers. As the seller's agent, the auctioneer's primary duty is to get the highest possible price for his principal.[127] While May LJ accepted an auctioneer's interest in attracting wealthy buyers, he clarified that everything going beyond facilitation in the relation to a potential buyer would constitute a conflict of interest with the duty owed to the principal.[128]

Allowing prospective buyers to inspect lots and answering their questions can be categorized as such facilitation.[129] Priority treatment such as arranging for private viewings or instructing clients on auction room strategies, or assisting them in building rapports on a work's condition, its unpublished reserve price and "the level of interest in a work" before a sale can also be categorized as facilitation.[130] The provision of information as defined and expected by the judge in the High Court, however, obviously works not only against the interests of the principal but also of the auctioneer himself.

Meanwhile, Christie's have given up their "special client" concept.[131] Cases such as the present show that its intention was misleading in essence. While clients relied on Christie's to provide them with information going beyond facilitating priority treatment as described, it should be clear that an auctioneer would not go beyond such possible facilitation, as that would bring him into a conflict with his principal and the duties owed to him. Since the buyer at auction knows about the agency relationship between seller and auctioneer, it is justified to argue that an extra duty arising from a "special client" treatment is limited to the point where the "extra" expected would constitute a conflict of duties. As described, that still gives the "special client" a considerable

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[127] This is a fiduciary duty, see *Keppel* v *Wheeler* [1927] 1 K.B. 577, CA.
[128] [2005] E.W.C.A. Civ. 555, paras. 33 and 34.
[129] *Ibid.*, para. 33.
[130] On preparing for bidding at auction and help offered by auctioneers: Greg Allen, 'Rule No.1: Don't Yell, 'My Kid Could Do That'' in THE NEW YORK TIMES, 5 November 2006, p.2.1.
[131] See [2004] E.W.H.C. 1101, QBD, para. 48; [2005] E.W.C.A. Civ. 555, para. 33.

advantage in comparison to other bidders – which was probably the original intention when the "special client" scheme was introduced.

The second reason, however, is the question of whether a duty to warn existed at all on Christie's side. To answer this question, general developments of the law must be considered as well as the specificities effective in the art world.

Allen describes the circumstances in which the existence of such a duty to warn of risks as found by the judge in the High Court would be significant as follows:[132]

> "A claimant in the same position as Ms Thomson would be able to rely upon the orthodox *Hedley Byrne* duty if an auctioneer unreasonably and falsely described a lot. The duty to warn of risks would come into play, however, when the auctioneer reasonably came to the conclusion that the catalogue description is correct. Should the law really impose liability on auctioneers who have produced a reasonable description of goods?"

The Court of Appeal rightly considered that people who provide information in the form of advice may assume a responsibility giving rise to a duty of care. The Court also acknowledged that the characteristics and experience of the recipient of the information are relevant when determining the extent of the advice to be given. But even in such a case the duty would not involve drawing attention "to the obvious" or "to risks which are fanciful".[133] By acknowledging the existence of such a duty, and against his own findings that Christie's had reasonably held a certain and definite opinion on the Houghton Urns, the judge in the High Court recognized a novel tortious duty of care for which there was no authority nor any reason in principle that would support such a development in liability. Thus, in overruling the High Court judgment in this respect, the Court of Appeal also brought the case back in line to the general recent development of limiting the scope of tortious liability in circumstances where the risk of loss should be obvious to the reasonable person.[134]

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[132] Rupert Allen, 'Caveat Emptor Beware' [2004] *Lloyd's Maritime and Commercial Law Quarterly* 442-445, 443.
[133] [2005] E.W.C.A. Civ. 555, para. 95, citing *Tomlinson* v *Congelton Borough Council* [2004] 1 A.C. 46, HL.
[134] *Tomlinson* v *Congelton Borough Council* [2004] 1 A.C. 46, HL. See also Allen, 'Caveat Emptor Beware', 443.

But what is it that the Court of Appeal believes to be obvious for those participating in the art market? First, the case confirms the long standing convention that a catalogue description of a work of art, however detailed, is in the end a matter of opinion as absolute certainty in attributing works of art often is not possible.[135] Secondly, if it is done with care and by appropriately qualified staff, dating and attribution of artifacts may be effected by visual examination and judgment.[136] Thirdly, when an auctioneer achieves what he feels to be reasonable certainty, then he may state this in unqualified terms and is under no obligation to disclose any initial doubts he may have had or to point out the process by which he has formed his view.[137]

It is thus submitted that the wider duty found by the judge in the High Court did not exist in the first place. Rather, provided that the auctioneer has not conducted the cataloguing process negligently, the remaining risks intrinsic to the dating and attribution of works of art are located with the buyer. Despite the somewhat unfortunate circumstances of the case, the decision has thus only clarified and affirmed earlier authorities on the subject matter of description in auction sales of art.

d. Result

An auctioneer's liability in disputes over the description of lots is most likely to be established under the tort of negligence for misrepresentation. Although in none of the cases discussed has an auctioneer been held liable under the principles of *Hedley Byrne*, the development that culminated in *Thomson* v *Christie's* has made clear that such liability attaches and has brought clarification about the circumstances under which auctioneers of works of art can be held liable.

[135] [2005] E.W.C.A. Civ. 555, para. 161, referring back to para. 188 of Jack J [2004] E.W.H.C. 1101, QBD. According to Hudson, 'A Tale of Two Urns', the decision in the Court of Appeal constitutes the recognition of a trade usage for the field of cataloguing, at 310 and 312. See on the operation and essential characteristics of a trade usage as an aid to interpretation of commercial texts *ibid.*, with further references. For unfolding effect, a usage needs not necessarily be known to the world at large or even not to the individual against whom it is asserted, but it must be capable of being easily discerned by anyone entering the field, *ibid.*

[136] [2005] E.W.C.A. Civ. 555, para. 161, referring back to para. 188 of Jack J [2004] E.W.H.C. 1101, QBD.

[137] *Ibid.*

For a long time, auctioneers[138] have benefited from the non-existence of a tort that grants damages for negligently made representations. Until today, a general reluctance of courts to grant damages for pure economic loss under the principles of *Hedley Byrne* can be recorded, not only because the law on the subject is still at an early stage of development.

With regard to the tort applying in the context of an art auction, however, current judicial thinking can be summarized as follows: there are now no difficulties in concluding that a special relationship between auctioneer and buyers exists[139] and that an assumption of responsibility is implied.[140] The difficulty lies in defining the standard of duty of care owed by the auctioneer of art. Insofar, courts have consistently acknowledged that the particular characteristics of the art world must be taken into account in deciding whether goods satisfy their description.

The extent of duty owed by a particular firm of auctioneers when describing goods to be auctioned first depends on whether the firm belongs to one of the large international auctioneers or whether it is to be qualified as a "provincial auctioneer".[141] In the latter case, the extent of duty is smaller because the role of the auctioneer is still more that of an intermediary and facilitator of the transaction between buyer and seller. In the first case, however, the auctioneer takes active influence on the course of a sale by his offering of specialized services and know-how and by often demanding to keep the sole discretion for the description of lots. It is this sophisticated way of conducting business – the reliance on own expert departments with sufficient expertise to produce reliable descriptions – that provides indications on whether a higher level of diligence is to be expected from a firm.

