Introduction: Problem statement and objectives of this book

The glamour and mystery of an art auction, gathering interested buyers from across the globe, make it one of the most fascinating marketplaces in existence. It is a place where rare collectibles and the works of world-famous artists are offered for sale; items which would otherwise only be displayed in well-established museums. The heated race to acquire the multi-million valued art ends in a matter of minutes, but the suspense and pressure generated by competitive bidding create a spectacular show for every observer.

The success of art auction sales has democratised the market. Auction sales are no longer limited to a specific circle of collectors or to the art connoisseur. Instead, they have developed a global sale platform reaching experienced and non-experienced bidders, wherever the sales may take place, through the distribution of sales catalogues and through their websites. Commonly, art auction houses offer in-house or online valuation services whereby anyone can request an initial estimate appraisal for an item. The democratisation of auction sales has rendered the sale platform more accessible to all kinds of individuals. It has also exponentially increased the quantity and monetary value of transactions, thereby greatly contributing to the commodification of art.

The reach and volume of art auction sales are such that many market actors have begun referring to the information that auction houses establish and publish when identifying and evaluating artworks and antiques. In particular, auction houses create an attribution for each art object consigned for sale. While attributions are primarily intended to serve only potential bidders, they have a much greater impact on the art market. This phenomenon ultimately benefits the auction houses, which have accordingly established – and continue to maintain – a reputation as experts for the authentication and sale of art. This reputation is what leads the owner of an artwork or an antique to trust an auction house with the sale of an art object.

Ernest Onians was a British businessman and art collector. When he died in 1995, his heirs decided to sell his collection and consigned a painting for sale at Sotheby’s. Onians had bought the painting at a country
house auction in the 1940s and stored it in a chicken shed ever since. He believed the painting to be “The Sack of Carthage” by the Italian artist Pietro Testa (1611–1650),¹ but never had it valued during his lifetime. When it was presented to Sotheby’s, the painting was covered by a thick layer of dust and dirt but was otherwise in good condition. The auction house offered the painting for sale under the Testa attribution with an estimate price range of £10,000–15,000. At the auction sale, two galleries bid against each other for the painting. “The Sack of Carthage” reached a hammer price of £155,000 – ten times the Sotheby’s estimate. Leading art historian Denis Mahon advised the winning gallery that the auction house had potentially misattributed the painting as it might be a work by the French master Nicolas Poussin (1594–1665). After the sale, the painting underwent restoration for two years after which Mahon and the director of the Louvre Museum, Pierre Rosenberg, confirmed that the painting was indeed by Poussin and once owned by the Cardinal Richelieu. A 19th-century nameplate on the painting’s back that read “Testa” must have misled Sotheby’s.

In 1998, the gallery sold the painting under its accurate attribution and title, “The Destruction of the Sack of the Temple of Jerusalem,” to the philanthropist Jacob Rothschild and the Rothschild Foundation for £4.5 million. Ultimately, the Foundation donated the painting to the Israel Museum in Jerusalem. Dismayed by the significant undervaluation, the Onians heirs brought suit against Sotheby’s, which the parties ultimately settled for an undisclosed amount.

Commentators considered the Poussin discovery as one of the most remarkable art finds of the decade.² Such discoveries are known as “sleepers” in the art world. Sleepers illustrate how vital attributions actually are and how auction houses handle and use attributions as part of their commercial process.

The importance of attributions is poorly reflected in current auction house practices. To consignors, auction houses generally disclaim any liability for misattributions. They consider their role as essentially limited to providing consignors and purchasers with a sale platform and acting as an intermediary between the parties, as if the property was presented for sale at a flea market or in a shop front. To the auction house, there might be no difference between these sale modes. Commonly, auction houses rely on the factual material provided by consignors and refrain from undertaking

¹ For an illustration of the sleeper, see Appendix 3.
² See Gibbons, “Sotheby’s Accused of Not Knowing Onians’ £4m Poussin Masterpiece.”
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additional authentication of the consigned property other than simply expressing an opinion towards its attribution. In the eyes of the consignor and the marketplace, the auction room differs from the street or the shop front in that auction houses promote the belief in, and enjoy a position of, endorsers of authenticity and value.

This book explores the legal and practical position of a sleeper’s consignor and examines an auction house’s commercial directive in creating sleepers and protecting itself against them. In particular, it attempts to analyse the consequences of the currently applicable legal regime for the sleeper consignor, the auction house, the courts and the marketplace.

Overall, this book has two main objectives.

First, it endeavours to show that the sleeper consignor stands in a vulnerable position due to the auction houses’ approach and due to current statutory and case law. This vulnerable position reflects a broader problem concerning the auction houses’ attributions: the dichotomy between their impact on the consignor and in the art market, on the one hand, and the auction houses’ engagement and liability in establishing those attributions, on the other hand.

Secondly, this book demonstrates how court proceedings and standards are ill-suited to address and resolve sleeper disputes.

This book is divided into four parts.

The first part examines the phenomenon of sleepers at auction. It defines the notion of sleepers and analyses how auction houses “create” sleepers. Essentially, it seeks to reveal the true importance of attributions in the art market and how they are processed by an auction house.

This book focuses on voluntary art auction sales that consignors and bidders can attend in person. Moreover, the types of auction sales discussed in this book are publicly announced and open to all bidders.

The second part of this book analyses the interests and expectations that the consignor, the auction house and the purchaser advance in the context of a sleeper at auction. This study seeks to explain why the parties make certain choices, which are, for example, reflected in the terms applying to the sale transaction. It paves the way for the main chapter of this part, which examines the current legal regime for sleeper disputes under the laws of Switzerland, England and the United States. In particular, it addresses the auctioneer’s duties in appraising the consigned property and

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3 Thereby excluding the particularities under the law of the United Kingdom for its states other than England.

4 Where applicable, this study focuses on the Federal law of the United States and on the specific State law of the State of New York, where the majority of the U.S. market lies.
The sale of misattributed artworks and antiques at auction

the sleeper consignor’s civil law remedies for the auctioneer’s negligence in doing so.⁵

The third part of this book endeavours to comparatively and critically assess the legal situation that prevails under each of the three examined jurisdictions. In particular, it examines how the current regime affects the consignor and the art auction trade by emphasising the resolution process of sleeper disputes. It is in this third part that this book advances the benefits and fairness of the current practice to all involved parties and to the marketplace.

Based on the foregoing analysis, this book concludes with a fourth part that seeks out new avenues to improve the art auction trade in the long run and the situation of the sleeper consignor. It offers a reflection and drafts a solution that seeks to reduce some of the drawbacks to current auction practices and the dispute resolution process.