Once the scope of the auctioneer's responsibility has been determined, what is the level of care to be expected in producing the catalogue description itself? Here, the findings

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[138] Like other individuals engaged with giving advice, be it in a professional or private occupation, provided the defendant has some special knowledge. In *Chaudhry* v *Prabhakar* [1989] 1 W.L.R. 29, for example, the liability of the gratuitous agent, here one providing a recommendation on the purchase of a used car, was established. In a professional occupation, an estate agent has been held to be potentially liable to the buyer for negligently misdescribing the acreage of property in *McCullagh* v *Lane Fox & Partners Ltd* [1996] P.N.L.R. 205, CA, although in the result the claim failed because the purchaser could establish no loss.

[139] See above, p. 77.

[140] See the above discussion of *de Balkany* v *Christie's* and of *Morin* v *Bonhams*, pp. 64-72.

[141] This distinction has been established in the decisions of *Luxmoore-May* v *Messenger May Baverstock* and of *de Balkany* v *Christie's*, discussed above, pp. 13 *et seq.* and pp. 64 *et seq.* See also Palmer, 'The Civil Liability of the Professional Appraiser', p. 34.

from this section and from chapter 3 must be drawn together. Of course, a firm of auctioneers who represents that they have special skill and expert knowledge will be required to have and exercise that skill or knowledge.[142]

Three main propositions have emerged and been adopted by the courts, in particular in *Thomson* v *Christie's*: first, dating and attribution of works of art may be carried out by visual examination and judgment provided it is done with care and by appropriately qualified personnel. Insofar, compliance with the prescribed standard must be judged by reference to the knowledge of art history available and generally accepted for use at the time the description is being written, rather than with the benefit of hindsight.[143]

Secondly, when the auctioneer comes to the conclusion that the result of his examination can be held with reasonable certainty, i.e. when he believes that it is correct, then he may express this in unqualified terms in his catalogue description and is under no obligation to disclose any initial doubts he might have had or to detail the process by which he has formed his view. At this point of the assessment one must remember that an auctioneer does not only act as an art expert when producing a description, but also as a merchant with an interest in gaining the highest possible profit. Here, the expert judgment may not make concessions to what might be commercially desirable – if doubts remain they must be expressed in the form of the qualifications developed by the auction houses as quoted in chapter 3.[144] Equally, an unjustified inflation of a catalogue description must give rise to liability.

Thirdly, courts acknowledge that the art world deals in opinions. That means that it is not necessarily negligent of an auctioneer if he holds an opinion that later turns out to be wrong, as long as he has formed his view by applying the care which is reasonable in light of his specialist knowledge. An auctioneer who chooses between two respectable

[142] While this seems to be self-evident, it is important for determining whether negligence is given: not only should the auctioneer have the represented expertise, but he must also know how to apply this expertise because expertise without application is useless. Thus, the person making an attribution must know how to apply his knowledge of art history, style, and scientific testing, first, by conducting the right types of tests and comparative analyses and, second, by drawing the right conclusions. Negligence is "not having" and/or "not applying" the represented knowledge. See in detail: Peter H. Karlen, 'Fakes, Forgeries and Expert Opinions' in: Lalive (ed.) *International Sales of Works of Art*, pp. 219-249, p. 229. Further above, ch. 3, D.1., pp. 19-22.
[143] See above, ch. 3, E.3.f., pp. 38-41.
[144] *Ibid.*

schools of professional opinion does not necessarily act negligently, even if the adopted school transpires to be erroneous.[145]

Considering that in the area of art authentication "one expert's certainty is another's real doubt"[146] it becomes obvious that the threshold for holding auctioneers liable under the tort of negligence for misrepresentation is still extremely high. While in line with the general rules and developments of the law, it is questionable whether such a strict application of the principle of *caveat emptor* promotes the measure of transparency to be regarded as desirable in an art market that is filled with private buyers, many of whom are amateurs and beginners and far from being expert.[147] The urgency of this question is only heightened by the use of sweeping exclusion clauses in the conditions of business employed by all auction houses in case disappointed buyers want to seek recovery for damages suffered because of misrepresentations. The examination of conditions disclaiming liability for misrepresentations is the concern of the next section of this chapter.

4. The Role of Exclusion Clauses in Conditions of Business Affecting the Buyer

It has become obvious in the previous discussion that the employment of standard terms and conditions forms a key feature in auction business. Conditions of business deal with a variety of questions, such as the terms under which an auction house accepts goods for auction or terms under which it conducts the auction sale. It is especially the exclusion clauses that seek to exclude any liabilities arising out of statements made by the auctioneer during the course of an auction that are of interest for the purposes of this study.

Before an examination of such clauses and their validity can be made, it is important to mention that the conditions of business employed in relation to the buyer at auction usually aim to protect both the seller and the auction house. It is thus important to keep the two cases apart: first, these conditions seek to limit or exclude liabilities with regard to the contract of sale, which especially happens through modifying the conditions

[145] *Cf.* Palmer, 'The Civil Liability of the Professional Appraiser', p. 33 and the discussion of *Luxmoore-May* v *Messenger May Baverstock* above, ch.3, B.1, pp. 13 *et seq.*
[146] Hudson, 'A Tale of Two Urns', 312.
[147] See the analysis above, ch. 3, E.1. and 2., pp. 27-29.

implied by the Sale of Goods Act 1979.[148] Second, these clauses also try to exclude all direct liabilities of the auctioneer. It is the validity of conditions of business in application to the latter case that this section of the chapter is concerned with, because, as discussed above, the auctioneer as the seller's agent is not liable on the contract of sale.

a. Excursus: "The Opinion-Defence"

In this context, however, it is suitable to briefly look at the general discussion on the legal nature of statements made about works of art in a transactional context. The question is especially important when it comes to assessing the contractual relationship between the seller and the buyer of a work of art. The remedies available to the disappointed buyer in a contractual situation depend on whether an authenticity statement has become a term of the contract as a condition or only as a warranty; whether the attribution is qualified as a representation with no contractual effect but which induced the buyer to enter into the contract; or whether it is to be qualified as an opinion with no legal effect whatsoever.[149]

The decision in *Jendwine* v *Slade*[150] is perhaps the oldest reported case concerning a catalogue statement, and set the traditional approach to the issue. This case arose from the sale of two pictures which were described in a catalogue as being a sea-piece by Claude Lorrain (1600-1682) and the other of a fair by Teniers (1610-1690), when in fact the paintings were copies. The court had to address the question of whether the appearance of an artist's name in a catalogue constituted a warranty or merely an opinion on which the buyer was not intended to rely. Lord Kenyon held that it "was impossible to make this the case of a warranty; the pictures were the work of artists some centuries back, and there being no way of tracing the picture itself, it could only be a matter of opinion whether the picture in question was the work of the artist whose name it bore, or not"[151] and that "[T]he catalogue of the pictures in question leaves the determination to the judgment of the buyer, who is to exercise that judgment in the purchase."[152]

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[148] The conditions implied by the Sale of Goods Act 1979 can be found in s.12 (implied terms about title), s.13 (sale by description), s.14 (implied terms about quality and fitness) and s.15 (sale by sample).
[149] See for a more detailed discussion of this question in the context of art transactions: Olsburgh, *Authenticity in the Art Market*, ch. 4.
[150] (1797) 2 Esp. 572., 170 Eng. Rep. 459.
[151] 170 Eng. Rep. 459.
[152] *Ibid.*, 460.

That this rule is not absolute can be seen in a later case: the case of *Power* v *Barham*[153] was about a receipt given to the buyer by the seller at the time of the sale, stating: "Four pictures, Views in Venice, Canaletto". Here it was held that this statement could be a warranty, distinguishing it from *Jendwine* v *Slade* on the ground that Canaletto (1697-1768) was "not a very old painter". The artist had died relatively recently, so that the seller should have been able to ascertain the paintings' origins.[154]

Both cases should not now be taken as being authoritative on the effect of a catalogue statement. Not only has the law on imposing liability for statements changed a great deal since;[155] attribution techniques have also advanced far beyond what was thought possible when these cases were decided in 1797 and 1836.[156] One might thus be induced to argue that today a statement in a catalogue may well be a term of the contract.[157]

Two recent cases involving private treaty transactions show, however, that this largely depends on the surrounding circumstances and any qualifications made in the statement itself. The first case, *Harlingdon and Leinster Enterprises* v *Christopher Hull Fine Art*,[158] concerned a sale between two London dealers of a painting clearly described in the invoice as being by the German painter Gabriele Münter (1877-1962), which later turned out to be a forgery. The second case, *Drake* v *Thos Agnew & Sons Ltd*,[159] involved the sale of a painting by an eminent London dealer specialized in Old Master paintings to a private client in the USA, whose agent was a dishonest art dealer. The seller was convinced that the painting was by Sir Anthony van Dyck (1599-1641), but expressly stated in his correspondence to the buyer's agent the existence of doubts. These doubts, however, never reached the buyer who sought to recover the price after he was advised that the painting was not by van Dyck.

Both cases were decided in favour of the defendant sellers, holding that there were no terms that the paintings were respectively by Münter and van Dyck and therefore no

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[153] (1836) 4 Ad. & E. 473; 111 Eng. Rep. 865.
[154] 111 Eng. Rep. 865, 866.
[155] Old cases show reluctance to impose liability for statements unless there was deceit, or contractual liability was clearly undertaken. But other categories of liability have developed in between. Old cases should be read with these developments in mind, see Anthony Gordon Guest (general ed.), *Benjamin's Sale of Goods* (6th edn, London: Sweet & Maxwell, 2002), para. 10-004.
[156] See ch. 3 above, D., pp. 19 *et seq.*
[157] In *Leaf* v *International Galleries* [1950] 2 K.B. 86; [1950] 1 All E.R. 693, the Court of Appeal indicated that a representation that a painting was a Constable could be a warranty.
[158] [1991] 1 Q.B. 564; [1990] 3 W.L.R. 13, CA.
[159] [2002] E.W.H.C. 294, QBD, noted by Anthony Hugh Hudson, 'Attribution of Paintings and Sale by Description' (2003) 8 *Art Antiquity and Law* 201-208.

sales by description governed by section 13 of the Sale of Goods Act 1979. Buckley J explained this conclusion in the second case as follows:

> "... a sale cannot be "by description" unless the parties intend the description to be a term of the contract. It is only then that the implied condition that the goods must correspond with the description arises. ... It only does so if the proper conclusion from all the evidence is that the parties intended the description to be a term of the contract. That makes good sense if one bears in mind the serious consequences that flow from a breach of the implied term, when the statute makes it a condition that the goods should correspond with the description."[160]

That in these cases the statements as to the authenticity of the paintings were held to be matters of opinion without legal consequences can be explained by reference to the particular circumstances: in *Harlingdon*, the seller disclaimed to have specialist knowledge and the buyer was much more expert than the seller in the particular field of German expressionist art. In *Drake*, doubts about the attribution were made known to the buyer by the seller. Consequently, the buyers were held to have bought the paintings "as they were" and section 13 of the Sale of Goods Act 1979 did not apply.

Because the description accorded to works of art sold in an auction forms a key feature for this type of sale, *Harvey and Meisel* argue that auction cases must be distinguished from private treaty sales.[161] However, even here it can now be said with confidence that the position in law takes into account the idiosyncrasies of the art market: that the art world deals in opinions and not facts has once again been acknowledged in the recent auction case of *Thomson* v *Christie's*.[162] According to *Hudson*, the decision in this case even constituted the recognition of a trade usage for the field of cataloguing.[163] The reasons for defining auction descriptions as matters of opinion only have been set out before: absolute certainty that the description attached to a work of art is correct is often not possible because of the risks inherent in the dating and attributing of objects that

[160] [2002] E.W.H.C. 294, QBD, at para. 26, referring to *Harlingdon*, where it has been held that for the sale to be *by* description, the description had to be influential in the sale so as to become an essential term or condition of the contract, *per* Nourse LJ, at 571, and citing Lord Diplock in *Gill & Duffus S.A.* v *Berger & Co. Inc. (No.2)* [1984] A.C. 382, HL, at p. 394.
[161] *Auctions Law and Practice*, para. 6.45.
[162] [2005] E.W.C.A. Civ. 555, para. 161, referring back to para. 188 of Jack J [2004] E.W.H.C. 1101, QBD. See the detailed discussion of this case above, pp. 72 *et seq.*
[163] 'A Tale of Two Urns', 310 and 312, see further n. 135 above.

often were created centuries ago, and the result of the attribution depending on the current state of scholarship.

However, the qualification of statements on the authenticity or the attribution of a work of art as opinions does not mean that there is no basis for a disappointed buyer to sue. As *Palmer* points out, a statement of opinion can itself contain an actionable misrepresentation of fact: "either on the ground that the statement of opinion suggests the existence of facts which reasonably support the opinion, or on the ground that an opinion itself is a fact capable of misrepresentation."[164] A mere reliance on what has been described here as "opinion-defence" thus does not put an end to the matter. The disappointed buyer is thus well advised to first contest whether under the particular circumstances the description attached to the work of art has not become a term of the contract. Further, a liability for damages can arise under section 2(1) of the Misrepresentation Act 1967 for negligent misrepresentation in a contractual situation[165] and under the tort of negligence for misrepresentation as developed above.

It is because of this that catalogue descriptions are almost inevitably subject to some form of express caveat or exclusion of liability in auction conditions.

b. Typical Content and Interpretation of Exclusion Clauses

If the disappointed buyer wishes to sue against the auctioneer and base his action on an alleged misrepresentation in the catalogue description,[166] it becomes necessary to look at the auctioneer's conditions of business to determine whether there is a clause that effectively excludes any liabilities.

As an illustration, Christie's current Conditions of Sale[167] on this subject matter are set forth here:

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[164] 'The Civil Liability of the Professional Appraiser', p. 26. See also Treitel, *Law of Contract*, p. 331.

[165] While it is established that auctioneers - in common with agents generally - cannot be liable under s.2(1) Misrepresentation Act 1967 with regard to inducing the contract of sale (see above, B.3.a., p. 57), a claim under the statutory provision is possible directly against the auctioneer when a collateral contract between buyer and auctioneer can be found into which the claimant entered as a result of representations made by the auctioneer. Such a collateral contract was held to have existed between Ms Thomson and Christie's in the first instance decision of *Thomson* v *Christie's* [2004] E.W.H.C. 1101, QBD, para. 199.

[166] Of course, the disappointed buyer will also be likely to sue against the seller as principal for breach of the implied condition of compliance with description, s.13 Sale of Goods Act 1979, and that the goods he bought were not of satisfactory quality under s.14(2) of the Sale of Goods Act 1979. As set out above, this study concentrates on the exclusion of direct liabilities of the auctioneer.

[167] The conditions of business of the leading auction houses are similar in essence.

"2. BEFORE THE SALE

(a) Examination of property

[1]Prospective buyers are strongly advised to examine personally any property in which they are interested, before the auction takes place. [2]Condition reports are usually available on request. [3]Neither Christie's nor the seller provides any guarantee in relation to the nature of the property apart from the Limited Warranty in paragraph 6 below. [4]The property is otherwise sold "as is".

(b) Catalogue and other descriptions

[1]Our cataloguing practice is explained in the Important Notices and Explanation of Cataloguing Practice which appear after the catalogue entries. [2]All statements by us in the catalogue entry for the property or in the condition report, or made orally or in writing elsewhere, are statements of opinion and are not to be relied on as statements of fact. [3]Such statements do not constitute a representation, warranty or assumption of liability by us of any kind. [4]References in the catalogue entry or the condition report to damage or restoration are for guidance only and should be evaluated by personal inspection by the bidder or a knowledgeable representative. [5]The absence of such a reference does not imply that an item is free from defects or restoration, nor does a reference to particular defects imply the absence of any others. [6] ... [7]Except as set forth in paragraph 6 below, neither Christie's nor the seller is responsible in any way for errors and omissions in the catalogue, or any supplemental material.

(c) Buyer's responsibility

[1]Except as stated in the Limited Warranty in paragraph 6 below, all property is sold "as is" without any representation or warranty of any kind by Christie's or the seller. [2]Buyers are responsible for satisfying themselves concerning the condition of the property and the matters referred to in the catalogue entry."

and

"5. EXTENT OF CHRISTIE'S LIABILITY

[1]We agree to refund the purchase price in the circumstances of the Limited Warranty set out in paragraph 6 below. [2]Apart from that, neither the seller nor we, nor any of our officers, employees or agents, are responsible for the correctness of any statement of whatever kind concerning any lot, whether written or oral, nor for any other errors or omissions in description or for any faults or defects in any lot. [3]Except as stated in paragraph 6 below, neither the seller, ourselves, our officers, employees or agents, give any representation, warranty or guarantee or assume any liability of any kind in respect of any lot with regard to merchantability, fitness for a particular purpose, description, size, quality, condition, attribution, authenticity, rarity, importance, medium, provenance, exhibition history, literature or historical relevance. [4]Except as required by local law any warranty of any kind whatsoever is excluded by this paragraph."

The repeated reference to paragraph 6 of the Conditions points at Christie's current anti-forgery provision. It is similar to the version discussed above that came under scrutiny in *de Balkany* v *Christie's*:[168] Christie's (in common with other leading auction houses) provides that they will set aside a sale and refund the original purchase price when certain strictly limited conditions are fulfilled which establish that a lot is not authentic.[169]

Christie's Condition 2 instructs buyers that they should make an appropriate inspection of the lots they are interested in before the sale starts. Especially inexperienced bidders are addressed with the advice to make use of independent experts for conducting an inspection on their behalf (Condition 2(b) cl.4). Besides ensuring that bidders must accept responsibility for making an inspection, it is emphasised that all property is sold "as is" (Condition 2(a) cl.4 and 2(c) cl.1). It is further declared that all information about lots supplied to buyers in any form are not statements of facts but rather statements of opinion (Condition 2(b) cl.2). Altogether, it is obvious that Condition 2 is drafted to achieve that the auction transaction is performed as a transparent *caveat emptor* transaction.

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[168] [1997] Tr.L.R. 163; THE INDEPENDENT, 19 January 1995.

[169] See for the discussion of such anti-forgery conditions above, B.2., pp. 52 *et seq.*

Christie's Condition 5 then excludes all implied warranties or conditions or assumptions of responsibility other than the limited warranty given in their Condition 6 authenticity provision and such obligations which are not excludable by law (cls.3 and 4).

c. Validity of Exclusion Clauses:
Test of Reasonableness under the Unfair Contract Terms Act 1977

A full consideration of the validity of exclusion clauses, especially whether such clauses are effectively incorporated into the contract of sale, cannot be made in this context.[170] The situation considered here is the auctioneer that seeks to avoid liability for negligent misstatements. To recall, this question regards whether the auctioneer is in breach of a tortious duty of care towards the buyer in the making of the catalogue description. If it can be established that there is a breach of the duty, consideration needs to be given to the disclaimer provisions and whether the disclaimers were effective in absolving the auctioneer from liability for negligent misstatement.

The Unfair Contract Terms Act 1977 provides that exclusion clauses may be invalid if they are judged to be "unreasonable". The Act does not apply solely to a contractual situation:[171] according to section 2(2) of the Act, a person cannot "exclude or restrict his liability for negligence except in so far as the term or *notice*[172] satisfies the requirement of reasonableness." "Negligence" is defined in section 1(1)(b) as "breach of any common law duty to take reasonable care or exercise reasonable skill".

It was questioned for some time whether the Act of 1977 applies to such disclaimers that prevent any duty arising in the first place because section 2(2) only makes exclusions of "liability *for* negligence" subject to the test of reasonableness. A wording such as the one in Christie's Condition 5 cl.3 ("neither ... assume any liability") suggests, however, that the auctioneer wants to prevent a duty coming into existence

[170] See for a detailed consideration of this issue Harvey and Meisel, *Auctions Law and Practice*, ch.6. Especially the validity of conditions under the requirement of fairness imposed by the Unfair Terms in Consumer Contracts Regulations 1999 will not be considered here. The Regulations are applicable only to contractual terms. On doubts whether the Regulations are applicable on auction house disclaimers, especially in relation to the auctioneer, see the detailed account by Palmer, 'Misattribution and the Meaning of Forgery', 55-56.
[171] *Cf.* Harvey, 'Problems of Identity and Description in the Saleroom', 432.
[172] Meant with notice is a statement that does not have contractual effect, *cf.* section 11(3) of the Act.

rather than that he seeks to avoid liability for the loss arising from the breach of the duty.[173]

In *Hedley Byrne* v *Heller*[174] (decided before the enactment of the Act) the defendants were, in the result, not held liable because they had expressly disclaimed liability by stipulating that their advice was given "without responsibility" on their part. As *Harvey and Meisel* explain,[175] a person cannot normally avoid liability for negligence by broadcasting that he does not incur it. However, the basis of the duty in this area is that the defendant has expressly or impliedly *undertaken* that he will give his advice or information with care. Thus, if he says in advance that he *undertakes no such thing*, no duty will arise.[176] In the words of Lord Devlin in *Hedley Byrne* v *Heller*: "A man cannot be said voluntarily to be undertaking a responsibility if at the very moment when he is said to be accepting it he declares that in fact he is not."[177]

Regarding the question of whether such disclaimers fall within the ambit of the Unfair Contract Terms Act 1977, the House of Lords in *Smith* v *Eric S Bush*[178] drew on sections 11(3) and 13(1) of the Act and concluded that the Act does catch disclaimers of this sort. Section 11(3) provides that in considering whether it is fair and reasonable to allow reliance on a notice which excludes liability in tort, account must be taken of "all the circumstances obtaining when the liability arose or (but for the notice) would have arisen." Section 13 (1) prevents the exclusion of any right or remedy and (to that extent) section 2 of the Act also prevents the exclusion of liability "by reference to ... notices which exclude ... the relevant obligation or duty." The House of Lords interpreted these sections as meaning that the existence of a common law duty of care had to be judged by considering whether it would exist "but for" the notice excluding liability. Any other interpretation would result in removing all liability for negligent misstatements from the ambit of the Act.

Do such disclaimers then satisfy the requirement of reasonableness imposed by section 2(2) of the Act? The meaning of reasonableness is dealt with by section 11(3). In *Smith*

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[173] This interpretation is supported by the clauses that say that any statement represents only an opinion and that buyers must satisfy themselves as to the accuracy of any statements in the catalogue (Conditions 2(b) cl.2 and 2(c) cl.2).
[174] [1964] A.C. 465, HL.
[175] *Auctions Law and Practice*, para. 5.151.
[176] *Ibid.*
[177] [1964] A.C. 465, HL, at 533.
[178] [1990] 1 A.C. 831, HL.

v *Eric S Bush* the House of Lords considered the factors that should be taken into account in determining the reasonableness of such disclaimers, in particular: were the parties of equal bargaining power? In the case of advice, would it have been reasonably practicable to obtain the advice from an alternative source taking into account considerations of costs and time? How difficult is the task being undertaken for which liability is being excluded? What would be the practical consequences of, for example, insurance, on the court's decision on the question of reasonableness?[179]

The validity of conditions of business excluding liability for misrepresentations remains to be tested in the auction context.[180] Following *Harvey and Meisel*,[181] there is good reason for the suggestion that auctioneers' disclaimers may be vulnerable. It is especially the imbalance of power and knowledge between auctioneer and most buyers that speaks against an effectiveness of such disclaimers.[182] On the other hand, it needs to be taken into consideration that such disclaimers intend to have the effect that the idiosyncrasies involved in sales of works of art are recognized, which is, as recent judicial comment suggests, well understood by the market.[183]

d. Result

The clauses excluding liabilities for misattribution employed by auction houses in their conditions of business are usually far-reaching. They build a barrier that is not easy to surmount for the disappointed buyer. Of course, exclusion clauses must be in accordance with the requirement of reasonableness under the Unfair Contract Terms Act 1977. However, since the clauses express what is long-established usage in the art trade, it is very difficult to decide whether such clauses are in fact unreasonable. The question has yet to be decided by a court. Often, such clauses are not tested because the parties do not wish to expend the time and costs, and, further, the risk involved in the

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[179] [1990] 1 A.C. 831, HL, *per* Lord Griffiths.

[180] In the recent decision of *Thomson* v *Christie's* the Courts were not concerned with the issue of reasonableness of the conditions of business that sought to exclude liability because Christie's had announced that they did not rely on their conditions in relation to the claims made, [2004] E.W.H.C. 1101, QBD, para. 14.

[181] *Auctions Law and Practice*, para. 6.63.

[182] *Ibid.*

[183] See especially *Thomson* v *Christie's* [2005] E.W.C.A. Civ. 555, para. 161, referring back to para. 188 of Jack J [2004] E.W.H.C. 1101, QBD, and discussion of this case above, especially text accompanying note 135.

review of standard clauses.[184] In consequence, although such conditions of business may *prima facie* be of questionable validity, they continue to govern the relations between buyer and auction house.

5. The Trade Descriptions Act 1968

As a final point, attention must be drawn to the provisions of the Trade Descriptions Act 1968 and their application to auction sales of art. Though the Act is a criminal statute, it can also have civil consequences: in addition to convicting the defendant, the court has the power to make a compensation order in the victim's favour.[185]

Section 1(1) of the Act reads as follows:

> "Any person who in the course of a trade or business
> (a) applies a false trade description to any goods; or
> (b) supplies or offers to supply any goods to which a false trade description is applied;
> shall, subject to the provisions of this Act, be guilty of an offence."

The offence is one of strict liability, meaning that the prosecution only has to prove that the description was false, and was made in the course of a trade or business – not that the trader intended to deceive or mislead. Section 24 of the Act, however, gives the defendant a defence when he can prove that the false trade description was made by mistake, accident, reliance on a third party, and that he took all reasonable precaution and exercised all due diligence to avoid the commission of such an offence.

The most recent case under the Act of 1968 concerning art auctioneers was decided by the Divisional Court of Queen's Bench, on appeal from a decision of the magistrates' court, in 1990. The facts in *May* v *Vincent*[186] were these: an auctioneer put up a picture for sale which was described in the catalogue as "JMW Turner, RA. A watercolour of moorland, stream, bridge and people, unframed 6 ½" x 9 ½"". Sold at £400, it subsequently turned out not to be by Turner and was found to be "virtually worthless".

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[184] Harvey, 'Problems of Identity and Description in the Saleroom', however, reports of a number of cases settled out of court where buyers had successfully challenged auction houses on the reasonableness of such exclusion clauses, at 432.
[185] Palmer, 'The Civil Liability of the Professional Appraiser', p. 27.
[186] (1990) 154 J.P. 997; [1991] 04 E.G. 144.

When the auctioneer was prosecuted under section 1(1)(a) of the Trade Descriptions Act 1968 for applying, in the course of trade, a false trade description, his first ground of defence was that the Act does not apply to auctioneers and, moreover, does not apply to the art world. The latter belief was reflected by the defendant's reliance on the fact that he had issued a complete, comprehensive disclaimer in the catalogue which warned bidders that all statements as to origin, authorship, date, age, period and authenticity were statements of opinion and not of fact.

The Divisional Court had no difficulties in ruling that, contrary to the defendant's belief, section 1(1) of the Act applies to auctioneers in the same way as it does to any other trade or business, it being irrelevant that the auctioneer was only acting as an agent in applying a description for the vendor.[187] The Court then turned to the question of whether a disclaimer can ever be a defence to a charge of applying a false trade description to goods under section 1(1)(a) of the Act. Here, the Court was able to rely on the earlier authority in *Newman* v *Hackney LBC*,[188] where it was held that the offence under section 1(1)(a) is committed when the false trade description is applied to the goods and that the common law doctrine of disclaimer, for that reason, was not open to a person charged under section 1(1)(a).[189] The distinction between applying a false trade description as opposed to supplying goods already bearing a false description was expressly approved in *R* v *Southwood*.[190] On the basis of these authorities, the Court rejected the auctioneer's submissions.

By applying section 1(1) of the Act, the Court also implicitly established that a catalogue statement about the authorship of a work of art is a "trade description" for the purposes of the Act, and thus dismissed the auctioneer's proposition that the Act would not be applicable to members of the art world because they deal in opinions only. Indeed, the term "trade description" is defined in section 2(1) of the Act, among other things, as an indication as to the person who "manufactured, produced, processed or reconditioned" the goods. However, recalling what has been said above in chapters 2

[187] The Court based its finding on the authoritative decision in the Scottish case of *Aitchison* v *Reith and Anderson Ltd* [1974] Sc.L.T. 282, at 284, where The Lord Justice-Clerk Wheatley pointed at the wide scope of the Act of 1968.
[188] [1982] R.T.R. 296.
[189] Otherwise, it would be possible for a person to disclaim his own fraud.
[190] [1987] 1 W.L.R. 1361. It was held in this case that a disclaimer could have some effect on a charge under s.1(1)(b) of the Act, and approved that it is not open to someone charged with applying a false trade description to rely on a disclaimer.

and 3, and following *Palmer*, these words hardly seem to be suitable to describe the process of artistic creation.[191]

Still, the case law on the Act offers a "back door route" for disappointed buyers, should they be unsuccessful with their civil claims and have the desire to nevertheless hold an auctioneer to a literal compliance with a catalogue description.[192] On the other hand, in such cases the auctioneer will quite likely be able to successfully argue the defence of due diligence.[193] It is probably because of this, and the fact that a compensation order usually cannot substitute for carefully assessed damages,[194] that the provisions of the Act have not developed as a significant legal instrument in disputes over attribution in the art market.

C. CONCLUSION

The law governing the auctioneer's liability to the disappointed buyer in disputes over attribution clearly favours the auctioneer.[195] While it can now be said with confidence that a liability can at least arise in tort of negligence for misrepresentation, the thresholds for establishing the tort in the context of an art sale are still very high. This is mainly due to courts acknowledging that the difficulties inherent with the dating and attribution of art must be taken into account when the level of care to be expected for producing a catalogue description needs to be determined.

However, as a result of the law reflecting the expectations of the trade, it becomes very difficult for the buyer of a misdescribed work of art to prove that the auctioneer acted negligently in reaching his description. This means that the risk intrinsic to dating and attribution of works of art is to a large extent located with the buyer. Beyond this, auction houses actively discourage dissatisfied buyers from approaching them through their strict sets of auction conditions, where, even in the case of the anti-forgery provisions, the burden and expense of proof is on the buyer. It thus must be concluded

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[191] 'The Civil Liability of the Professional Appraiser', p. 27.

[192] Palmer, *ibid.* THE TIMES, 25 November 1987, reported of a case where the Trade Descriptions Act 1968 was applied in relation to an auctioneer for wrongly attributing a painting in his catalogue to the painter Thomas Girtin (1775-1802). The auctioneer was fined £100. Subsequently, the auctioneer also voluntarily paid compensation in full to the buyer of the painting, which shows that a conviction under the Act can also help the disappointed buyer to achieve out of court settlements in his favour.

[193] See s.24 of the Act.

[194] *Cf.* Brian W. Harvey, *Violin Fraud* (2nd edn, Oxford: Clarendon Press, 1997), p. 74.

[195] For individual summaries and analyses of the legal issues discussed, see the particular result sections in this chapter.

that the current nature of the auction sale is such that buyers need to exercise the utmost vigilance.

On the one hand, one can argue that such a clear allocation of risk ensures the security of transactions and is thus positive for the prosperity of the market. As one judge commented in a misattribution case: "there is much to be said for the view that on acceptance [of a work of art] there is an end of that particular transaction, ... otherwise, business dealings in these things would become hazardous, difficult and uncertain."[196]

This, however, completely disregards the information asymmetries and the unequal bargaining powers by which the art auction market is marked. One may not forget that in recent years auction houses have especially targeted beginners and amateurs to engage into bidding at their art auctions, to quote from one drastic comment, "they have pumped out glamorous catalogues, mounted high-glamour evening dress sales and attracted the public through the doors with a thousand high-profile parties".[197]

Entranced by the prestige, the glamour and the excitement of entering the art market, it is no wonder that many buyers remain unaware of the risks and dangers involved in purchasing art. It is thus argued that consumers in art are in need of some protection. As examined, the current legal regime under which disputes over attribution are governed does not offer such protection. Having reached this conclusion, it would surely be disappointing if this study did not have some suggestions to offer as to how risk allocation in auction transactions can be made more balanced. These ideas will be presented in chapter 5.

It must, however, be repeated that the current application of the general rules of law on disputes over attribution is such that the attributions and descriptions of works of art made in the context of auctions, especially those in auction catalogues, may only be seen by the consumer as a springboard for engaging in own research and study.[198] Most of all, the art buyer must remember the maxim of *caveat emptor*.

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[196] *Leaf* v *International Galleries* [1950] 2 K.B. 86, CA, *per* Evershed MR, at 95.
[197] Godfrey Barker, 'Let the Seller Beware' in THE GUARDIAN, 20 May 2004.
[198] Amateur buyers should especially consider employing their own experts.

5

Alternative Theories of Auction House Liability

It has been concluded that under the current legal regime the risks intrinsic to the dating and attribution of works of art are to a large extent located with the buyer at auction. While courts generally acknowledge that the peculiarities of works of art as commercial goods must be regarded in resolving authenticity disputes, it has been seen that the approach by which this recognition is exercised favours the position of the auctioneer through a strict enforcement of the principle of *caveat emptor*. As long as art auctions were mainly frequented by art dealers with an equal level of expertise as auctioneers, this approach could be justified in view of ensuring the safety of transactions in art. With the art auction market now being frequented by many private, non-expert buyers, it is argued, however, that this application of the law puts auction houses in a position of unjustified superiority over buyers. The amateur buyer certainly buys art at auction with no other alternative but to rely on the auctioneer's expert descriptions of the goods offered. This reliance of consumers in art deserves some protection.

In the following, two alternative theories of liability as they have been offered and discussed by American art law commentators will be presented. Both of them attempt to alleviate the present liability asymmetries by strengthening the accountability of auction houses for erroneous attributions. None of them is unproblematic and easy to implement into the current legal system. These models are therefore only presented with the intention to promote further debate.

A. Agency-Based Liability

The first such theory is based on agency principles and comes close to the views adopted by Jack J in the particular circumstances of the "special client" relationship

between the claimant-buyer and the auction house in the High Court ruling of *Thomson* v *Christie's*.[1]

According to this theory, the relationship between the auctioneer and the buyer at auction would be characterised as an agency relationship.[2] The auctioneer therefore would act as the agent for both seller and buyer. As examined above, the buyer often relies on the auctioneer's expertise regardless of whether the law recognises a formal agency relationship or not. It can be argued that the extent of a duty of care under agency principles is bigger than what is covered by the duty of care in case of an action in tort of negligence. A duty of care arising from an agency relationship would cover the exercise of degrees of diligence that seem to be unreasonable to impose under the tort of negligence for misrepresentation, such as a duty to give warnings about the inherent uncertainties in attribution if this seems to be appropriate in the special circumstances.

The downside of this approach is obvious. An agent who represents both parties to a transaction, of course, presents a conflict of interest problem and, for this reason, the theory is unsuitable under English law.[3]

Regardless of this conflict, those who advance this view point at the flexibility an agency approach would offer. The auctioneer would only incur liabilities where the buyer reasonably regarded the auction house as acting on his behalf.[4] The level of probable reliance of a particular buyer would depend on his level of expertise:[5] some buyers need less protection than others. Where the buyer is a sophisticated art dealer himself, liability would not attach. If there is a significant disparity in knowledge and expertise between the two parties, such as in the case of amateur first-time buyers, then the auctioneer would become responsible. This way, the unsophisticated purchaser

[1] [2004] E.W.H.C. 1101, QBD. See discussion of the High Court ruling above, ch.4, pp. 72-75.
[2] See for a discussion of this proposal: Patty Gerstenblith, 'Picture Imperfect: Attempted Regulation of the Art Market' (1988) 29 *William and Mary Law Review* 501-566, 557 *et seq.*
[3] In the Court of Appeal's ruling in *Thomson* v *Christie's* [2005] E.W.C.A. Civ. 555, May LJ clarified that an auctioneer must not put himself into a position where he owes a duty to a third person which is inconsistent with his duty to his principal, here the seller at auction, at paras. 33 and 34. See discussion above, ch.4, pp. 78. Considerations whether an analogy can be drawn with the common situation of a real estate agent who similarly finds himself advising both the seller and buyer simultaneously need not to be made here after this clarification. It must be pointed out, however, that recent American decisions recognise this duality by imposing an agency relationship on the estate agent when the buyer views the estate agent as his agent. See Gerstenblith, 'Picture Imperfect', 558, with case references.
[4] Gerstenblith, 'Picture Imperfect', 559.
[5] Stuart Bennett, 'Fine Art Auctions and the Law: A Reassessment in the Aftermath of *Cristallina*' (1992) 16 *Columbia Journal of Law and the Arts* 257-284, 270.

would receive some protection, while the liability of the art auctioneer would be limited to situations in which he indeed has superior knowledge and resources.[6]

B. Strict Liability

The second theory is one of strict liability based on tort notions of enterprise responsibility and an assessment of who is best placed to bear the losses if a work of art is discovered to be misattributed. Though the application of a strict liability regime is generally limited to inherently defective products[7] and unreasonably dangerous objects,[8] and to situations where the losses involve personal injury or property damage,[9] it is argued by some commentators that a system of strict liability would fit best to solve the art world's misattribution problem.[10]

It is especially two arguments discussed in favour of strict liability which show that a regime of strict liability would be particularly suited to solve disputes over attribution. They are (1) the proposition that the auctioneer is best equipped to pay for damages caused by a defective product; and (2) the view that the requirement of proving fault in tort of negligence claims is overly burdensome and expensive.[11]

As *Jáuregui* explains, the auctioneer is in the best position to internalise and externalise the costs of preventing the risks involved in describing works of art: the auctioneer has the choice to offer a work of art with a lesser level of attribution, thus internalising the lower price but preventing the risk of misattribution, or to sell with an unqualified attribution and taking the risk that the attribution may turn out to be wrong. In the latter case, the costs of the risk of misattribution could be covered by the purchase of adequate insurance. These insurance costs would then be transferred to the consumer by

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[6] Such a flexible standard, however, also contains effects that are undesirable for the art market. A factual determination would have to be made in each instance as to whether the buyer in fact viewed the auctioneer as his agent and reasonably relied on representations made to induce the subsequent purchase, which involves difficult questions of proof and would thus result in uncertainty and increased litigation, *cf.* Gerstenblith, 'Picture Imperfect', 559.

[7] See, for example, the rules on strict liability contained in the Consumer Protection Act 1987.

[8] See the rules on strict liability contained in s.2(1) of the Animals Act 1971.

[9] According to Lord Porter in *Read* v *J Lyons* [1947] A.C. 156, HL, 'strict liability' cannot be assigned a constant meaning. Rather, the rules of strict liability differ from tort to tort – consequently the nature and extent of the liability in each of them must be considered separately, at 178. For the origins of strict liability, see *Rylands* v *Fletcher* (1866) L.R. 1 Exch. 265; (1868) L.R. 3 H.L. 330.

[10] The model is especially advocated by Raúl Jáuregui, 'Rembrandt Portraits: Economic Negligence in Art Attribution' (1997) 44 *U.C.L.A. Law Review* 1947-2029, 2012-2026.

[11] *Ibid.*, 2024.

increasing the minimum sale price of the lot, thus externalising the expense of risk prevention.[12] *Jáuregui* compares the situation to other risks common in the auction context which are prevented with insurance, and where the costs are passed on to the consumer. For example, the risks that lots kept by auction houses in their storage rooms may be stolen or damaged are always covered by insurance. Likewise, auction houses could easily arrange to have misattribution insurance to cover such claims that may arise under a strict liability regime.[13] Only the auctioneer can absorb such widespread liability, as he is in the best position to spread the costs of accident prevention among all purchasers through a small increase in price, in contrast to the imposition of the entire costs caused by one misattribution on a single buyer.[14]

It has further emerged from the entire previous discussion that the art world's problem of misattribution often involves no fault: in the majority of cases auction houses act without negligence and to the best of their ability when they set out to describe the artworks they offer for sale.[15] Nevertheless, misattributions do occur and, due to lack of negligence, a morally culpable agent often cannot be assigned to the economic loss caused by the misattribution. Why then should the art auctioneer be burdened with a strict liability? As seen, the auctioneer is also in a far better position than the purchaser to determine the authenticity of an artwork, be it by conducting scientific tests, researching, questioning of the owner, or simply by refraining from making unreliable claims as to the authenticity and attribution.[16] In contrast, there simply is no opportunity for the purchaser to conduct equally diligent and exhaustive examinations prior to an auction sale, besides the facts that most of the buyers lack the expertise and knowledge necessary for making such appraisals, nor can they afford the expense of a professional second-opinion. Furthermore, the costs of litigation when an attribution is being challenged in court can easily rise well above the price paid for the item whose authenticity is in doubt.[17]

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[12] *Ibid.*, 2018 and 2024.
[13] *Ibid.*, 2025.
[14] *Ibid.*
[15] *Ibid.*, 2024.
[16] Gerstenblith, 'Picture Imperfect', 562.
[17] In the 2005 case of *Thomson* v *Christie's* [2004] E.W.H.C. 1101, QBD; [2005] E.W.C.A. Civ. 555 , the litigation costs in the High Court were estimated at £1,6 million, with the additional costs for the appeal having driven the final total above the £1,9 million the claimant paid for the urns whose attribution she challenged, see Will Bennett, 'Christie's Wins Appeal Over £2m 'Fake' Urns' in THE DAILY TELEGRAPH, 13 May 2005.

By holding auction houses accountable on a strict liability basis, the buyer would be freed from such unreasonable burdens and could be reassured not to suffer a loss because he would obtain a refund from the auctioneer in the event of a misattribution.[18] Because of the insurance, the auctioneer would also be protected against losses, and, as a side effect, and compared to the current "it's up to you to discover if our opinion's right"-approach[19] taken, auction houses would also turn "into completely reliable and prestigious suppliers in the eyes of their customers."[20]

There are, of course, objections against this model, which would entirely change the current regime based on *caveat emptor* into one of *caveat auctionator*. First of all, it is yet again questionable whether such a model is arrangeable with the prevailing agency relationship between the auctioneer and the seller-consignor, as it encourages the auctioneer to make risk averse attributions, which may bring him in conflict with his fiduciary duties to his principal. Further, doubts have been expressed about the fairness and utility of the theory in the context of the art market. It is argued that the buyer of art would be able to purchase works more cheaply at auction than if sold through a dealer, but in exchange for this benefit, the buyer would assume a greater risk of misattribution of the work.[21] The argument is based on the notion that dealers buy works from the owner or artist at a definite price, rather than taking it on consignment, and sell them to the purchaser on their own behalf, rather than on behalf of the original owner or artist. It is argued that works of art sold this way generally command a higher price than if sold at public auction, because the dealer is held to a higher standard of obligation in certifying the title and authenticity of the work of art.[22] By preserving a market environment where the liability of the auctioneer is limited, the purchaser of art would have more choice: "the buyer who is risk averse can buy from a dealer, whereas the buyer who wants a bargain can assume the risk and buy from an auction house."[23]

However, such a clear distinction between dealers and auctioneers does no longer reflect the reality of the market. Auction houses nowadays enter the domain of dealers

[18] Jáuregui, 'Rembrandt Portraits', 2025.
[19] Words of Godfrey Barker, 'Let the Seller Beware' in THE GUARDIAN, 20 May 2004.
[20] Jáuregui, 'Rembrandt Portraits', 2025.
[21] *Cf.* Gerstenblith, 'Picture Imperfect', 554-555.
[22] *Ibid.*
[23] *Ibid.*, 565.

by purchasing works of art and reselling them on their own behalf,[24] and dealers offer works for sale which have been given to them on consignment and thus broker such deals comparable to auction houses.[25] It is therefore not too far-fetched to call for auction houses to be governed by equivalent standards as dealers and galleries.

C. RESULT

As argued, both alternative suggestions are difficult to implement into the current legal system. There is thus little likelihood that changes will be imposed on auctioneers from outside. Traditionally, private actions between parties have not been subject to detailed regulation in England. Considering that the art market is a comparatively small market, and the group of art buyers an unorganised set of consumers,[26] it is not to be expected that the legislator will intervene by imposing rules of stricter liability on art auctioneers. Judges ruling on misattribution cases must take into consideration the impact an expansion of the liability of auctioneers would have for other areas of professional negligence. The Court of Appeal's recent decision in *Thomson* v *Christie's*[27] has shown that courts are currently not willing to reallocate risks in favour of consumers in the auction context, which is in line with the general trend of limiting the scope of tortious liability in cases of pure economic loss.

Especially in *Thomson* v *Christie's*, however, the asymmetry in knowledge and expertise between the consumer and the auction house had been astonishing. If auction houses want to avoid scaring off such amateur buyers in the long term, they would be well advised to voluntarily adopt measures that provide effective remedies for buyers in the event of a misattribution. This could be done, for example, by offering more generous authenticity guarantees[28] than it is currently the case. Such an approach of

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[24] If so, it is established practice that the fact that an auction house has a direct financial interest in a lot is disclosed to the buyer by attaching a symbol to the lot which indicates the auction house's ownership.
Another controversial practice that indicates a direct interest in the good is the practice of auction houses guaranteeing minimum prices to consignors, regardless of whether or not the work sells. See on guaranteed prices Jorge Contreras, 'The Art Auctioneer: Duties and Assumptions' (1991) 13 *Hastings Communications and Entertainment Law Journal* 717-751, 747.
Notably, and to the detriment of dealers, the leading auction houses have also acquired art galleries in recent years and managed to gain access to such traditional dealers' events as The European Art Fair in Maastricht, see Anthony Haden-Guest, 'A New Treaty for Maastricht?' in FINANCIAL TIMES, 24 February 2007, p.9.

[25] Gerstenblith, 'Picture Imperfect', 556.

[26] Gertrude Prescott Nuding, 'Saleroom Practice' (1988) 128 *Apollo* 34-41, 35.

[27] [2005] E.W.C.A. Civ. 555.

[28] See on authenticity guarantees above, ch.4, pp. 52-57.

"quasi-strict liability"[29] would make the buyer whole in the event of a loss and could also be operated in form of the purchase of misattribution insurance, whose costs are passed on to all buyers at auction.

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[29] The term has been introduced by Jáuregui, 'Rembrandt Portraits', 2026, in his description of the broad guarantees offered to buyers at art fairs.

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Conclusion

Two main conclusions may be drawn from this research. First, the notion of authorship governing contemporary art market expectations is very different from that which prevailed during earlier non-Romantic periods. As explored, flowing transitions of authenticity in the past militate against art experts meeting the expectations of the current market with definite and precise attributions. Admittedly, art auction houses have standards which allow them to express lingering doubts in a description. But auctioneers act not only as art experts when cataloguing works of art, but also as merchants, that is, they owe fiduciary and contractual duties to their principals, the sellers of art, and they consequently act with a view to gaining the highest possible profit. Optimistic descriptions can turn out to be wrong, however, and this usually results in great economic loss.

Second, it has been established that the current law solves the art world's misattribution problem in the context of auctions by placing the risk and burden of loss almost fully on the buyer. Buying art at auction appears in every sense to be a speculative business. Since compared to the large group of amateur buyers, which has emerged in recent years, auction houses tend to have the advantage of superior knowledge and expertise, this allocation of risk is seen as unfair: auction houses have particularly targeted beginners and amateurs to engage into bidding at their auctions, and many of these new buyers, entranced by the excitement of entering the art market, do not appreciate the difficulties with attribution and remain unaware that they must often shoulder the risk of misattribution. The assessment of who is best placed to bear and spread the cost of these losses, strongly suggests that the auctioneer should have liability imposed upon him when a work of art sold at auction is discovered, at a later point, to be forged or misattributed. It is not expected that legislative action or judicial opinion can initiate such a move; but there are signs that market forces may eventually affect the position of auction houses, imposing pressure on them to offer consumers better protection. A self-imposed regime of "quasi-strict liability" would not only protect the consumer at auction, but also the auctioneer, who would thereby gain in prestige.

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Websites

Bonhams	www.bonhams.com
Christie's	www.christies.com
Sotheby's	www.sothebys.com